NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Appointed Chief Judge 1 February 2003.
2. Resigned 31 January 2004.
3. Appointed and sworn in 3 February 2004.
4. Deceased 23 February 2004.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. CURTIS LEVAN WADE

No. COA02-25

(Filed 31 December 2002)

1. Evidence— testimony of defendant's ex-wife—shorthand statements of fact

The trial court did not commit plain error in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by failing to strike ex mero motu under N.C.G.S. § 8C-1, Rule 701 portions of the testimony of defendant's ex-wife including that defendant's drinking was the reason that he had molested, that defendant was a molester at heart, that defendant's other behavior was due to the fact he was drinking and was crazy, that there were signs that made her suspicious of defendant, and her sense that defendant only cultivated a boyfriend/girlfriend relationship with his daughter, because a careful reading of the testimony as a whole reveals that most, if not all, of the challenged testimony related to conclusions as to the mental state of defendant derived from observation of a variety of facts and circumstances making the testimony admissible as shorthand statements of facts.

2. Evidence— hearsay—admission by party opponent

The trial court did not commit plain error in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by failing to strike ex mero motu the victim daughter's testimony that defendant said it

was his word against hers, because defendant's statement was admissible as an admission by a party-opponent.

3. Evidence— hearsay—excited utterance—corroboration—state of mind—effect on listener

The trial court did not commit plain error in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by failing to strike ex mero motu the testimony of defendant's ex-wife concerning her child's report of defendant's sexual abuse of the child, because: (1) a young child's report of sexual abuse made between two and three days of the event is admissible under the excited utterance exception of N.C.G.S. § 8C-1, Rule 803(2); (2) the testimony was admissible as corroboration since the child testified to the events herself; and (3) the remaining portions of the challenged testimony were not offered for the truth of the matter asserted, but for the nonhearsay purposes of showing state of mind and effect on the listener.

4. Evidence— hearsay—business records—medical records of sexual disease in child abuse case

The trial court did not commit plain error in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by failing to strike ex mero motu a witness nurse's testimony that both defendant and his victim daughter had been treated for gonorrhea when the witness did not treat defendant, because: (1) the testimony was based upon the contents of medical records maintained by the county health department during the normal course, scope, and business of the health department; and (2) medical records showing that defendant and the victim in a child abuse case were both treated for gonorrhea at approximately the same time is admissible as evidence with regard to the cause or source of the victim's disease.

5. Appeal and Error— preservation of issues—failure to make assignment of error

Although defendant contends the trial court committed plain error in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by admitting under N.C.G.S. § 8C-1, Rule 404(b) the testimony of three of his alleged victims without making findings of fact as to the sufficient similarity and remoteness in time, this issue is dis-

missed because defendant failed to make findings of fact pursuant to N.C.G.S. § 8C-1, Rule 404(b) the basis of an assignment of error.

6. Evidence— prior crimes or bad acts—sexual misconduct—state of mind—intent—motive—plan—opportunity

The trial court did not err in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by failing to give the jury a limiting instruction as to the N.C.G.S. § 8C-1, Rule 404(b) evidence concerning prior acts of sexual misconduct, because: (1) defendant failed to request a Rule 404(b) limiting instruction; and (2) evidence of prior acts of sexual misconduct may properly be admitted under Rule 404(b) to show a relevant state of mind such as intent, motive, plan, or opportunity.

7. Constitutional Law— effective assistance of counsel—failure to object to testimony and evidence—failure to request limiting instruction

A defendant in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case was not denied effective assistance of counsel even though his counsel failed to object to the expert testimony of a clinical therapist, failed to object to N.C.G.S. § 8C-1, Rule 404(b) evidence of prior acts of sexual misconduct, and failed to request limiting instructions, because defendant has failed to show that there would have been a different result in the proceedings.

8. Evidence— expert testimony—victim in fact sexually abused—no plain error

Although the trial court erred in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by admitting expert testimony that the victim was in fact sexually abused, the error did not amount to plain error when the remaining evidence in the case is such that it is not probable the jury would have reached a different result including: (1) testimony from the victim that she had been sexually abused by defendant; (2) testimony from the two children of defendant's ex-wife who recounted, without objection, prior instances of abuse by defendant; (3) testimony from an expert witness that the victim exhibited characteristics of a victim of sexual abuse by a primary caretaker; and (4) evidence that the

victim and defendant had both been treated for the same sexually transmitted disease at about the same time.

Judge GREENE concurring in the result.

Judge MARTIN concurrs in the result and joins in the concurring opinion.

Appeal by defendant from judgment entered 27 June 2001 by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 12 November 2002.

Attorney General Roy Cooper, by Assistant Attorney General Allison S. Corum, for the State.

Russell J. Hollers III, for defendant-appellant.

EAGLES, Chief Judge.

Defendant, Curtis Levan Wade, appeals from judgment entered in Lenoir County Superior Court upon a jury verdict convicting him of four counts of taking an indecent liberty with a child; three counts of felonious child abuse by a sexual act; three counts of incest; two counts of statutory rape; and one count of first degree rape. Defendant was sentenced to life in prison.

The State's evidence tended to establish that defendant and Carol Jean Wade were married in 1980. At the time of her marriage to defendant, Carol Wade had two daughters from a previous relationship: "T," who was eight years old and "L," who was five. Both "T" and "L" lived with Carol Wade and defendant in Kinston, North Carolina. Carol Wade conceived another child, by defendant, soon after their marriage. Before this child was born, defendant "molested" "T" by fondling her. Carol Wade reported the incident to authorities and expelled defendant from the home. Carol Wade and defendant separated after this incident. Although the couple were not divorced until 2000, defendant never again lived with the family. Carol Wade gave birth to defendant's daughter, "A," on 19 November 1981. Defendant had no significant contact with "A" until she was approximately ten years old, when Carol Wade allowed defendant to have "visitation" with "A." Defendant visited with "A" "periodically" until she reached the age of twelve. At that point, defendant began a more regular routine of visitation.

"A" testified that during a visit with defendant when she was ten years old, defendant took her to Bill Fay Park in Kinston, North

Carolina. Once at the park, defendant led "A" down a nature trail where defendant exposed his erect penis and sat "A" on his lap, so that his penis was touching her between her legs. "A" did not report this incident.

During another visit when "A" was twelve years old, defendant took her to a video store where he rented a pornographic movie. Defendant then took "A" to his house where they watched the movie together. Before watching the movie, defendant removed both his and "A's" clothes so that they were both nude. During the movie, defendant fondled "A's" breasts and masturbated in front of her. Later, defendant engaged in vaginal intercourse with "A." "A" did not report this incident either.

Thereafter, defendant began regularly engaging in various forms of sexual intercourse with "A." "A" testified that she visited defendant virtually "every weekend" until she was seventeen years old. "A" further stated that she had sexual intercourse with defendant "every single time" she visited him. Sometimes this involved "oral sex" and "fondl[ing]," in addition to vaginal intercourse. However, defendant always penetrated "A" vaginally, ejaculated and never wore a condom. At one point, "A" was tested and treated for gonorrhea. Later, she learned that defendant had been treated for gonorrhea as well. On 23 October 1999, following yet another sexual encounter with defendant, "A" told Carol Wade that defendant had been "molesting" her. The following day, "A" and Carol Wade reported defendant to the Kinston Police.

Carol Wade testified that shortly before "A" was born, "T" told her that defendant had "molested" her. As a result, Carol Wade made defendant leave the home. Initially, Wade thought the incident with "T" occurred because defendant was a "heavy drinker." Consequently, Wade only allowed "A" to visit with defendant because he had stopped drinking. Notwithstanding this fact, Wade suspected that something improper might have been going on between defendant and "A" and on several occasions questioned "A" about her concerns. Each time, "A" denied that anything improper had occurred.

"T," now twenty-eight years old, testified that when she was eight years old, defendant took her into the bathroom of their home, put "vaseline on his penis" and tried to "put it inside [her]." "T" said she began to cry and defendant stopped. "T" said that she told her godmother about the incident, who in turn told her mother. "T" stated

further that defendant left and never returned to the home after this incident.

"E," the fourteen year old granddaughter of Carol Wade, testified that when she was eleven or twelve, defendant volunteered to babysit her at his house while Carol Wade was at work. While defendant was helping "E" with her hair, he rubbed his penis on her buttocks in a way that made her "uncomfortable." "E" told Carol Wade about the incident and never went to defendant's house alone again.

Barbara Hebert, a psychologist and clinical therapist at the Teddy Bear Child Advocacy Center in Greenville, North Carolina, also testified. Hebert testified that she performed "A's" initial "clinical intake" interview in December of 1999. "A" began counseling immediately following this interview. In June of 2000, Hebert took over "A's" case and continued counseling "A" approximately one hour each week until March of 2001. In order to assist in her therapy, Hebert had "A" complete a time-line of all of the events of sexual abuse she could recall. Hebert and "A" then discussed each event on the time-line. Hebert noted that the earliest events "A" described were known in the field as "preparatory grooming behaviors." Hebert also noted that "A" exhibited feelings of guilt, fault and fear; experienced problems with trust; confused boundaries between herself and others; suffered from decreased self-esteem; experienced difficulty in disclosing the incidents of abuse; and experienced conduct problems. "Based on her training and experience," Hebert opined that these symptoms were the result of "sexual abuse" because they "were consistent with those that we[re] see[n] in other victims of sexual abuse." Consequently, Hebert counseled "A" "as the victim of a long history of sexual abuse by her father."

Melanie Palmer, a licensed nurse and the Women's Health Supervisor for the Lenoir County Health Department, testified that health department records indicated that both defendant and "A" were tested and treated for gonorrhea in 1997: Defendant was treated on 8 January 1997 and 30 January 1997. "A" was tested on 25 February 1997 and received treatment on 12 March 1997.

Defendant denied all allegations of sexual abuse. Defendant testified that he believed the charges stemmed from his refusal to allow "A" to move in with her current boyfriend. Defendant was convicted and sentenced to life in prison. Defendant appeals.

Defendant first argues that the trial court committed plain error in admitting the expert testimony of Barbara Hebert. After careful review of the record and transcript, we find no error.

"The 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 . . . .' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "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." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002).

It has long been the law in North Carolina that "an expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation . . . ." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002), *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002). This requires the State to demonstrate that " 'the opinion expressed by the experts was really based upon their special expertise, or . . . that the experts were in a better position than the jury to have an opinion on the subject.' " *State v. Grover*, 142 N.C. App. 411, 414, 543 S.E.2d 179, 181 (2001) (quoting *State v. Trent*, 320 N.C. 610, 614, 359 S.E.2d 463, 465 (1987)), *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). Accordingly, "an expert cannot base his conclusions *solely* on the children's statements that they had been abused." *State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 215 (2001), *modified and aff'd per curiam*, 355 N.C. 266, 559 S.E.2d 788 (2002). Moreover, "in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has *in fact* occurred is not admissible because it is an impermissible opinion regarding the victim's credibility." *Dixon*, 150 N.C. App. at 52, 563 S.E.2d at 598 (emphasis added). However, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (per curiam). An expert may also give an "expert opinion based on her examination of the child and based on her expert knowledge concerning abused children in general." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 656 (1988). " 'The fact that this evidence may support the credibility of the victim does not alone render it inadmissible.' " *Dixon*, 150

N.C. App. at 52, 563 S.E.2d at 598 (quoting *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987)).

Defendant contends that Hebert's testimony was inadmissible because it was based "solely" on the victim's statements. Defendant bases this argument on the following portion of his cross-examination of Hebert:

Q: Ms. Hebert, what other sources of information did you have other than what ["A"] told you, ma'am, to base your opinion on?

A: My opinion about what?

Q: That she was a victim of some type of abuse.

A: The—I base all of my responses to a child on what they tell me. I do not consult other sources other than, I guess, her mother.

Q: Okay. So you based your opinion on what ["A"] told you?

A: Yes.

Q: And no independent corroboration, that is, nothing to independently corroborate what she was saying.

A: I did not research others.

Where "[t]he expert testimony . . . [is] based on the overall examination of the child during the course of treatment," it is not inadmissible as based "solely on the [victim's] statements." *Stancil*, 146 N.C. App. at 240, 552 S.E.2d at 216. The *Stancil* court noted five factors in support of its conclusion that the testimony was based on the overall examination of the child: (1) The "opinion was given by an expert in the field of child abuse or child investigation and interviews"; (2) The testifying expert "had conducted at least one interview with [the victim]"; (3) The testifying expert had "observed the child"; (4) The testifying expert had "noted [the victim's] symptoms and manifestations"; and (5) The testifying expert "was aware of [the victim's] account of the incident to others." *Id.*

Here, although Hebert was never tendered as an expert in the field of child abuse, she was the clinical therapist at Teddy Bear Child Advocacy Center. She had a masters degree in marriage and family therapy and had been working in that field for twelve years, counseling children who were victims of physical or sexual abuse, neglect or

domestic violence. In addition to performing the initial "clinical intake" interview of "A" in December of 1999, Hebert took over "A's" case in June of 2000 and counseled her approximately one hour per week until March of 2001. Moreover, Hebert testified to the various behavioral and psychological manifestations that "A" exhibited during her counseling sessions. Finally, Hebert testified that she "consulted" Carol Wade during the course of "A's" treatment.

Although the record is unclear as to whether or not Hebert was specifically made aware of "A's" account of the incidents to others; on the facts before us, this alone does not preclude the determination that Hebert's testimony was based on her overall examination of "A." Here, unlike *Stancil*, Hebert had the opportunity to observe and counsel "A" on a regular weekly basis for approximately ten months. We find it unlikely, given the testimony that was elicited, that Hebert would not have been made aware of "A's" account of the incidents to others. Therefore, we conclude Hebert's testimony was based on her overall examination of "A" during the course of treatment and not based solely on "A's" statements.

Defendant next contends that because there was no physical evidence of sexual abuse, Hebert's testimony was inadmissible as merely an attestation to "A's" credibility. Defendant bases this argument on the following:

> Q: Ms. Hebert, what would you and ["A"] discuss during these particular sessions?
>
> A: By that time she had been through some of the initial counseling stages with Ms. Burmeister. And she and I started to work on relationship issues that had come about as a result of being abused.
>
> Q: What type of relationship issues did she have in your opinion that were a result of the abuse?
>
> A: In general children who have had sexual abuse experiences, especially from a primary caretaker, someone that they love and trust, have problems with trust, problems with confused boundaries between themselves and other people, decreased self-esteem. They don't respect themselves. They have a difficult time valuing themselves and believing that other people should value them. And they make poor choices as a result of that by allowing other people to take advantage of them, by trying to please other people, and

sometimes conduct problems. ["A"] was experiencing all of those things at that time.

Q: And in your opinion were they a result of the sexual abuse she had been a victim of in the past?

A: Yes.

Q: Were you aware, Ms. Hebert, as a result of your counselling with ["A"] that the sexual abuse had began when she was around the age of ten and had continued for a number of years?

A: ["A"] and I—one of the activities that we did together in processing the abuse experiences she had had is that we did a time line and started from birth, worked forward—when was the first time that you remember something happening? And we worked through feelings and her inner—what she remembered of her inner processing during that time. And in that process, yes, she told me that she had first experienced abuse—I believe it was—and I'm going from my memory and not from the record. I don't want to contradict something, but eight or ten.

Q: And did she tell you who that abuse was from?

A: Yes.

Q: Who was that, Ma'am?

A: That was her father, Curtis Wade.

. . . .

Q: In your opinion, Ms. Hebert, based upon your training and education and your experience as a counselor at the Teddy Bear Center when you say that ["A"] had relationship issues, do you have an opinion as to the cause of those relationship issues?

A: I can't be definitive in saying that all of ["A's"] relationship issues would stem from the sexual abuse, but I can say that she had relationship issues that were consistent with those that we see in other victims of sexual abuse. So that almost certainly they at least in part relate back to the sexual abuse she experienced.

It is well settled that "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and

whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002). Our courts have also held that where child victims are examined by psychologists for purposes of " 'diagnosis and treatment of alleged sexual abuse, details of the offense, *including the identity of the offender*, provided by the child during such examination are generally admissible at trial.' " *State v. Youngs*, 141 N.C. App. 220, 225, 540 S.E.2d 794, 798 (2000) (citations omitted), *disc. review denied*, 353 N.C. 397, 547 S.E.2d 430 (2001).

Our reading of this testimony leads us to conclude that Hebert's second response described the general characteristics or traits exhibited by children who have been sexually abused by primary caretakers. Hebert ends this answer by giving her opinion that the manifestations she observed in "A" were consistent with "all" of those characteristics. Hebert next opined that these characteristics were the result of past sexual abuse and explained in her final response that this conclusion was based on the consistency between the manifestations exhibited by "A" and other victims of sexual abuse. Hebert next relayed what she had been told by "A" during the course of treatment, regarding some of the details of her abuse and the identity of her abuser. Therefore, while this testimony comes precariously close to that which has previously been held inadmissible by our courts, *see*, *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987); *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001), we conclude there was no error.

Here, unlike *Trent* and *Grover*, Hebert did not explicitly testify that "A" had in fact been sexually abused. Instead, Hebert stated that her overall conclusion was that "A's" manifestations were consistent with those exhibited by other victims of sexual abuse, which was proper under *Stancil*. Based on this consistency, Hebert further opined that these *manifestations* were the result of past sexual abuse. This is not the same as saying that "A" was in fact sexually abused. Rather, this testimony related to a conclusion based upon the witness's expert knowledge concerning abused children in general. Therefore, this testimony was permissible under *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

We are also mindful that this Court has previously allowed a treating psychologist to testify that a child had in fact been sexually abused. In *State v. Youngs*, 141 N.C. App. 220, 540 S.E.2d 794 (2000), this Court held that "an expert may testify to his opinion that a child has been sexually abused as long as this conclusion relates to a diag-

nosis based on the expert's examination of the child during the course of treatment." *Id.* at 227, 540 S.E.2d at 799. The *Youngs* court found the following "testimony established a sufficient foundation to permit the trial court to allow [the psychologist's] expert opinion to be admitted into evidence": (1) The witness testified to being "a professional psychologist in private practice . . . specializing in children and adolescents"; (2) The witness "was accepted as an expert witness in the field of child psychology"; (3) The witness "treated [the victim] on at least forty-five occasions prior to trial" and (4) the witness's opinion was "[b]ased on her observations during treatment, her professional experience, and the report of [the examining physician which concluded that the victim had sustained vaginal, oral and possibly anal penetration.]" *Id.* at 227-28, 540 S.E.2d at 799.

Here, we have already concluded that Hebert's testimony was based on her overall examination of "A" made during treatment. In addition, Hebert testified that she was a professional psychologist with twelve years experience specializing in the treatment of abused children; that her opinion was based on her training, education and experience as a counselor; and that she counseled "A" on a weekly basis for approximately ten months, which equates to approximately forty, hour-long sessions prior to trial. Hebert also testified concerning her observations made during the course of "A's" treatment. Although Hebert was not specifically tendered and accepted as an expert in the field, defendant concedes in his brief that Hebert was an expert. Even though there was no medical report indicating that there had been "penetration"; the mere fact that no physical examination was performed on the victim does not negate the probative value of the testimony and render the expert incompetent to testify.

In *State v. Stancil*, 146 N.C. App. 234, 552 S.E.2d 212 (2001), *modified on other grounds and aff'd per curiam*, 355 N.C. 266, 559 S.E.2d 788 (2002), this Court found a psychologist competent to testify despite the absence of physical evidence of abuse. The *Stancil* court distinguished *Grover* on grounds that in *Stancil*, "the nature of the sexual act (cunnilingus) was not likely to leave forensic evidence, particularly after the child used the bathroom." *Id.* at 240, 552 S.E.2d at 215. Notwithstanding that fact, the *Stancil* court concluded that the expert's testimony was admissible as "based on the overall examination of the child during the course of treatment," pointing out that "[t]he child not only was consistent in relating facts during each interview but also exhibited physical symptoms of trauma such as com-

pressed speech, hand-wringing, shaking, nervousness and anxiety." *Id.* at 240, 552 S.E.2d at 216.

Here, like *Stancil*, some of the acts alleged by "A," *i.e.*, cunnilingus and fellatio, involved acts that were not likely to leave forensic evidence. Furthermore, although "A" alleged acts that were likely to yield physical evidence, it is unlikely that a physical examination would have resulted in the recovery of any evidence with forensic value, given the length of time that had elapsed between the offenses and their reporting. It is also noteworthy that here, like *Stancil*, there was other corroborating physical evidence that indicated abuse: the medical records which indicated that both "A" and defendant were treated for a sexually transmitted disease at approximately the same time during 1997. On these facts, we conclude that Hebert's opinion concerning whether "A" had been sexually abused was admissible, as it related to a diagnosis based on her examination of "A" during the course of treatment.

Finally, we note that the scope of our review is limited to that of plain error. In *Stancil*, our Supreme Court concluded that "although the trial court's admission of the challenged portion of Dr. Prakash's testimony was error, it did not rise to the level of plain error" because "[t]he overwhelming evidence against defendant" lead[] . . . to [the] conclu[sion] that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. After carefully reviewing the entire record, we cannot say that defendant has shown that the jury probably would have reached a different verdict. Even if the questionable portions of Hebert's testimony were stricken, the jury would still have before it: (1) the testimony of the victim; (2) corroboration of the victim's account; (3) evidence of defendant's pattern of misconduct; (4) evidence of the victim's psychological symptoms; (5) the conclusion of an expert that these symptoms were consistent with those exhibited by victims of sexual abuse; and (6) medical records indicating that both the victim and defendant were treated at approximately the same time for a sexually transmitted disease. Since there was overwhelming evidence against defendant, none of the alleged errors, if any, rises to the level of plain error. Accordingly, this assignment of error is rejected.

[1] Defendant next argues that the trial court committed plain error when it failed to strike portions of Carol Wade's testimony *ex mero motu*. Defendant contends the following portions of Carol Wade's testimony were inadmissible under Rule 701: (1) her initial opinion that

defendant's "drinking was the reason that he . . . had molested . . . ["T"]"; (2) her ultimate conclusion that defendant "was a molester at heart"; (3) her conclusion that some of defendant's other behavior was because he was "drinking and crazy"; (4) her testimony concerning the "signs [that] made her suspicious of [defendant]"; and (5) her sense that "[defendant] only cultivated a boyfriend/girlfriend relationship with his daughter". Although defendant made no objections at trial, he now argues that the trial court's failure to strike the testimony *ex mero motu* constitutes plain error. After careful review of the whole record, we disagree.

Rule 701 provides that a lay witness may testify in the form of opinions or inferences, provided they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2001). However, nothing in Rule 701 bars "evidence that is commonly referred to as a 'shorthand statement of fact.' " *Id.* *See*, Commentary.

> [Our courts have] long held that a witness may state the 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.' Such statements are usually referred to as shorthand statements of facts.

State v. Brown, 350 N.C. 193, 203, 513 S.E.2d 57, 64 (1999) (citations omitted).

A careful reading of the testimony as a whole reveals that most, if not all, of the challenged testimony related to conclusions as to the mental state of defendant derived from observation of a variety of facts and circumstances. Therefore, the testimony was admissible as shorthand statements of facts. When taken out of context, Wade's statement that defendant was a "molester at heart" gives us some pause; when read in context, we cannot say that absent this statement, the jury probably would have reached a different result. Accordingly, this assignment of error is rejected.

[2] Defendant next argues that the trial court committed plain error by allowing "A" to give the following testimony:

Q: Why didn't you think anyone would believe you?

A: Because of what my father said.

Q: What had your father told you about someone believing you?

A: *He said that it would be his word against mine and that no one would believe me.*

(Emphasis added.) Although defendant did not object at trial, he now contends that his statement to "A" was inadmissible hearsay and the trial court committed plain error by failing to strike the testimony *ex mero motu*. We disagree.

" '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). "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement . . . ." N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (2001). Here, defendant's statement was admissible as an admission by a party-opponent. Therefore, defendant's argument is without merit.

[3] Defendant makes the same argument with respect to certain portions of Carol Wade's testimony. Specifically, defendant contends the following was inadmissible as hearsay: (1) "E" "told her that [defendant] had done something to her that made her feel uncomfortable"; (2) "A's" boyfriend, Gene, "had told ["A"] to tell Carol 'what [defendant] been doing to you' "; (3) The police department told her twenty years earlier that "T's" allegations would be "[defendant's] word against hers"; (4) "E" had told her that "she had seen ["A"] nude in front of [defendant]." After careful review of the record, we disagree and find no error.

Statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not excluded as hearsay. N.C. Gen. Stat. § 8C-1, Rule 803(2) (2001). Our Supreme Court has held that when a young child's report of sexual abuse is made "between two and three days of the event," those statements are admissible under the excited utterance exception of Rule 803(2). *State v. Smith*, 315 N.C. 76, 90, 337 S.E.2d 833, 843 (1985).

Here, "E" testified that she "immediately" told a neighbor and her grandmother, Carol Wade, about the incident. Therefore, "E's" statement was admissible as an excited utterance. The testimony was also admissible for corroboration since "E" testified to the events herself. A careful reading of the testimony reveals that the remaining portions of the challenged testimony were not offered for the truth of the mat-

ter asserted, rather they were offered for the non-hearsay purposes of showing state of mind and effect on the listener. Accordingly, this argument is also rejected.

[4] Defendant next argues that the trial court committed plain error by permitting Melanie Palmer to testify that both defendant and "A" had been treated for gonorrhea. Defendant contends this testimony was inadmissible as hearsay because Palmer did not "treat" him. Defendant further contends that the evidence was irrelevant and the trial court committed plain error by failing to strike the testimony *ex mero motu*. We disagree.

Rule 803 of the North Carolina Rules of Evidence provides that the following are not excluded by the hearsay rule:

> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
>
> . . . .
>
> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803 (2001).

Here, Palmer's testimony was based upon the contents of medical records maintained by the Lenoir County Health Department. Palmer testified that the records were "based upon information that individuals give . . . for treatment"; "the notations [are] made when the individuals come into the health department" by "people at the health department"; and that the "records [are] maintained during the normal course, scope, and business of the Lenoir County Health Department." This testimony established a sufficient foundation for

the records and their contents to be admitted into evidence. Therefore, this assignment of error is without merit.

" 'Relevant evidence' means 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). Medical records showing that defendant and the alleged victim in a child sexual abuse case were both treated for gonorrhea at approximately the same time is "admissible as evidence with regard to the cause or source of [the victim's] disease." *State v. Efird*, 309 N.C. 802, 806, 309 S.E.2d 228, 230 (1983).

Here, Palmer testified that "gonorrhea is a sexually transmitted disease" and "the only way to get it is [through] intercourse or oral sex" with another individual who has gonorrhea. Therefore, evidence that both were infected with gonorrhea is relevant to show that "A" had sexual contact with an infected person and defendant was an infected person. Accordingly, this assignment of error is without merit.

[5] Defendant next argues that the trial court committed plain error by admitting the testimony of "A," "T" and "E," pursuant to Rule 404(b), without making specific findings of fact as to "sufficient similarity" and "remoteness in time." The scope of appellate review "is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C. R. App. P. 10(a). Here, defendant did not make the trial court's failure to make findings of fact pursuant to Rule 404(b) the basis of any assignment of error in the record. Accordingly, this issue is beyond the scope of our review.

[6] Defendant next argues that the trial court erred in failing to give the jury a limiting instruction as to the Rule 404(b) evidence. Defendant contends that even though a limiting instruction was not requested at trial, the trial court should have intervened *ex mero motu* and given a Rule 404(b) limiting instruction. We disagree.

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C. Gen. Stat. § 8C-1, Rule 105 (2001) (emphasis added). It is the general rule that "[t]he admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by

the defendant for a limiting instruction. 'Such an instruction is not required unless *specifically* requested by counsel.' " *State v. Stager*, 329 N.C. 278, 309, 406 S.E.2d 876, 894 (1991) (citations omitted).

Here, defendant failed to request a Rule 404(b) limiting instruction. Since evidence of prior acts of sexual misconduct may properly be admitted under Rule 404(b) "to show a relevant state of mind such as intent, motive, plan, or opportunity," *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988), we conclude there was no error.

[7] Finally, defendant argues that he was deprived of a fair trial because of the ineffective assistance of his counsel. Defendant bases this argument on his trial counsel's (1) failure to object to the expert witness testimony of Barbara Hebert; (2) failure to object to the Rule 404(b) evidence; and (3) failure to request limiting instructions. Defendant contends that absent these errors, the jury would have reached a different result. We disagree.

> When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden defendant must satisfy a two part test[:] 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.' . . . The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

State v. Braswell, 312 N.C. 553, 561-63, 324 S.E.2d 241, 248 (1985) (citations omitted).

After careful review of the evidence in light of the forgoing analysis, we conclude that defendant has not shown that there would have been a different result in the proceedings. Accordingly, this assignment of error is without merit. We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judge GREENE concurs in the result with a separate concurring opinion.

Judge MARTIN concurs in the result and joins in Judge Greene's concurring opinion.

GREENE, Judge, concurring in the result.

[8] Although I agree with the result reached by the majority, the trial court's admission of the expert opinion that "A" was in fact sexually abused was error. The admission of this testimony, however, did not constitute plain error.

As the majority recognizes, an expert in a child abuse prosecution "cannot base [her] conclusions solely on the [child's] statements that [she has] been abused." *State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 215 (2001), *modified and aff'd*, 355 N.C. 266, 559 S.E.2d 788 (2002). Further, "in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002), *aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002) (per curiam).

In this case, Hebert, an expert witness,[1] testified "A" was in fact sexually abused. Specifically, she testified "A" 's relationship issues "almost certainly . . . at least in part relate back to the sexual abuse ["A"] experienced." This opinion was based on statements given to Hebert by "A." Indeed, Hebert testified she based her opinion on the responses she received from questions posed to "A." There is no testimony Hebert based her opinion of any physical evidence of sexual abuse. It was thus error to admit Hebert's opinion that "A" was sexually abused. *Dixon*, 150 N.C. App. at 52, 563 S.E.2d at 598; *see State v. Grover*, 142 N.C. App. 411, 418, 543 S.E.2d 179, 183 (2001), *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001) (per curiam).

The admission of this expert testimony, however, does not rise to the level of plain error. The remaining evidence in this case, excluding the improper expert testimony, included testimony from: "A" that she had been sexually abused by Defendant; Defendant's ex-wife

1. It is not disputed that Hebert was an expert witness in the field of child abuse.

about learning from "A" of the abuse; and Defendant's ex-wife's two other children who recounted, without objection, prior instances of abuse by Defendant. The evidence also included testimony from Hebert that victims of sexual abuse by a primary caretaker often exhibit problems with trust, confuse boundaries between themselves and others, have decreased self-esteem, and do not respect themselves and that "A" exhibited all these characteristics. Further, there was evidence Defendant and "A" were both treated for the same sexually transmitted disease at about the same time. Thus, even if the improper expert testimony is not considered, the remaining evidence in this case is such that it is not probable the jury would have reached a different result. *See State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002).

SANDRA P. SUAREZ, AS GUARDIAN AD LITEM FOR ANDERSON LUKE SUAREZ, AND ALEX SUAREZ AND SANDRA P. SUAREZ, INDIVIDUALLY, PLAINTIFFS V. JAMES WILLIAM WOTRING, JR., M.D., SCOTT THOMAS CHATHAM, M.D., AND CATAWBA WOMEN'S CENTER, P.A., DEFENDANTS

No. COA02-108

(Filed 31 December 2002)

1. Evidence— hearsay—deposition testimony—available witness—Rule 32 exception

The trial court did not err in a medical malpractice case by admitting under N.C.G.S. § 1A-1, Rule 32(a) the deposition testimony of three witnesses without establishing that the deponents were unavailable within the meaning of N.C.G.S. § 8C-1, Rule 804(a), because: (1) Rule 32(a) creates an independent exception to the hearsay rule and the proponent of that witness's deposition testimony need only show that the party against whom the deposition is offered was present or represented at the deposition or had reasonable notice thereof, and that one of the enumerated purposes of Rule 32 is met; (2) plaintiffs were present and represented at the taking of the depositions; and (3) Rule 32 allows the deposition of a person called as a witness to be used as substantive evidence by any party adverse to the party who called the deponent as a witness, and the pertinent witnesses in this case were all called by plaintiffs thus allowing defendants to use any part or all of the depositions of these witnesses.

2. Evidence— hearsay—deposition testimony—available witness—Rule 32 exception

Although the trial court erred in a medical malpractice case by allowing the admission of selected portions of the deposition testimony of an available expert witness without showing that a stated purpose under Rule 32(a) was met, the error was harmless because plaintiffs cannot show prejudice in the admission of this deposition testimony.

3. Discovery— scheduling order—subject of expert testimony

Even assuming the trial court erred in a medical malpractice case by allowing defendants to elicit expert testimony regarding the standard of care required of defendants and whether defendants complied with that standard when defendants only provided on their discovery scheduling order that the pertinent expert would testify that shoulder dystocia can be an obstetrical emergency, the error was harmless because: (1) plaintiffs have failed to show how they were prejudiced by the admission of the expert's opinion when it was cumulative and corroborative of substantially similar testimony given by another of defendants' experts; and (2) plaintiffs have failed to show how introduction of this testimony influenced the jury's verdict.

4. Trials— motion for new trial—accident or surprise—sympathy

The trial court did not abuse its discretion in a medical malpractice case by denying plaintiffs' motion for a new trial against defendant doctor based on alleged accident or surprise which ordinary prudence could not have guarded against caused by the jury being informed near the close of defendants' case that this defendant's mother had died the preceding afternoon, because: (1) the jury was instructed to perform its duty fairly and objectively and without bias, sympathy, or partiality toward any party and not to be swayed by pity, sympathy, partiality, or public opinion; and (2) there is no evidence that the jury disregarded the trial court's instruction and ignored its solemn duty to fairly and impartially decide the case.

5. Trials— motion for new trial—sufficiency of evidence

The trial court did not abuse its discretion in a medical malpractice case by denying plaintiffs' motion for a new trial against defendant doctor based on the jury's verdict allegedly being contrary to the evidence at trial, because the jury was pre-

sented with all of the evidence, was instructed properly on the law, and made its decision accordingly.

Chief Judge EAGLES concurring.

Appeal by plaintiffs from judgment entered 27 March 2001 and order entered 19 July 2001 by Judge L. Oliver Noble in Catawba County Superior Court. Heard in the Court of Appeals 14 October 2002.

Simpson Kuehnert Vinay & Bellas, P.A., by Eric R. Bellas and Daniel A. Kuehnert, for plaintiff-appellants.

Dameron, Burgin & Parker, P.A., by Charles E. Burgin and Phillip T. Jackson, for defendant-appellees.

THOMAS, Judge.

Plaintiffs, Sandra P. Suarez, as guardian ad litem for Anderson Luke Suarez and in her individual capacity, and Alex Suarez, appeal the trial court's entry of judgment on the jury's verdict in favor of defendants in this medical negligence case. Plaintiffs also appeal the trial court's denial of their motion for a new trial as to defendant James William Wotring, M.D.

Plaintiffs contend the trial court committed reversible error by (1) allowing defendants to read into the record selected portions of the depositions of three of plaintiffs' expert witnesses after they had been released from subpoena with defendants' consent following their testimony at trial; (2) allowing defendants to read into the record the deposition testimony of one of plaintiffs' designated expert witnesses who did not testify at trial, without finding the witness unavailable to testify; (3) allowing testimony from one of defendants' expert witnesses concerning the standard of care and whether defendants complied with the standard of care, when defendants' designation of expert witnesses did not state the expert would so testify; (4) denying their motion for a new trial based on the jury being informed prior to the close of defendants' case that Dr. Wotring's mother had died the previous evening; and (5) denying their motion for a new trial based on the evidence being insufficient to support the jury's verdict. For the reasons herein, we affirm the judgment and order of the trial court.

On 15 October 1998, plaintiffs filed the instant complaint alleging defendants, James William Wotring, M.D., Scott Thomas Chatham,

M.D., and Catawba Women's Center, P.A., negligently caused injuries and other damages sustained by Anderson Suarez during his natural birth delivery. Defendants denied that their actions prior to and during the birth violated the applicable standard of care.

Plaintiffs' evidence at trial tends to show that Sandra and Alex Suarez are the parents of two children. Sandra became pregnant with their first child in September 1989. She received prenatal care at defendant Catawba Women's Center and the delivery of her first child was accomplished with the aid of doctors and other employees at the Women's Center. The delivery, however, required an episiotomy and the use of forceps.

In February 1995, Sandra became pregnant with Anderson Suarez. At the time, she weighed 232 pounds and was five feet six inches in height. During her prenatal care at the Women's Center, she continuously reminded defendants that the birth of her first child was difficult. Sandra eventually began experiencing numbness in her leg, which she attributed to pressure being caused by the baby. She expressed her concerns to defendants that the baby was too large to deliver vaginally if she went to term.

On 6 October 1995, four days prior to the due date, Dr. Chatham performed an ultrasound which revealed the baby weighed approximately nine pounds. Sandra reminded him about the difficulties she experienced with her first delivery and asked if he would consider inducing labor. Chatham told her not to worry about delivering the baby vaginally.

In the early morning hours of 18 October 1995, Sandra began experiencing contractions and telephoned Dr. Wotring. He did not answer. Sandra left three messages, none of which were returned. When the Women's Center opened that morning, she called and was told to come in. Sandra was initially examined by Chatham and told to return home because Wotring would not send her to the hospital until she was dilated four centimeters and the contractions occurred every four minutes. Upon her insistence, Chatham reluctantly sent her to Catawba Memorial Hospital, where she was admitted around noon.

At the hospital, Sandra received an epidural, numbing her below the waist. After breaking Sandra's water, Wotring decided to proceed with a vaginal delivery, but to artificially shorten the second stage. Wotring attached a vacuum extractor suction unit to the baby's head and delivered the head on the fourth contraction.

However, delivery of the rest of the baby's body proved extremely difficult. Because the baby was so large and Sandra's pelvis was borderline and her symphysis flat, there was "shoulder dystocia" involving the baby's left shoulder—the position of the shoulder prevented the body from proceeding down the birth canal.

Before performing any maneuvers to relieve the shoulder dystocia, Wotring applied pressure to Anderson's head in an attempt to deliver the rest of the body. According to Alex Suarez, who was present in the delivery room, Wotring had his fingers in the sockets of the baby's eyes and was leaning back with his full body weight trying to deliver the baby. When this proved unsuccessful, Wotring resorted to the McRoberts maneuver, a recognized method to relieve shoulder dystocia which does not involve manipulation of or pressure on the baby's head. Anderson was delivered during the second attempt at the McRoberts maneuver. He weighed nine pounds, eleven ounces.

At birth, Anderson suffered from numerous injuries and currently suffers from Erb's Palsy, a permanent condition characterized by limited use of his left arm. The cause is severe damage to the nerves running between Anderson's left arm and spinal cord resulting from the nerves having been physically stretched to the breaking point. According to plaintiffs, the condition resulted from a brachial plexus nerve root injury suffered at Anderson's birth due to excessive lateral traction applied to his head during delivery. Plaintiffs' experts testified that defendants' care prior to and during the delivery of Anderson, particularly Wotring's use of excessive force on Anderson's head, was not in accordance with the standard of practice of members of the same health care profession with similar training and experience situated in the same or similar communities. *See* N.C. Gen. Stat. § 90-21.12 (2001). Defendants' experts testified that the standard of care was not violated.

Following the trial, the jury returned the following verdict:

1. Was Anderson Luke Suarez injured as a result of the negligence of James William Wotring, M.D.?

ANSWER: NO

2. Was Anderson Luke Suarez injured as a result of the negligence of Scott Thomas Chatham, M.D.?

ANSWER: NO

The trial court subsequently entered judgment consistent with the jury's verdict.

Plaintiffs filed a timely Rule 59 motion for a new trial as to Wotring alleging (1) irregularities by which they were prevented from having a fair trial, (2) accident or surprise which ordinary prudence could not have guarded against, (3) insufficiency of the evidence to justify the verdict, and (4) other errors in law entitling them to a new trial.

Plaintiffs' motion was denied. They gave timely notice of appeal.

During plaintiffs' case-in-chief, Dr. Robert Allen, their bio-medical engineering expert, testified regarding the forces exerted during a routine delivery, and the forces necessary to cause the injuries suffered by Anderson. Allen offered his opinion that approximately ten pounds of force is exerted on a baby in a normal delivery, whereas in shoulder dystocia cases, the average is twenty-two pounds. Allen further opined that, based on Anderson's injuries, at least thirty-five pounds of force were exerted on Anderson's head during delivery. Allen was cross-examined at trial by defendants, and then released from subpoena with defendants' consent.

After plaintiffs rested, defense counsel stated his intention to read into evidence a portion of Allen's pretrial deposition. Plaintiffs objected. The trial court overruled the objection and defense counsel read part of the deposition to the jury.

In addition to the pretrial deposition of Allen, defense counsel also read into the record portions of the pretrial depositions of Dr. Andrew Koman, Anderson's treating orthopaedic surgeon, and Dr. Stuart Edelberg, both of whom had likewise testified in plaintiffs' case-in-chief and been released from subpoena with defendants' consent.

[1] Plaintiffs contend the depositions of Allen, Koman and Edelberg should not have been read into the record because defendants did not establish that the deponents were "unavailable" within the meaning of Rule 804(a) of the North Carolina Rules of Evidence. Rule 804 permits the admission of certain statements, including deposition testimony, which would otherwise be hearsay, if the declarant is "unavailable." Defendants, meanwhile, maintain the depositions were admissible under Rule 32 of the North Carolina Rules of Civil Procedure without a showing of "unavailability" under Rule 804(a).

Rule 32(a) of the North Carolina Rules of Civil Procedure states, in pertinent part:

> (a) *Use of depositions.*—At the trial or upon the hearing of a motion or an interlocutory proceeding or upon a hearing before a referee, any part or all of a deposition, *so far as admissible under the rules of evidence applied as though the witness were then present and testifying*, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> . . . .

N.C.R. Civ. P. 32(a) (2001) (emphasis added). The above-italicized language in Rule 32(a) creates an exception to the hearsay rule. The Comment to the 1975 Amendment to Rule 32(a), which added the language, states:

> A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. . . .

N.C.R. Civ. P. 32(a), comment.

Federal courts applying Federal Rule of Civil Procedure 32(a), the companion provision to N.C.R. Civ. P. 32(a), have consistently held that it creates an independent exception to the hearsay rule. *See Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 962-63 (10th Cir. 1993); *Southern Indiana Broadcasting, Ltd. v. F.C.C.*, 935 F.2d 1340, 1342 (D.C. Cir. 1991); *U.S. v. Vespe*, 868 F.2d 1328, 1339 (3d Cir. 1989); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204 (1st. Cir. 1988). Under the federal rules and applicable case law, the proponent of deposition testimony has the burden of proving the deposition is admissible under Fed.R.Civ.P. 32(a) *or* Fed.R.Evid. 804(b)(1). *Angelo*, 11 F.3d at 963.

This interpretation is reinforced by subsection (b) of both Federal Rule 32 and North Carolina Rule 32, which states that "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the

exclusion of the evidence if the witness were then present and testifying." N.C.R. Civ. P. 32(b); Fed.R.Civ.P. 32(b).

Nonetheless, plaintiffs argue that deposition testimony is not admissible, for any purpose, unless the proponent proves admissibility under *both* Rule 32 of the Rules of Civil Procedure and Rule 804 of the Rules of Evidence. Since Allen, Koman and Edelberg all testified at trial and were released from subpoena with defendants' consent, plaintiffs maintain they were not "unavailable" within the meaning of Rule 804(a) and, therefore, their deposition testimony was inadmissible.

Plaintiffs rely on our Supreme Court's decision in *Investors Title Insurance Co. v. Herzig*, 330 N.C. 681, 413 S.E.2d 268 (1992) and this Court's decision in *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 464 S.E.2d 47 (1995), to support their interpretation.

In both *Investors Title* and *Pleasant Valley*, the trial court found the witnesses whose deposition testimonies were offered to be "unavailable" under Rule 804(a). The Supreme Court concluded in *Investors Title* that (1) the "unavailability" test in the former testimony exception to the hearsay rule was met, and (2) the party against whom the deposition was offered had an opportunity and similar motive to develop the offered testimony by cross-examination at the deposition, thus meeting the requirements of Rule 804(b)(1). *Investors* Title, 330 N.C. at 691-92, 413 S.E.2d at 273-74; *see also* N.C.R. Evid. 804(b)(1) (an unavailable witness's deposition is admissible at trial "if the party against whom the testimony is . . . offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination"). Accordingly, the Court held the challenged deposition testimony was properly admitted.

In *Pleasant Valley*, the witness was "unavailable" under Rule 804(a) but the Court concluded the party against whom the deposition was offered at trial did not have a motive to develop the deposition testimony because, at the time of the deposition, no damages claim was pending against that party. *Pleasant Valley*, 120 N.C. App. at 659, 464 S.E.2d. at 55. Accordingly, the Court held the deposition testimony to have been properly excluded.

Unlike the witnesses in *Investors Title* and *Pleasant Valley*, Allen, Koman, and Edelberg were all available to testify at trial. In fact, they all testified before being released from subpoena with defendants' consent. Thus, *Investors Title* and *Pleasant Valley* are

not binding precedent on the issue presented here—whether the deposition of a witness who is available to testify is admissible under Rule 32(a).

Having reviewed the text of Rule 32(a) of the North Carolina Rules of Civil Procedure, the comment to the 1975 amendment to Rule 32(a), and applicable case law interpreting the companion federal rule, we hold that the deposition of an available witness is admissible under Rule 32(a), so long as one of the enumerated purposes set forth in Rule 32(a) have been met. When a witness is available, Rule 32(a) creates an independent exception to the hearsay rule and the proponent of that witness's deposition testimony need only show that (1) the party against whom the deposition is offered was present or represented at the deposition or had reasonable notice thereof, and (2) one of the enumerated purposes of Rule 32 is met. N.C.R. Civ. P. 32(a).

Rule 32 states as one of its purposes:

> (2) The deposition of a person called as a witness may also be used as substantive evidence by any party adverse to the party who called the deponent as a witness . . . .

N.C.R.Civ. P. 32(a)(2).

Here, Allen, Koman, and Edelberg were all called as witnesses by plaintiffs. Defendants, in turn, are "adverse to the party who called the deponent as a witness." Plaintiffs were present and represented at the taking of the depositions thereby meeting the requirement found in the introductory paragraph of Rule 32(a). Accordingly, Rule 32(a) permitted defendants to use any part or all of the depositions of Allen, Koman and Edelberg, who were available, as substantive evidence. The trial court did not commit error.

[2] Plaintiffs next contend the trial court erred in allowing the admission of selected portions of the deposition testimony of Dr. Ronald Foote.

During discovery, plaintiffs designated Foote as an expert witness who was expected to testify that defendants failed to comply with the applicable standard of care in their delivery of Anderson Suarez. Foote's deposition was subsequently taken by defendants' counsel.

However, plaintiffs did not call Foote to testify during their case-in-chief. After plaintiffs rested, defense counsel, over objection, read

excerpts from Foote's deposition to the jury. Plaintiffs argue this was error because the trial court made no finding that Foote was "unavailable" within the meaning of Rule 804.

We agree with plaintiffs that the trial court erred in allowing the admission of Foote's deposition testimony. However, we do so for a reason different than the one cited by plaintiffs.

Investors Title and *Pleasant Valley* hold: "To be admissible at trial, the deposition of an unavailable non-party witness must meet the requirements of both N.C.R. Civ. P. 32 and N.C.R. Evid. 804(b)(1)." *Pleasant Valley*, 120 N.C. App. at 659, 464 S.E.2d at 55 (citing *Investors Title*, 330 N.C. at 690-91, 413 S.E.2d at 273 (1992). In the instant case, we hold that the deposition of an available witness is admissible under Rule 32, so long as one of the stated purposes set forth in Rule 32(a)(1)-(5) has been met. Therefore, regardless of whether a witness is available or unavailable, one of the stated purposes in Rule 32(a) must be met before that witness's deposition testimony can be admitted for any purpose. *See Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864 (1985) ("[a]ll or part of a deposition may be used only if the provisions of G.S. 1A-1, Rule 32(a) are met."); *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Defendants maintain the reading of Foote's deposition was permitted under Rule 32(a)(4), which states:

> (4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . that the witness is at a greater distance than 100 miles from the place of trial or hearing . . .; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena . . . .

N.C.R. Civ. P. 32(a)(4).

However, the trial transcript does not contain a finding by the trial court that Foote was more than 100 miles away from the place of the trial or that defendants had been unable to procure his attendance by subpoeana. The record does show the trial court was informed by defense counsel that Foote resided in Buffalo, New York. Following this declaration, a bench conference was held, the contents of which were not transcribed. The trial court then overruled plaintiffs' objection and Foote's deposition was read to the jury. Although the trial court was informed that Foote lived in Buffalo, which is well over 100

miles from Catawba County, it made no findings to support its admission of Foote's deposition. Absent any findings, we refuse to speculate as to the grounds for the trial court's ruling. Thus, we conclude the trial court erred in allowing the reading of Foote's deposition to the jury.

However, an error in the admission of evidence is not grounds for granting a new trial or setting aside a verdict unless the admission amounts to the denial of a substantial right. *See* N.C.R. Civ. P. 61 (2001); N.C.R. Evid. 103(a) (2001). The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred. *Warren*, 74 N.C. App. at 409, 328 S.E.2d at 864; *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730-31 (1981). The erroneous admission of testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative. *Warren*, 74 N.C. App. at 409, 328 S.E.2d at 864.

The portion of Foote's deposition read to the jury indicted the following: (1) shoulder dystocia is an unpredictable event; (2) in Dr. Foote's opinion, the maneuvers documented by Dr. Wotring as having been used in the delivery of Anderson Suarez did not violate the standard of care; and (3) if Wotring delivered Anderson with the force described by Alex Suarez, he violated the standard of care.

Plaintiffs and defendants both elicited other expert evidence that shoulder dystocia is an unpredictable event. Dr. Donald Horner, one of plaintiffs' experts, and Dr. Joseph Ernest, defendants' obstetrical expert, both testified to this fact. Ernest also opined that, based on the information documented by Wotring in Anderson's medical charts, Wotring performed the right maneuvers at the right time. Thus, the reading of Foote's deposition served only to corroborate competent evidence already before the jury as to issues (1) and (2) above. In addition, Foote's opinion that Wotring violated the standard of care if he used the force described by Alex Suarez is supportive of plaintiffs' case and in no way prejudicial. Accordingly, plaintiffs cannot show prejudice in the admission of Foote's deposition testimony, and we hold the admission of the evidence to be harmless error.

[3] Plaintiffs next contend the trial court erred in allowing the testimony of Dr. Gary Hankins regarding the standard of care required of defendants and whether they complied with that standard.

Prior to trial, the court entered a discovery scheduling order (DSO) pursuant to Rule 26(f1) of the North Carolina Rules of Civil Procedure. The DSO required defendants to designate all expert witnesses they intended to call to render expert opinions at trial, and provide the experts' curriculum vitae (CV) and the information set forth in Rule 26(b)(4) of the Rules of Civil Procedure. Rule 26(b)(4) provides that a party may be required to identify each expert witness the party anticipates calling at trial, "the subject matter on which the expert is expected to testify, . . . the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion." N.C.R. Civ. P. 26(b)(4) (2001).

Defendants subsequently filed their designation of expert witnesses which identified Hankins and stated "he is expected to testify that shoulder dystocia can be, as was in this case, an obstetrical emergency." Plaintiffs had no disagreement with this opinion, and because Hankins was not expected to testify regarding the applicable standard of care, plaintiffs elected not to depose him.

Defendants then elicited at trial Hankins' opinion that Wotring had provided treatment to Sandra and Anderson Suarez in accordance with the standard of care. Plaintiffs objected and now argue admission of such evidence was erroneous because it violated the discovery scheduling order.

However, plaintiffs have failed to show how they were prejudiced by the admission of Hankins' opinion. His testimony was cumulative and corroborative of substantially similar testimony given by defendants' other expert, Dr. Ernest. Plaintiffs have failed to show how introduction of Hankins' testimony influenced the jury's verdict. Accordingly, assuming the trial court erred, we hold the error was harmless. *See* N.C.R. Civ. P. 61.

[4] Plaintiffs next contend the trial court erred in denying their motion for a new trial against defendant Wotring based on "accident or surprise which ordinary prudence could not have guarded against" caused by the jury being informed near the close of defendants' case that Wotring's mother had died the preceding afternoon. We find no manifest abuse of discretion on the trial court's part.

The standard of appellate review for discretionary rulings granting or denying motions for new trials was set forth by the Supreme Court in *Campbell v. Pitt County Memorial Hospital*, 321 N.C. 260, 362 S.E.2d 273 (1987), as follows:

> Appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). The trial court's discretion is " 'practically unlimited.' " *Id.*, 290 S.E.2d at 603 (quoting from *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915)). A "*discretionary* order pursuant to [N.C.]G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Id.* at 484, 290 S.E.2d at 603. "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605.

Id. at 264-65, 362 S.E.2d at 275-76 (emphasis and alterations in original), *quoted in Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997).

On the morning of 14 March 2001, the last day of testimony in this case, court reconvened and Wotring returned to the stand for re-cross examination. During re-cross, plaintiffs' counsel asked Wotring if he had a good night's sleep and Wotring answered he did not.

Following re-cross, defense counsel returned for a second redirect examination of Wotring. At the conclusion of this redirect, the following exchange occurred:

> Q: Doctor, I didn't hear what you said when Mr Britt asked you if you had a good night. Is that what he asked you?
>
> A: Yeah.
>
> Q: Well, what did you say? I didn't hear the answer.
>
> A: I told him I did not.
>
> Q: Why did you not have a good night?
>
> A: Well, unfortunately, my mother passed away yesterday afternoon, and we were up most of the night making arrangements. And it was—she was ninety, but—and not unexpected, but it was still a shock.

Plaintiffs argue defense counsel elicited the testimony regarding the death of Wotring's mother in a manner designed for maximum effect and the result of such testimony was that everyone in the courtroom, including the jurors, "felt profound sympathy for Dr. Wotring." Plaintiffs maintain such a reaction was natural and unavoidable and prevented plaintiffs from having a fair trial. We disagree.

The jury was instructed "to perform [its] duty fairly and objectively and without bias, sympathy or partiality toward any party" and "not to be swayed by pity, sympathy, partiality or public opinion." Absent some evidence in the record, we cannot assume the jury here disregarded the trial court's instruction and ignored its solemn duty to fairly and impartially decide the case. Therefore, the trial court's ruling denying plaintiffs' motion for a new trial on this ground did not amount to a substantial miscarriage of justice or a manifest abuse of discretion.

[5] In their final assignment of error, plaintiffs contend the trial court erred in denying their motion for a new trial against Wotring because the jury's verdict was contrary to the uncontradicted evidence at trial. We disagree.

"Like any other ruling left to the discretion of a trial court, the trial court's appraisal of the evidence and its ruling on whether a new trial is warranted due to the insufficiency of the evidence is *not* to be reviewed on appeal as presenting a question of law." *In re Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 860-61 (1999) (emphasis in original). It is well-settled that a trial judge's discretionary ruling either granting or denying a motion for a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

> It is impossible to place precise boundaries on the trial court's exercise of its discretion to grant a new trial. However, we emphasize that this power must be used with *great care and exceeding reluctance*. This is so because the exercise of this discretion sets aside a jury verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution.

In re Buck, 350 N.C. at 626, 516 S.E.2d at 861 (emphasis in original).

Here, plaintiffs argue that every medical expert witness testified that the standard of care required Wotring to attempt a variety of dif-

ferent maneuvers to relieve Anderson's shoulder dystocia *before* applying excessive traction to Anderson's head. According to plaintiffs, the only witness who testified to the details of Anderson's delivery was Alex Suarez, who stated that Wotring panicked when Anderson's shoulder got stuck and immediately starting pulling hard on Anderson's head. Thus, plaintiffs contend the uncontradicted evidence shows that Wotring violated the standard of care.

However, defendants introduced into evidence Wotring's medical notes detailing the steps he took to effectuate the delivery of Anderson. Two of defendants' expert witnesses testified that Wotring's actions, as documented in his notes, did not violate the standard of care.

It is the jury's function to weigh the evidence and to determine the credibility of witnesses. In this case, the jury was presented with all of the evidence, was instructed properly on the law, and made its decision accordingly. We cannot conclude from the record that the trial court's denial of plaintiffs' motion for a new trial based on insufficiency of the evidence to support the verdict probably amounted to a substantial miscarriage of justice.

For the reasons stated herein, we conclude the trial court did not err in entering judgment on the jury's verdict and in denying plaintiffs' motion for a new trial as to defendant Wotring.

Affirmed.

Judge TYSON concurs.

Chief Judge EAGLES concurs in a separate opinion.

EAGLES, Chief Judge, concurring.

I concur in the result reached by the majority. However, I write separately to express my uneasiness and disagreement with the extensive use of a witness's deposition testimony to impeach the witness after the witness testifies in person, has been examined in person and has been excused.

Here, defendants used deposition testimony to impeach plaintiff's expert witnesses after those same witnesses had been present in court, testified in person, and defendants had the opportunity to cross-examine them on the witness stand. Defendants agreed to excuse those witnesses and allowed the witnesses to leave the court-

room. Relying upon Rule 32(a) of the North Carolina Rules of Civil Procedure, defendants then proceeded to read the witnesses' deposition testimony into the record in order to impeach their live testimony. The depositions were read into evidence without the witnesses' presence or ability to explain their previous deposition testimony. This practice smacks of trial by ambush. Use of deposition testimony without the deponent's presence is technically allowed by N.C. R. Civ. P. 32 and N.C. R. Evid. 804. However, this practice impairs the fact-finder's ability to perform its traditional role of sorting truth from fiction by judging witness credibility during live testimony at trial. Although the parties in this case behaved in strict compliance with the rules, I believe that use of a witness's deposition testimony when that witness has been excused should be discouraged. The rules which appear to authorize this practice, N.C. R. Civ. P. 32 and N.C. R. Evid. 804, should be revisited by the General Assembly.

STATE OF NORTH CAROLINA v. VINCENT TODD CARPENTER, DEFENDANT

No. COA01-1600

(Filed 31 December 2002)

1. **Jury— dismissal of jurors—ex parte communication—absence of defendant**

The trial court did not err in an assault inflicting serious injury and assault on a female case by conducting alleged ex parte communication with jurors and thereafter dismissing those jurors, because: (1) defendant's trial had not commenced when the court held unrecorded bench conferences and deferred five jurors; and (2) the jurors were not excused at a stage of defendant's trial, and defendant did not have the right to be present at the conferences.

2. **Constitutional Law— denial of right to self-representation—no plain error**

Although defendant contends he is entitled to a new trial in an assault inflicting serious injury and assault on a female case based on the trial court's denial of defendant's request to represent himself, this assignment of error is dismissed because: (1) plaintiff failed to object at trial and plain error review involves either errors in the judge's jury instructions or rulings on the

admissibility of evidence; and (2) defendant's assignment of error does not involve jury instructions or the admissibility of evidence.

3. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial

Although defendant contends the trial court violated his equal protection rights by failing to vacate his habitual misdemeanor assault conviction under N.C.G.S. § 14-33(c)(3), this assignment of error is dismissed because: (1) defendant did not raise the constitutionality of the statute at trial; and (2) the Court of Appeals will not review constitutional questions that were not raised or passed upon in the trial court.

4. Assault— inflicting serious injury—sufficiency of evidence—volitionally or knowingly causing injuries

The trial court did not err by denying defendant's motion to dismiss the charge of assault inflicting serious injury under N.C.G.S. § 14-33 based on alleged insufficient evidence to show that defendant volitionally or knowingly caused these injuries, because the evidence viewed in the light most favorable to the State revealed that defendant broke a bone in the victim's mouth, damaged the victim's tooth, and broke a bone in the victim's hand.

5. Assault— instruction—definition including "attempt"—not plain error

The trial court did not commit plain error by giving the jury a definition of assault that included "attempt or the unequivocal appearance of an attempt with force and violence to do some immediate physical injury" when the indictments did not allege assaults based on a theory of "attempt" because the court instructed the jury that, in order to find defendant guilty of assault on a female, it must find that "the defendant intentionally assaulted the victim by hitting her with his hands and feet," and in order to find defendant guilty of assault inflicting serious injury, it must find that "the defendant assaulted the victim by intentionally and without justification or excuse hitting and/or scratching the victim."

6. Assault— inflicting serious injury—on a female—jury instruction—theory not presented in indictment—scratching

Assuming that the trial court erred in an assault inflicting serious injury case by instructing the jury on a theory of the case

not presented in the indictment by allowing the consideration of scratching of the victim as the cause of the injuries when the indictment alleged only hitting the victim with hands and fists, the error does not rise to the level of plain error since it did not have a probable impact on the jury's finding of guilt.

7. Assault— inflicting serious injury—self-defense instruction

The trial court did not commit plain error by failing to incorporate a full self-defense instruction into the assault inflicting serious injury charge, because: (1) the trial court gave a complete self-defense instruction when it instructed the jury on the assault on a female charge; (2) the trial court then instructed on the assault inflicting serious injury charge and provided a summary of the self-defense instruction and incorporated by reference the earlier instruction; and (3) the transcript revealed that the two instructions were given in close proximity.

8. Appeal and Error— preservation of issues—failure to object at trial—no assignment of error

Although defendant contends the trial court erred in an assault inflicting serious injury and assault on a female case by failing to instruct the jury on the lesser-included offenses of affray or simple assault, this argument is waived because: (1) defendant did not object at trial to this portion of the jury instructions; and (2) the record does not contain any assignments of error pertaining to this issue.

9. Appeal and Error— preservation of issues—issue already decided

Although defendant contends the trial court erred in an assault inflicting serious injury and assault on a female case by failing to vacate defendant's habitual felon conviction since his habitual misdemeanor assault conviction allegedly is not a substantive offense, this assignment of error is overruled because: (1) a panel of the Court of Appeals has decided the same issue against defendant in a different case; and (2) subsequent panels are bound to the decision until it is overturned by a higher court.

10. Assault— habitual misdemeanor assault convictions—ex post facto laws—double jeopardy

The trial court did not err by failing to vacate defendant's habitual misdemeanor assault convictions even though defendant contends N.C.G.S. § 14-33.2 is unconstitutional on its face and as

applied to defendant, because: (1) defendant's argument that habitual misdemeanor assault convictions violate ex post facto prohibitions has already been rejected by our Court of Appeals; and (2) the statute does not violate the United States Constitution or the North Carolina Constitution provisions against double jeopardy since the statute is a substantive offense and a punishment enhancement offense rather than a statute imposing punishment for previous crimes.

11. Sentencing—habitual felon—incompetent prior convictions

The trial court erred by denying defendant's motion to dismiss the habitual felon indictment based on incompetent prior convictions in the indictment, because: (1) the State did not show that defendant's New Jersey convictions were felonies under the law of New Jersey; (2) defendant's two New Jersey judgments do not state that defendant was convicted of a felony or sentenced as a felon; (3) there was no certification from any official that the two offenses were felonies in New Jersey; and (4) it cannot be concluded from the length of defendant's sentence that the offense was a felony in New Jersey.

Appeal by defendant from judgment entered 22 March 2001 by Judge Kimberly S. Taylor in Stanly County Superior Court. Heard in the Court of Appeals 14 October 2002.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender, Aaron Edward Carlos, for defendant-appellant.

EAGLES, Chief Judge.

Vincent Todd Carpenter ("defendant") appeals from judgment entered on jury verdicts finding him guilty of assault inflicting serious injury, assault on a female, and habitual felon. After careful consideration of the briefs and record, we discern no error in part, reverse in part, vacate in part and remand for resentencing.

At trial, the State's evidence tended to show that defendant called the American Fiber and Finishing plant several times to speak with Melissa Alexander ("Alexander") on 5 August 1999. Alexander testified that she did not want to speak with defendant. Calvin Gainey ("Gainey"), a shift manager, answered one telephone call from

defendant and at Alexander's request, would not put Alexander on the phone. Gainey testified that defendant told him that "he was coming down to that plant and he was going to whip her God damn ass and anybody that got in the way." At approximately 1:45 p.m., Alexander saw defendant at the plant. Alexander began to run but defendant caught her and pushed her to the ground. Defendant kicked Alexander and struck her in the head and stomach. Gainey testified that he received a radio call that "some guy was downstairs beating on [Alexander]." Gainey and his manager, Shane Phillips ("Phillips"), ran to the scene. They saw Alexander lying on the ground and defendant near her. Phillips told defendant that he should leave. Defendant took a step toward Gainey and struck him in the cheek with his fist. Gainey and Phillips then grabbed hold of defendant. Defendant then attempted to grab Gainey and Gainey struck defendant twice in the head. Defendant then "claw[ed]" Gainey's face and grabbed Gainey's bottom lip, and "ripped [his] bottom lip open." Defendant stuck his fingers in Gainey's mouth and "ripped [Gainey's] soft tissue out from under [Gainey's] tongue" while Gainey bit defendant. Phillips pulled defendant away and defendant pulled his hand out of Gainey's mouth which broke Gainey's jaw. Gainey and Phillips were holding onto defendant as the three men fell to the floor. Soon after, the police arrived.

Defendant was charged with assault on a female, assault inflicting serious injury, two counts of habitual misdemeanor assault and being an habitual felon. At trial, the jury returned guilty verdicts of assault on a female and assault inflicting serious injury. Defendant stipulated to the five misdemeanors listed in the two habitual misdemeanor assault indictments. The trial court then re-impaneled the jury for the habitual felon phase of the trial. After the jury returned a guilty verdict of being an habitual felon, the trial court pronounced that she "raised the level of the two misdemeanor assaults to class H felony, habitual misdemeanor assault convictions." The trial court entered judgment and sentenced defendant to a minimum term of imprisonment of 133 months to a maximum term of 169 months. Defendant appeals.

On appeal, defendant contends that the trial court erred when: (1) the trial court engaged in *ex parte* communication with and dismissed jurors; (2) the trial court denied his request to represent himself; (3) his assault on a female conviction was not vacated because the statute is unconstitutional; (4) his assault inflicting serious injury conviction was not vacated for insufficiency of the evidence; (5) his

assault convictions were not vacated because the jury instructions were erroneous; (6) his habitual misdemeanor assault conviction was not vacated because the statute is unconstitutional; (7) his habitual felon conviction was not vacated because habitual misdemeanor assault is not a substantive offense; (8) his habitual felon conviction was not vacated because the trial court erred by failing to dismiss the indictment because of incompetent prior convictions; (9) his habitual felon conviction was not vacated because the "principal indictments" are insufficient to support his sentence as an habitual felon; (10) his habitual felon conviction was not vacated because the trial court had not found defendant guilty of a felony before the habitual felon proceeding; and (11) his sentence was not vacated because the trial court sentenced defendant at the incorrect prior record level. After careful consideration we discern no error in part, reverse in part, vacate in part, and remand for resentencing.

Defendant presents arguments relating to 18 of the 36 assignments of error in the record on appeal. Any assignments of error not argued in defendant's brief are deemed abandoned. N.C.R. App. P. 28(b)(6).

[1] First, defendant contends that the trial court's *ex parte* communication with and dismissal of jurors was inappropriate. Defendant requested full recordation of the proceedings pursuant to G.S. § 15A-1241(b). Defendant contends that the trial court held unrecorded bench conferences, deferred five jurors without noting any reasons in the record and swore in the remaining jury pool. Defendant argues that the trial court's actions violated his Sixth and Fourteenth Amendment rights under the United States Constitution and Article I, § 23 of the North Carolina Constitution. We do not agree.

On 20 March 2001, the trial court heard and ruled on defendant's motion to suppress a statement made by defendant. Defendant and his counsel were present for the hearing. After the trial court denied the motion, the trial court ruled on some other preliminary motions. Defendant and his counsel left the courtroom and the jury pool was brought in. The trial court then deferred five members of the jury pool. The clerk of court swore in the remaining members of the jury pool. The trial court then had the jury pool leave the courtroom. Defendant and his counsel came back to the courtroom for another preliminary motion. The jury pool reentered the courtroom, the trial court stated "we're ready to begin the [defendant's] trial" and jury selection commenced.

"The Confrontation Clause in Article I, Section 23 of North Carolina's Constitution 'guarantees the right of . . . defendant to be present at *every stage* of the trial.' " *State v. Rannels*, 333 N.C. 644, 652-53, 430 S.E.2d 254, 258-59 (1993) (emphasis in original) (quoting *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990)). *Rannels* held that "defendant's trial had not begun when the complained of unrecorded bench conferences with prospective jurors took place. They occurred . . . before any case had been called for trial." *Id.* at 654, 430 S.E.2d at 259.

Here, defendant's trial had not commenced when the court held unrecorded bench conferences and deferred five jurors. This occurred before the trial court began defendant's trial. "The jurors were not excused at a stage of the defendant's trial and the defendant did not have the right to be present at the conferences." *State v. Cole*, 331 N.C. 272, 275, 415 S.E.2d 716, 717 (1992). This assignment of error is overruled.

[2] Defendant contends that he is entitled to a new trial because the trial court denied his request to represent himself. We do not agree.

Defendant failed to object at trial and now seeks plain error review of this assignment of error. Our Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Defendant's assignment of error here does not involve jury instructions or the admissibility of evidence. Accordingly, this assignment of error is dismissed.

[3] Next, defendant contends that his habitual misdemeanor assault conviction must be vacated because G.S. § 14-33(c)(2) violates defendant's constitutional right to equal protection of the laws. We are not persuaded.

G.S. § 14-33(c)(2) (2001) states that "any person who commits any assault . . . is guilty of a Class A1 misdemeanor if, in the course of the assault . . . he or she: (2) Assaults a female, he being a male person at least 18 years of age." Defendant concedes that he did not raise the constitutionality of the statute at trial but requests that this Court review his claim pursuant to Appellate Rule 2. It is well settled that this Court will not review constitutional questions that "[were] not raised or passed upon in the trial court." *State v. Elam*, 302 N.C. 157,

160-61, 273 S.E.2d 661, 664 (1981). We decline to review this issue pursuant to Rule 2. This assignment of error is dismissed.

[4] Defendant next contends that his conviction for assault inflicting serious injury must be vacated for insufficiency of the evidence. Specifically, defendant argues that the State did not produce any evidence to show that defendant "volitionally or knowingly caused these injuries." We are not persuaded.

"When ruling on a motion to dismiss for insufficiency of the evidence, the trial court determines whether substantial evidence exists for each essential element of the offense charged, and whether defendant is the perpetrator of the offense." *State v. Gay*, 151 N.C. App. 530, 532, 566 S.E.2d 121, 123 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002), *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (Nov. 4, 2002) (No. 02-6059). "[T]he trial court is not to be concerned with the weight of the evidence. Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted). "In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case." *Mann*, 355 N.C. at 301, 560 S.E.2d at 781. "The motion to dismiss should be denied if there is substantial evidence supporting a finding that the offense charged was committed." *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002).

Defendant was charged with assault inflicting serious injury pursuant to G.S. § 14-33. "[A]ny person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) Inflicts serious injury upon another person or uses a deadly weapon." G.S. § 14-33(c)(1) (2001). "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. Williams*, 154 N.C. App. 176, 181, 571 S.E.2d 619, 622 (2002) (quoting *State v. Hannah*, 149 N.C. App. 713, 718-19, 563 S.E.2d 1, 4-5, *disc. review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002) (citations omitted)). The indictment here alleged that defendant "did assault and strike Calvin L. Gainey, by hitting him with his hands and fists

thereby inflicting serious injury, to wit: a broken bone in Calvin Gainey's mouth, a damaged tooth and a broken bone in Calvin Gainey's hand."

Here, Gainey testified that defendant: struck him in the left cheek; "claw[ed] at my face"; "grabbed my bottom lip, and [defendant] ripped my bottom lip open"; and "stuck his hand back in my mouth and ripped my soft tissue out from under my tongue." Gainey also testified that Phillips grabbed the defendant and that defendant "pulled his hand out of my mouth and it broke my jaw, is what it done, around my tooth. And we fell to the floor." The evidence, taken in the light most favorable to the State, is sufficient to support a finding that defendant committed the assault inflicting serious injury and to withstand a motion to dismiss.

Defendant next contends that his assault convictions must be vacated because the trial court's jury instructions were erroneous. Defendant argues that the trial court erred in answering a jury question and then failing to correct the error, by instructing the jury on a theory of the case not presented by the indictment, and by failing to incorporate a full self-defense instruction into the assault inflicting serious injury charge. We are not persuaded.

[5] Defendant argues that the trial court committed plain error by erroneously answering a jury question and failing to correct it. The jury sent a question to the trial court asking for the "Definition of Assault." The trial court then instructed the jury that:

> An assault is an—is an overt act or an attempt or the unequivocal appearance of an attempt with force and violence to do some immediate physical injury to the person of another which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

The following day, the jury sent another question to the trial court which stated: "Definition of Assault differs from 'charge' definition by omitting the word Attempt. In proving guilty [sic] of Assault does Physical contact have to occur?" The trial court then instructed the jury that:

> The agreement of all the parties, and I agreed with their recommendation, is that I ask you to rely on the jury instructions that you've already been given. You've been given the definition of assault and been given other instructions as far as the offense is concerned. And it's our belief that the answer to that question

> lies within the instructions you've already been given. So I would ask you to go back through the instructions.

Defendant argues that the indictments here did not allow the State to prove either assault based on a theory of "attempt." Defendant argues that these instructions allowed the jury to consider "attempt" as a basis for a guilty verdict. We do not agree.

"In order to establish plain error, a defendant must establish that the trial court committed error and that absent this error, the jury would have probably reached a different result." *State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 477 (2002), *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (Oct. 7, 2002) (No. 02-5130). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

> The error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." We have observed that " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' "

State v. Lucas, 353 N.C. 568, 584, 548 S.E.2d 712, 723-24 (2001) (citations omitted).

Here, the trial court instructed the jury for assault on a female that "the defendant intentionally assaulted the victim by hitting her with his hands and feet." For the assault inflicting serious injury charge, the trial court instructed that "the defendant assaulted the victim by intentionally and without justification or excuse hitting and/or scratching the victim." The trial court did not instruct on the definition of assault during the jury charge. However, the trial court did define assault after it received a question from the jury for a definition of assault. The trial court, with the consent of both the State and the defendant's counsel, brought the jury back to the courtroom and read the pattern jury instruction on assault to the jury. The following day, the jury sent a question seeking clarification of the definition of assault. Again, both the State and defendant's counsel agreed with the instruction by the trial court for the jury to "rely on the jury instructions that [they have] already been given."

"The trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). The definition of assault provided to the jury did include "attempt or the unequivocal appearance of an attempt with force and violence to do some immediate physical injury." However, the trial court's instruction during the jury charge stated that "the defendant intentionally assaulted the victim by hitting her with his hands and feet" and that "the defendant assaulted the victim by intentionally and without justification or excuse hitting and/or scratching the victim." The inclusion of "attempt" in the definition of assault and the trial court's instruction that the jury was to rely on the instructions already given do not constitute plain error. "Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for a reversal." *State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978).

[6] Defendant further argues that the trial court erred by instructing the jury on a theory of the case not presented by the indictment. Defendant argues that the indictment charged defendant with assaulting Gainey "by hitting him with his hands and fists thereby inflicting serious injury." The trial court instructed the jury "that the defendant assaulted the victim by intentionally and without justification or excuse hitting and/or scratching the victim; and second, that the defendant inflicted serious injury upon the victim." Defendant argues that this instruction reduced the burden of proof and allowed the jury to consider scratching as the cause of the injuries. We do not agree.

Here, defendant again argues that this instruction constituted plain error. The indictment alleged "hitting [Gainey] with his hands" and the trial court's instruction provided "hitting and/or scratching [Gainey]." Assuming arguendo, that the instruction was flawed, it does not rise to the level of plain error. In reviewing the entire record to "determine if the instructional error had a probable impact on the jury's finding of guilt," *Odom*, 307 N.C. at 661, 300 S.E.2d at 379, we conclude that it did not. This assignment of error is dismissed.

[7] Defendant's remaining argument is that the trial court erred by failing to incorporate a "full self-defense" instruction into the assault inflicting serious injury charge. When instructing the jury on the

assault inflicting serious injury charge, the trial court stated that "I'm not going to reread the instruction on self defense to you. Just remember the instructions I gave you previously, because they apply in this offense as well as in the prior one." Defendant argues that "the jury failed to hear the full instruction regarding self-defense with the elements of the charge in mind." We are not persuaded.

The trial court gave a complete self-defense instruction when it instructed the jury on the assault on a female charge. The trial court then instructed on the assault inflicting serious injury charge and provided a summary of the self-defense instruction and incorporated by reference the earlier instruction. From the transcript, the two instructions were given in close proximity as only two pages of transcript exist between the complete self-defense instruction and the complained of instruction. Under the plain error standard "reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done." *State v. Prevatte*, 356 N.C. 178, 258, 570 S.E.2d 440, 484 (2002). The absence of a second full self-defense instruction here is not plain error. This assignment of error is dismissed.

[8] In addition, defendant argues that the trial court erred by not instructing the jury on the lesser included offenses of affray or simple assault. This Court "will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal. Further, the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect." *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980) (citations omitted). Defendant did not object at trial to this portion of the jury instructions and the record does not contain any assignments of error pertaining to the failure of the trial court to give instructions on the lesser included offenses of affray or simple assault. Accordingly, this argument is waived.

[9] Next, defendant contends that his habitual felon conviction must be vacated because habitual misdemeanor assault is not a substantive offense. Defendant concedes that *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 520, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000) held that the habitual misdemeanor assault statute defines a substantive offense. Defendant asks this Court to review the issue and overrule *Smith*. "When a panel of this Court has decided the same issue in a different case, subsequent panels are bound to the decision until it is overturned by a higher court." *State v. Taylor*, 128 N.C. App. 394, 402, 496 S.E.2d 811, 816-17, *aff'd*, 349 N.C. 219, 504

S.E.2d 785 (1998). We are bound by *Smith* and overrule this assignment of error.

[10] Defendant next contends that his habitual misdemeanor assault convictions must be vacated because the habitual misdemeanor assault statute is unconstitutional. Specifically, defendant argues that G.S. § 14-33.2 is unconstitutional on its face and is unconstitutional as applied to the defendant. We do not agree.

Defendant argues that the habitual misdemeanor assault statute is unconstitutional as applied to defendant because it retroactively increases the punishment for defendant's five misdemeanor charges used to support the habitual misdemeanor assault charge. Defendant argues that some of the prior misdemeanors preceded the enactment of the habitual misdemeanor assault statute. Defendant argues that this violates the *ex post facto* clauses of the United States and North Carolina Constitutions.

Defendant's argument that the felony of habitual misdemeanor assault violates the *ex post facto* prohibitions has already been rejected by this Court. *See Smith*, 139 N.C. App. at 214-15, 533 S.E.2d at 521. Because the habitual misdemeanor assault statute "does not impose punishment for previous crimes, but imposes an enhanced punishment for behavior occurring after the enactment of the statute, because of the repetitive nature of such behavior, we hold the habitual misdemeanor assault statute does not violate the prohibition on *ex post facto* laws." *Id.*

Defendant's remaining argument is that G.S. § 14-33.2 is unconstitutional on its face. Defendant argues that his conviction violates double jeopardy because his prior misdemeanor convictions are elements of the habitual misdemeanor assault offense. Defendant further argues that his habitual misdemeanor assault conviction violates double jeopardy because it is a substantive offense, rather than a penalty enhancing offense.

These same arguments were made by the defendant in *State v. Vardiman*, 146 N.C. App. 381, 552 S.E.2d 697 (2001), *cert. denied*, — U.S. —, — L. Ed. 2d — (Oct. 7, 2002) (No. 01-10066) in challenging the habitual impaired driving statute. The *Vardiman* court rejected those arguments and upheld the constitutionality of the habitual impaired driving statute. *Id.* at 383, 552 S.E.2d at 699. Because we conclude that the logic of *Vardiman* applies with equal force here, we hold that the habitual misdemeanor assault statute

does not violate the United States Constitution or the North Carolina Constitution provisions against double jeopardy.

G.S. § 14-33.2 (2001) states that:

> A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony.

This Court has previously noted the similarities in the habitual misdemeanor assault statute and the habitual impaired driving statute. *See Smith*, 139 N.C. App. at 213, 533 S.E.2d at 520 ("Both the habitual misdemeanor assault statute and the habitual impaired driving statute declare that a person 'commits the offense' if that person currently commits specified acts and has been convicted of a specified number of similar offenses in the past."); *Vardiman*, 146 N.C. App. at 386, 552 S.E.2d at 700 ("[T]he habitual misdemeanor assault statute was congruent in form to the habitual driving while impaired statute such that both were substantive and not 'merely' status offenses."). This Court's reasoning in *Vardiman* is instructive here with regard to the defendant's double jeopardy argument.

The *Vardiman* court "concluded that 'the legislature must not have intended to make habitual impaired driving *solely* a punishment enhancement status.' " *Vardiman*, 146 N.C. App. at 385, 552 S.E.2d at 700 (emphasis in original) (quoting *State v. Priddy*, 115 N.C. App. 547, 549, 445 S.E.2d 610, 612, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994)).

> Statutes criminalizing behavior such as theft and murder, which are substantive offenses, are subject to double jeopardy analysis. *Habitual impaired driving, however, is a substantive offense and a punishment enhancement (or recidivist, or repeat-offender) offense.*
>
> It is not disputed that the habitual impaired driving statute is a recidivist statute. Of the aforementioned cases that draw a distinction between substantive and status offenses, none hold a recidivist statute unconstitutional for double jeopardy reasons. Throughout the country, recidivist statutes are routinely upheld against double jeopardy concerns. The more authentic distinction to be drawn in assessing double jeopardy concerns is between

> recidivist and non-recidivist statutes, not between substantive and status offenses. While most recidivist statutes are set out in language that makes them classifiable as status offenses, the difference between a status offense and the habitual impaired driving statute, a substantive offense, is merely one of form, not substance. Prior convictions of driving while impaired are the elements of the offense of habitual impaired driving, but the statute "does not impose punishment for [these] previous crimes, [it] imposes an enhanced punishment" for the latest offense.

Id. at 385, 552 S.E.2d at 700 (citation omitted) (emphasis added). The court then relied on *Smith* to "hold that the habitual impaired driving statute does not punish prior convictions a second time, but rather punishes the most recent conviction more severely because of the prior convictions." *Id.* at 386, 552 S.E.2d at 701.

Here, "[a] close analysis of the precise wording of the habitual offender statutes in North Carolina reveals the intent of the Legislature that habitual misdemeanor assault be a substantive offense *rather than merely a status* for purposes of sentence enhancement." *Smith*, 139 N.C. App. at 212, 533 S.E.2d at 519-20 (emphasis added). Applying the reasoning in *Vardiman* here, we conclude that habitual misdemeanor assault "is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense." *Vardiman*, 146 N.C. App. at 385, 552 S.E.2d at 700 (emphasis in original).

The defendant in *Vardiman* also argued that habitual impaired driving violated the double jeopardy provisions because the statute "encompasses prior driving while impaired convictions as *elements* of the crime of habitual driving while impaired." *Vardiman*, 146 N.C. App. at 386, 552 S.E.2d at 701 (emphasis in original). Again, the *Vardiman* court's rationale is instructive.

> Defendant cites a litany of cases that seem to stand for the proposition that "when a criminal offense *in its entirety* is an essential element of another offense a defendant may not be punished for both offenses." The United States Supreme Court, however, distinguishes *prior convictions* as elements of a crime from other elements of a crime, holding that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Apprendi* is in line with our conclusion in the case *sub judice*, that whether a statute sur-

> vives a double jeopardy constitutional analysis does not depend on whether the statute is called substantive or status, or whether the statute is comprised of elements or sentencing factors, but what the statute accomplishes in reality. The point that "[l]abels do not afford an acceptable answer . . . applies as well . . . to the constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.' " "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect[.]" The effect of section 20-138.5 is that a defendant is punished more severely for a recent crime based on having committed previous crimes. Consequently, section 20-138.5 does not violate the United States and North Carolina Constitutions.

Id. at 386-87, 552 S.E.2d at 701 (citations omitted).

This Court has previously stated that "the habitual misdemeanor assault statute similarly does not impose punishment for previous crimes, but imposes an enhanced punishment for behavior occurring after the enactment of the statute." *Smith*, 139 N.C. App. at 214, 533 S.E.2d at 521. Accordingly, we hold that the habitual misdemeanor assault statute does not violate the double jeopardy provisions of the United States and North Carolina Constitutions.

[11] Defendant next contends that his habitual felon conviction must be vacated because the trial court erred by failing to dismiss the indictment due to incompetent prior convictions. Defendant argues that the trial court erred by denying his motion to dismiss the habitual felon indictment because the two New Jersey convictions were "not felonies within the meaning of the North Carolina Habitual Felons Act." Defendant contends that the State did not show that defendant's New Jersey convictions were felonies under the law of New Jersey. We agree.

In *State v. Lindsey*, 118 N.C. App. 549, 552-53, 455 S.E.2d 909, 911-12 (1995), this Court reversed the denial of defendant's motion to dismiss his habitual felon charge when one of the three convictions was a New Jersey conviction. *Lindsey* noted that:

> The indictment does not charge defendant with felonious possession of stolen property. The judgment does not recite that defendant pled guilty to a felony or was sentenced as a felon. There was no certification from any official that the offense charged in Count III was a felony in New Jersey in 1975. We can-

not conclude from the length of defendant's sentence (two to three years) that the offense was a felony in New Jersey.

Id. at 553, 455 S.E.2d at 912. The *Lindsey* court "agree[d] with [the] defendant that the State did not present substantial evidence that this third conviction relied upon was a felony as required by our law." *Id.*

Here, defendant's two New Jersey judgments do not state that he was convicted of a felony or sentenced as a felon. In addition, there was no certification from any official that the two offenses were felonies in New Jersey. We note the State's argument that defendant could have received sentences exceeding one year for each of his two New Jersey convictions and that "under New Jersey law, offenses punishable by more than one year in prison constitute common-law felonies." *United States v. Brown*, 937 F.2d 68, 70 (2nd Cir. 1991). However, *Lindsey* provided that "[w]e cannot conclude from the length of defendant's sentence (two to three years) that the offense was a felony in New Jersey." *Lindsey*, 118 N.C. App. at 553, 455 S.E.2d at 912. We conclude that the trial court erred in denying defendant's motion to dismiss the habitual felon indictment.

Because we conclude that defendant's habitual felon conviction must be vacated due to incompetent prior convictions and the matter must be remanded for resentencing, we need not address defendant's remaining assignments of error regarding his habitual felon conviction and prior record level.

No error in part, reversed in part, vacated in part and remanded for resentencing.

Judges TYSON and THOMAS concur.

STATE OF NORTH CAROLINA v. RANDY LEE SELLERS

No. COA01-1284

(Filed 31 December 2002)

1. Criminal Law—insanity—directed verdict precluded

The trial court did not err in an assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, and discharging a firearm into occupied

property case by failing to grant defendant's motions to dismiss the charges based upon insanity as a matter of law even though four expert witnesses testified defendant did not know right from wrong at the time of the shooting, because evidence of insanity offered by defendant, even if uncontroverted, is for the jury to determine and precludes the entry of a directed verdict for defendant on insanity.

2. Sentencing—aggravating factors—knowingly creating great risk of death to more than one person

The trial court did not err in an assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, and discharging a firearm into occupied property case by finding the aggravating factor under N.C.G.S. § 15A-1340.16(d)(8) that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, because: (1) additional evidence was required from the State to prove the existence of N.C.G.S. § 15A-1340.16(d)(8) beyond that required for the offenses themselves; and (2) where, as here, the jury has found defendant's evidence regarding insanity lacking, there is sufficient evidence for a reasonable judge to find that, despite the expert testimony to the contrary, defendant acted knowingly.

3. Sentencing—aggravating factors—defendant on pretrial release when committed crimes

The trial court erred in an assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, and discharging a firearm into occupied property case by finding the aggravating factor under N.C.G.S. § 15A-1340.16(d)(12) that defendant was on pretrial release when he committed these crimes, because proof of arrest and absence of proof that a trial occurred is not sufficient evidence to conclude defendant was on pretrial release.

4. Sentencing—findings—aggravating factors outweigh mitigating factors—clerical error

Although defendant contends the trial court erred by failing to make the requisite finding that the aggravating factors outweighed the mitigating factors before sentencing defendant to an aggravated term for assault with a firearm on a law enforcement

officer, the transcript revealed that it was a mere clerical error that the trial court can correct on remand.

5. Constitutional Law—double jeopardy—assault with a firearm on a law enforcement officer—discharging a firearm into occupied property

The trial court did not violate double jeopardy by sentencing defendant to consecutive terms for the crimes of assault with a firearm on a law enforcement officer and discharging a firearm into occupied property, because: (1) the fact that each crime requires proof of an element which the other does not demonstrates the intent to allow multiple punishments to be imposed for the separate crimes; and (2) one crime requires proof of a law enforcement officer then performing his duties while the other requires proof of willful and wanton discharging of a firearm into occupied property.

Judge WYNN concurring.

Appeal by defendant from judgment entered 7 March 2001 by Judge Osmond Smith in Alamance County Superior Court. Heard in the Court of Appeals 14 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amy L. Yonowitz, for the State.

Daniel H. Monroe, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted by the Alamance County Grand Jury for numerous offenses in 1999 and 2000. On 8 November 1999, defendant was indicted for two counts of assault with a deadly weapon on a law enforcement officer, the victims being Officers Sam Ray ("Officer Ray") and Christopher Denny ("Officer Denny") of the Graham Police Department. On 24 January 2000, defendant was indicted for two counts of attempted murder, the victims being Officer Denny and Officer Ray, and assault with a deadly weapon with intent to kill inflicting serious injury upon Officer Denny, and assault with a deadly weapon with intent to kill Officer Ray, and assault with a deadly weapon on a law enforcement officer and assault by pointing a gun, the victim being Officer Peter Acosta ("Officer Acosta") of the Graham Police Department. On 6 November 2000, defendant was indicted for discharging a firearm into occupied property, the occu-

pant being Officer Ray. Defendant was also indicted with superceding indictments for three counts of assault with a deadly weapon on a law enforcement officer, the victims being Officers Ray, Denny and Acosta. On 14 February 2001, the charge of assault by pointing a gun at Officer Acosta was dismissed.

The cases were joined and tried from 19 February 2001 through 7 March 2001 before a jury, Judge Osmond Smith ("Judge Smith"), Alamance County Superior Court, presiding. The jury found defendant not guilty of attempted murder of Officers Denny and Ray. The jury did not base its verdict on defendant's asserted insanity defense. The jury found defendant guilty of the following offenses: assault with a firearm on a law enforcement officer against Officers Denny, Ray, and Acosta; assault with a deadly weapon inflicting serious bodily injury upon Officer Denny; assault with a deadly weapon upon Officer Ray; and discharging a firearm into occupied property.

The court arrested judgment in the case of assault with a deadly weapon upon Officer Ray. The court found as aggravating factors that defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person," and that defendant "committed the offense while on pretrial release." The court found as mitigating factors that defendant "was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced defendant's culpability for the offense," "has been honorably discharged from the United States Armed Services," "has a support system in the community," and "has a positive employment history or is gainfully employed." The court went on to find that the aggravating factors outweighed the mitigating factors. The court sentenced defendant to four terms, of 31-47 months each, to be served consecutively for the following offenses: assault with a firearm on Officer Ray; discharging a weapon into property occupied by Officer Ray; assault with a firearm and assault with intent to inflict serious bodily injury upon Officer Denny (consolidated for judgment); and assault with a firearm on Officer Acosta. The total sentence imposed was 124-188 months.

The State's evidence tended to show that defendant entered the Pantry Convenience Store in Graham just before 2 a.m. on 28 October 1999 and told the clerk to call the police because he needed to speak to a law man. Defendant was wearing a uniform with an insignia which read "Department of Justice, Federal Bureau of Prisons." He was carrying two guns, a 9 millimeter semi-automatic Ruger pistol,

and a .380 Lorcin semi-automatic pistol. The clerk testified that defendant's eyes were "kind of shiney," "like he had been drinking alcohol." The clerk called 911 and told the operator there was a man with the Department of Justice carrying two guns who wanted to have some Graham police officers come to the store. Officers Acosta and Ray responded in one police car and Officer Denny responded in a separate police car. Officer Ray was driving and pulled up next to defendant. Officer Acosta, speaking through Officer Ray's open window, asked defendant what was up. Defendant responded "Nothing much" and then asked them if they thought that justice had been done in the world that day. When Officer Acosta noticed defendant had a gun (the Ruger), he exited the car, drew his weapon and maneuvered to the rear passenger side. He called to Officer Denny, who was exiting his car, that defendant had a gun and to get him away from the car. Officers Acosta and Denny each told defendant to put down the gun. Defendant said "I'm immortal" and asked if they believed in God. Defendant then shot into the air, maneuvered himself in front of the car and began shooting into the front of the car where Officer Ray was sitting. Officer Acosta fired at defendant, and defendant shot back at Officer Acosta. Officer Ray partially exited the car and shot at defendant. Defendant then moved down the driver's side of the car and fired into the door as Officer Ray dove out of the car. Officer Ray was hit three times in the chest, but was not injured because he was wearing a protective vest. Defendant began walking towards Officer Denny's car attempting to line up a shot. Officer Denny was crouched behind his patrol car when defendant began shooting at him. A bullet struck Officer Denny's hand, rendering him unable to fire his weapon. During a short pause in the exchange of fire, Officer Denny ran towards the back of the Pantry building.

While the bullets were flying between the officers and defendant there were customers inside the store. Some customers were in their cars when the shooting began and had to run into the store for safety. One such individual, Nathaniel Newton, was sleeping in the backseat of a vehicle stopped at the gas pumps and was awakened by the gunshots. He testified, "I sat and I thought. I was like, well, bullets hit the gas pumps and something, they could blow up, and like I could run into the store and be a little safer. . . . I just ducked my head and ran." Another customer, Toby Overman, was preparing to leave the parking lot in his truck when the shooting started. He crouched down in the seat and then exited the truck. He saw defendant with his gun and held up his hands. He first sought cover behind an ATM machine, and then behind the Pantry building.

As defendant headed north on South Main Street, additional officers arrived. Officer Chris Anderson, over a P.A. system, directed defendant to drop his weapon. Defendant continued towards the officers, said "Bring it on" and waved his gun in their direction. The officers shot defendant, who fell and was then handcuffed. The entire incident lasted 3-4 minutes. Officer Acosta recalled defendant had repeatedly yelled that he "was the son of God and wouldn't die."

Defendant's evidence tended to show that defendant had suffered from a mental illness. He was honorably discharged from the Air Force with a 30% mental disability rating. He had been on medication but had stopped taking it before the incident. Four experts testified that in their opinion defendant did not know right from wrong at the time of the incident.

Defendant asserts the trial court erred at trial by: (I) failing to grant defendant's motion to dismiss based upon insanity as a matter of law; (II) finding two aggravating factors; (III) imposing an aggravated sentence without making the necessary findings; and (IV) sentencing defendant to consecutive terms for crimes committed by the same conduct.

I. Insanity as a Matter of Law

[1] Defendant asserts the trial court erred by denying the motions to dismiss on the grounds that defendant was not guilty by reason of insanity as a matter of law. He directs the court's attention to the four expert witnesses, each of whom testified defendant did not know right from wrong at the time of the shooting. However, "[i]f evidence of insanity is offered by the defendant, even if un-controverted, the credibility of that testimony is for the jury and thus precludes the entry of a directed verdict for defendant on insanity." *State v. Dorsey*, 135 N.C. App. 116, 118, 519 S.E.2d 71, 72 (1999), *cert. denied*, 351 N.C. 363, 542 S.E.2d 221 (2000). Defendant urges the Court to reconsider this holding. We are bound by the precedent, and therefore find that the trial court properly denied defendant's motion to dismiss based upon insanity as a matter of law. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

II. Sentencing Issues: Finding of Aggravating Factors

[2] Defendant asserts the trial court erred in finding the aggravating factor that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.

Gen. Stat. § 15A-1340.16(d)(8) (2001). "The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists." N.C. Gen. Stat. § 15A-1340.16(a). "The trial court's finding of an aggravating factor must be supported by 'sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence.' " *State v. Hughes*, 136 N.C. App. 92, 99, 524 S.E.2d 63, 67 (1999), *disc. rev. denied*, 351 N.C. 644, 543 S.E.2d 878 (2000) (quoting *State v. Hayes*, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991)). The trial court is permitted great latitude in determining the existence of mitigating and aggravating factors. *Hayes*, 102 N.C. App. at 781, 404 S.E.2d at 15. "In order to impose this aggravating factor, the sentencing judge must consider: (1) whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created." *State v. Evans*, 120 N.C. App. 752, 758, 463 S.E.2d 830, 834 (1995).

First, defendant asserts that in finding that in its normal use the weapon "would normally be hazardous to the lives of more than one person" the trial court violated the rule that "[e]vidence 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). Defendant argues that since it was necessary for the State to prove defendant used a firearm to be convicted of assault with a firearm, shooting into an occupied vehicle, and assault with intent to inflict serious bodily injury, therefore the trial court could not consider the use of the firearm as evidence to support an aggravating factor. We disagree. In order to prove the substantive crimes, the State needed to prove use of the firearm, but did not need to prove "that defendant employed a weapon normally hazardous to the lives of more than one person," as required for finding the aggravating factor. *State v. Platt*, 85 N.C. App. 220, 228, 354 S.E.2d 332, 336 (1987). The State proved that defendant utilized a semi-automatic pistol, which "in its normal use is hazardous to the lives of more than one person and is the type of weapon contemplated by [this statute]." *State v. Antoine*, 117 N.C. App. 549, 551, 451 S.E.2d 368, 370 (1995). Therefore, we hold additional evidence was required from the State to prove the existence of this aggravating factor, beyond that required for the offenses themselves, and the trial court did not violate N.C. Gen. Stat. § 15A-1340.16(d) in finding this factor.

Defendant next asserts this aggravating factor should not have been applied because he did not act "knowingly." Defendant asserts the testimony of four mental health experts proves that he did not

know right from wrong. In addressing whether a person has knowingly created the risk, the court asks whether a reasonable person would have recognized the danger. *State v. Carver*, 319 N.C. 665, 356 S.E.2d 349 (1987). While the burden rests on the State to prove the existence of an aggravating factor, "[e]very person is presumed sane and the 'burden of proving insanity is properly placed on the defendant.' " *Dorsey*, 135 N.C. App. at 118, 519 S.E.2d at 72 (quoting *State v. Leonard*, 296 N.C. 58, 64, 248 S.E.2d 853, 856 (1978)). "If evidence of insanity is offered by the defendant, even if un-controverted, the credibility of that testimony is for the jury." *Id.* The jury, here, found the evidence offered by the defendant was insufficient to conclude that defendant was insane and unable to distinguish right from wrong. Likewise the judge, in his determination at sentencing, rejected the expert testimony from the defense, and found that a reasonable person would have recognized that this conduct created a great risk of death to the lives of more than one person. Where, as here, the jury has found defendant's evidence regarding insanity lacking, we find there is sufficient evidence for a reasonable judge to find that, despite the expert testimony to the contrary, defendant acted "knowingly." Therefore, the trial court did not err in finding this aggravating factor.

[3] Defendant also asserts the trial court erred in finding that he was on pretrial release when he committed the crimes, an aggravating factor provided by N.C. Gen. Stat. § 15A-1340.16(d)(12). "The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists." N.C. Gen. Stat. § 15A-1340.16(a). "In order to be valid, an aggravating factor must be supported by sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence. The trial court should be permitted wide latitude, however, in arriving at the truth as to the existence of aggravating and mitigating factors, for it alone observes the demeanor of the witnesses and hears the testimony." *Hayes*, 102 N.C. App. at 781, 404 S.E.2d at 15 (citations omitted). The evidence must be "sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary*, 1201 (7th ed. 1999).

In the case at bar, the only evidence to support the finding that defendant was on pretrial release at the time of the crime is the testimony of State Trooper Steven Bradley ("Trooper Bradley") that he arrested defendant two months before the shooting for driving while impaired, and defendant was released pending trial. The State argues

that since there was no evidence that defendant's charge had gone to trial, the State had therefore established that defendant was on pretrial release. We disagree. Proof of arrest and absence of proof that a trial occurred is not sufficient evidence to conclude defendant was on pretrial release. Therefore the State's evidence, standing alone, does not meet its burden of proving the existence of the aggravating factor by a preponderance of the evidence. We reverse the trial court's finding of this aggravated factor and remand for new sentencing.

III. Sentencing Issue: Correction of Clerical Error

[4] Defendant asserts the trial court erred in failing to make the requisite finding that the aggravating factors outweighed the mitigating factors before sentencing defendant to an aggravated term for assault with a firearm on Officer Denny. The transcript reveals the trial court stated, "[t]he Court finds that the factors, factors in aggravation outweigh the factors in mitigation, and that an aggravated sentence is justified in the judgments to be entered." The form, however, leaves unchecked this important finding. From the transcript and the aggravated sentence imposed, it is clear that the court intended to have this box checked. Clerical errors are properly addressed with correction upon remand because of the importance that the records " 'speak the truth.' " *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) (quoting *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956)). Accordingly, upon remand the trial court should correct the clerical error when it enters a new judgment.

IV. Sentencing Error: Consecutive Sentences

[5] Defendant asserts the trial court erred in sentencing him to two consecutive terms for the crimes of assault with a firearm on a law enforcement officer and discharging a firearm into occupied property, both of which stemmed from the same action of shooting Officer Ray. Defendant asserts this violated his constitutional protections from double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits imposing multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 450, 340 S.E.2d 701, 706 (1986). "When the same act or transaction constitutes a violation of two criminal statutes, the test to determine whether there are two separate offenses is whether each statute requires proof of a fact which the other does not." *State v. Haynesworth*, 146 N.C. App. 523, 530-31, 553 S.E.2d 103, 109 (2001) (citing *Blockburger v. United*

States, 284 U.S. 299, 76 L.Ed. 306 (1932)). "The fact that each crime requires proof of an element which the other does not demonstrates the intent of the General Assembly to allow multiple punishments to be imposed for the separate crimes." *Haynesworth*, 146 N.C. App. at 531, 553 S.E.2d at 109.

The crime of assault with a firearm on a law enforcement officer in violation of N.C. Gen. Stat. § 14-34.5 requires an assault, with a firearm, upon a law enforcement officer who was then performing his duties. The crime of discharging a firearm into occupied property in violation of N.C. Gen. Stat. § 14-34.1 requires the willful or wanton discharge of a firearm, into property, then occupied. Since one crime requires proof of a law enforcement officer then performing his duties, and the other requires proof of willful and wanton discharging of a firearm into occupied property, different elements constitute each offense, and there is no double jeopardy.

We have examined defendant's remaining assignments of error and find them to be without merit.

No error in trial, remanded for re-sentencing.

Judge HUDSON concurs.

Judge WYNN concurs with a separate opinion.

WYNN, Judge, concurring,

On appeal, defendant argues "if this case does not call out for a directed verdict of [not guilty] by reason of insanity, then we might as well remove that defense from our jurisprudence." The majority relies on *State v. Dorsey* in holding that trial courts are precluded from entering a directed verdict for a defendant based on a claim of insanity. *State v. Dorsey*, 135 N.C. App. 116, 118, 519 S.E.2d 71, 72 (1999). Bound by the holding of *Dorsey*, the majority correctly resolves this assignment of error by summarily discussing the events supporting defendant's claim of insanity. I write separately to (1) point out additional facts in this case, and (2) respectfully request that our Supreme Court examine the application of the holding of this Court's opinion in *Dorsey* to this case.

The record on appeal shows that upon graduating from Southern High School in Graham, North Carolina, defendant entered the United States Air Force. For five years, until his mid-twenties, defendant did

not show any signs of mental health problems; defendant married, advanced to the rank of Sergeant, and lived a normal life.

In early 1997, defendant's mental health began a serious, rapid, and documented decline into a state of psychosis. Defendant became a "Born-Again Christian": One psychiatrist described defendant's faith as "more religious than a reasonable person." Over the next six months, Air Force records reveal defendant began experiencing a form of paranoia in which he felt discriminated against because of his Christianity. In June 1997, defendant "became fixated on the fact that he was the son of God"; believed "that by watching the weather channel, he could tell that the end of the world was coming"; and baptized himself in a military swimming pool.

When defendant's wife became exceedingly concerned at defendant's actions and beliefs, defendant called the military police reporting that his wife was crazy. When the military police arrived, defendant was in the front yard talking about religion, his hereditary relationship with God, and the end of the world. The military police took defendant to the hospital, where defendant was diagnosed as a psychotic. Defendant spent six weeks in the hospital and was placed on anti-psychotic medication. However, because it was defendant's first psychotic episode, "the doctors decided not to keep him on his medicine and just see how he [would] do." However, within one day of being back on the Air Force base, defendant hit two military officers, proclaimed he was the son of God, again, and was back in the hospital. After six months in and out of the hospital, "it became clear to the military that [defendant was psychotic]." Consequently the "[Air Force] decided to medically retire" defendant with a 30% mental disability rating. According to the testimony of Dr. Baroriak, a forensic psychiatrist employed by the State of North Carolina at Dorothea Dix Hospital, defendant "believed that he had been railroaded out of the Air Force, and that the issue of mental illness was used against him . . . [as] part of a plot."

After his honorable discharge from the military, defendant returned to North Carolina in November 1998 and moved back home residing with his mother, Mary Frances Walker, and his mother's husband, Timothy Walker. Defendant obtained employment at the Federal Bureau of Prison's facility in Butner. However, defendant was placed on administrative suspension after the nature of his military discharge was discovered. After a short while, defendant realized that "one of his main career goals . . . to be a correctional officer" was over. "[Defendant] thought he was [yet again] being railroaded out of

the Federal Bureau of Prisons, and that this was part of a conspiracy based on his religious beliefs."

Dr. Baroriak testified that "at this point [defendant] started experiencing [and] exhibiting psychotic symptoms." On 22 October 1999, Ms. Walker, defendant's mother, testified she began "to notice a great big difference" in defendant. Specifically, beginning on 22 October 1999, defendant stopped responding verbally, began staring off into space, was susceptible to spontaneous bouts of crying, and ceased sleeping at night. On the night of 27 October 1999, defendant watched the Atlanta Braves play the New York Yankees in the Major League Baseball World Series. "He thought the Yankees represented the white people, and the Braves represented people of color. And that the [Yankees] victory . . . was part of God's statement" that the rapture was coming. Accordingly, defendant created a plan wherein defendant would get shot by police while wearing a Department of Justice uniform, and defendant reasoned that this would "alert[] the world to all the injustices that would be obvious to anybody investigating . . . that these conspiracies had happened to [him]."

Later that night, Ms. Walker awoke and noticed defendant in the bathroom. Ms. Walker knocked on the door, and defendant emerged with "no expression on his face." At 1:30 a.m., Ms. Walker heard defendant's "car crank up . . . . [And] when [she] saw him again, it was over at the emergency room." As summarized by the majority, from his home defendant drove to the Pantry Convenience Store wearing a uniform with Department of Justice insignia and carrying two semi-automatic pistols. Defendant asked the Pantry Clerk to call a "law man." When the Graham Police arrived, defendant approached their squad car and said something in the following vein: "Do you think justice has been done in the world today?" Noticing defendant's bizarre behavior, and his gun, the police drew their weapons, asking defendant to put his weapon down. Defendant stated "I'm immortal," asked the officers if they believed in God, and, within seconds, defendant began shooting. Defendant repeatedly yelled that "he was the son of God and could not die." The incident lasted between three and four minutes until defendant was shot, handcuffed, and taken to the hospital.

Dr. Bruce Brian Hughes testified that he was the "on-call" psychiatrist for Alamance Regional Mental Health Authority on 28 October 1999. After the incident at the Pantry, Dr. Hughes was called-in to evaluate defendant's mental health. During the course of his interview, defendant "revealed to [Dr. Hughes] that he felt he was the son

of God, that he had a mission that evening . . . . He felt that he was immortal, and that . . . by drawing [gun] fire from . . . police officers and sustaining no injuries, he would show the world he was immortal, [and] the son of God here to redeem us." Based on interviews with defendant, defendant's family, and an analysis of his previous mental health problems, Dr. Hughes formed the opinion that defendant had a psychotic disorder which on 28 October 1999 prevented defendant from "know[ing] right from wrong."

Dr. Patricia Hahn, a forensic psychologist employed by the State of North Carolina at Dorothea Dix Hospital, testified that she gave defendant a mental evaluation in March 2000. Dr. Hahn testified that "one of [my] main tasks [at Dorothea Dix Hospital] is to determine whether somebody is malingering a mental illness" because "we have a lot of people . . . trying to fake [insanity]." Dr. Kahn arrived at the conclusion that defendant "was psychotic at the time" of the incident. Dr. Kahn concluded that defendant was not faking his mental illness. Moreover, Dr. Peter Baroriak, also employed by Dorothea Dix, testified that in his medical opinion "[defendant] thought he was . . . doing something morally right when he fired his weapon on October 28 . . . . [And that defendant's] psychotic episode . . . impaired his ability to know the difference between right and wrong."

Dr. Holly Rogers, a psychiatrist and professor employed by Duke University, testified that she diagnosed defendant with schizoaffective disorder—a combination of manic depression and schizophrenia. Based on an analysis of defendant's records, police reports, and extensive interviews, Dr. Rogers testified "with a reasonable medical certainty that [defendant's] mental illness was definitely interfering with his ability to know right from wrong" on 28 October 1999.

Although the State cross-examined the defendant's psychological and psychiatric experts, the State did not proffer any experts to contradict their testimony. At the close of the State's evidence, and at the close of all the evidence, the defendant made a motion to dismiss. Apparently, defendant argued that the State failed to produce sufficient evidence of intent, because the State did not contradict defendant's expert testimony regarding his inability to differentiate between right and wrong on 28 October 1999. The trial court denied the motion, and, today, we affirm this decision because of the precedent created by *State v. Dorsey*. Because I question this Court's holding in *Dorsey*, I urge the Supreme Court to accept defendant's probable request for discretionary review to re-examine that case and its application to the issue in this case.

In *State v. Leonard*, our Supreme Court held that:

> The prosecution may assume, as the law does, that the defendant is sane. . . . If no evidence of insanity be offered, the presumption of sanity prevails. . . . Even if the evidence of insanity presented by the defendant is uncontradicted by the state, it is the defendant's burden to satisfy the jury of the existence of the defense. The credibility of the defense witnesses in this case was a proper matter for the jury. A diagnosis of mental illness by an expert is not in and of itself conclusive on the issue of insanity.

State v. Leonard, 296 N.C. 58, 65, 248 S.E.2d 853, 857 (1978). Subsequently, in *State v. Dorsey*, this Court held that "[i]f evidence of insanity is offered by the defendant, even if un-controverted, the credibility of that testimony is for the jury and thus precludes the entry of a directed verdict for defendant on insanity." *State v. Dorsey*, 135 N.C. App. 116, 118, 519 S.E.2d 71, 72 (1999). However, in announcing this principal, the *Dorsey* Court relied on *Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395-96 (1979), in which our Supreme Court held that a directed verdict, for the party bearing the burden of proof, is proper when the credibility of the evidence is "manifest as a matter of law." Seemingly, the *Dorsey* court should have held that *Burnette* left open the possibility of a "directed verdict" for a defendant pleading not guilty by reason of insanity "*where the credibility of [the] movant's evidence [of insanity] is manifest as a matter of law.*" *Id.* at 537, 256 S.E.2d at 396 (emphasis in original). However, the *Dorsey* court went much further than *Burnette* and foreclosed the possibility of a directed verdict for a defendant on a claim of insanity.

Since I, like my colleagues who join in the majority opinion, am bound to follow the holding of *Dorsey*,[1] I respectfully request our Supreme Court to re-examine this Court's prior holding in *Dorsey* that a directed verdict is never permitted for the defendant on the issue of insanity. Indeed, the holdings of our Supreme Court in *Leonard* and *Burnette* indicate that a directed verdict should be permitted if the credibility of the insanity evidence is "manifest as a matter of law." For that reason, I respectfully request that our Supreme Court re-examine the underlying basis of *Dorsey*, and determine if the facts of the case *sub judice*, warrant a reconsideration of our opinion issued today.

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1. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). ("Where a panel of the Court of Appeals has decided the same issue . . . a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

STATE PROPERTIES, LLC, PLAINTIFF v. CALVIN A. RAY, MADELINE C. RAY AND THE ESTATE OF BEATRICE B. JONES, DEFENDANTS

No. COA02-305

(Filed 31 December 2002)

1. Fraud—judgment notwithstanding the verdict—sufficiency of evidence

The trial court improvidently granted defendants' motion for judgment notwithstanding the verdict on a fraud claim arising out of the purchase of real property and the case is remanded to the trial court for reinstatement of the jury's verdict on the fraud claim, because: (1) defendants represented in the contract of sale that the property had not been used as a landfill or for the storage or disposal of hazardous materials; (2) defendants orally misrepresented that nothing had been buried on the property; (3) provisions of the contract of sale required defendants to turn over to plaintiff all pertinent information regarding the property, but evidence revealed that defendants failed to apprise plaintiff of the existence of a Department of Transportation plan showing a debris pond or the Phase I reports indicating potential soil contamination on the outparcel; (4) plaintiff conducted an independent investigation on the property prior to the closing, and plaintiff would have conducted more environmental tests on the outparcel if it had been provided with the Phase I report; and (5) although there was conflicting evidence as to whether plaintiff should have performed soil borings on the outparcel and whether these additional borings would have revealed buried debris and soil contamination, it was for the jury to resolve the conflicting evidence.

2. Unfair Trade Practices—judgment notwithstanding the verdict—finding of fraud

Although plaintiff contends the trial court erred by failing to instruct the jury and by granting judgment notwithstanding the verdict on its unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1 arising out of the purchase of real property, this issue does not need to be considered because: (1) the Court of Appeals reinstated the jury's fraud verdict; and (2) a finding of fraud constitutes a violation of N.C.G.S. § 75-1.1.

3. Contracts—breach—directed verdict—motion for judgment notwithstanding verdict—misrepresentation—nondisclosure

The trial court did not err by denying defendants' motion for a directed verdict and motion for judgment notwithstanding the verdict on plaintiff's breach of contract claim arising out of the purchase of real property even though defendants contend that plaintiff's knowledge of the buried materials on the property prior to closing is fatal to the allegations of misrepresentation and nondisclosure, because: (1) plaintiffs conducted an independent investigation of the property's condition; and (2) plaintiff presented evidence that defendants violated the provisions of the contract of sale including the requirement of providing plaintiff with all information pertinent to the property and the provision making certain representations and warranties regarding the property.

4. Damages and Remedies—future damages—breach of contract

The trial court did not err by failing to reduce the damages award for a breach of contract claim arising out of the purchase of real property even though defendants contend plaintiff failed to prove future damages to a reasonable certainty, because: (1) plaintiff's evidence on damages was not so speculative as to be inadmissible; and (2) plaintiff presented sufficient evidence to provide a basis for the jury's calculation of prospective damages to a reasonable certainty.

Appeal by plaintiff and cross-appeal by defendants Calvin A. Ray and Madeline C. Ray from judgment entered 31 May 2001 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 November 2002.

Herring McBennet Mills & Finkelstein, PLLC, by Mark Anderson Finkelstein and Stephen W. Petersen, for plaintiff.

Poyner & Spruill, LLP, by Keith H. Johnson and Timothy P. Sullivan, for defendants Calvin A. Ray and Madeline C. Ray.

WALKER, Judge.

Defendants Calvin A. Ray and his wife, Madeline C. Ray, (the Rays) owned a tract of land contiguous to another tract owned by

Beatrice B. Jones (Ms. Jones), Madeline Ray's mother. Together, these two tracts totaled 8.77 acres and bordered North Carolina Highway 98 and U.S. Route 1 in Wake Forest. The Rays operated various businesses on their tract of land from the time they acquired title from Ms. Jones in 1966, including Mr. Ray's current grading and paving business, Calvin Ray Asphalt Paving Contractor.

In September 1996, the Rays and Ms. Jones executed a contract of sale with Coharie Market L.L.C. (Coharie) for the two tracts of land described above (the property). The contract of sale contained the following language:

> 5. Surveys, Engineering Data, Development Plans, Building Plans, etc. Subject to reasonable availability Seller at Seller's sole cost and expense, shall deliver to Buyer all surveys, engineering studies, environmental reports, development plans, building plans, special use permits, water and sewer permits and tap-ons, and related data, licenses, permits and information which may be owned by or available to Seller, if any, with respect to the Property . . . .
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> . . .
>
> 8. Seller's Representations and Warranties. Seller makes the following representations and warranties which shall survive the Closing . . . (d) To the best of Seller's knowledge, there are no underground storage tanks on the Property, and no portion of the Property has been used as a landfill or for the production, storage or disposal of any petroleum, petroleum byproduct, natural or synthetic gas, or any regulated substance, waste, pollutant, contaminant, toxic or hazardous materials (collectively, "Hazardous Materials") of any kind as defined under Applicable Laws.

The contract of sale further provided plaintiff with the right to conduct surveys, tests and an environmental audit on the property. The original closing date on the contract of sale was 31 October 1996.

In January 1997, Coharie, the Rays and Ms. Jones executed an amendment to the contract of sale assigning all of Coharie's rights to State Properties, LLC (plaintiff). Plaintiff subsequently executed an agreement with the Rays and Ms. Jones which reaffirmed the representations made in the contract of sale and required defendants to remove all personalty from the property within thirty days of the amended closing date of 15 December 1997 (closing). Plaintiff planned to develop one-half of the property for a Winn-Dixie store

and a parking lot (Winn-Dixie parcel), reserving the remainder (outparcel) for "future development" and sale. Issues relating to the condition of the outparcel are the subject of this action.

Before the original closing date, Ted Royall (Royall), a managing member of Coharie and of State Properties, inspected the property from his vehicle and observed various "junk" and debris scattered on the property. Royall testified that he inquired about the debris and was informed by Mr. Ray that the debris would be cleaned up and removed.

At one of several meetings with the Rays before the closing, Mrs. Ray showed Royall an article from the *Triangle Business Journal* (*TBJ*) stating that Midland Group had aborted its planned purchase of the property due to "environmental problems" requiring "costly clean-up." Royall testified that Mrs. Ray told him the article was "a lie" because the Rays "had owned the land for such a long period of time and knew that no one had buried anything on the site." The Rays made similar statements indicating that nothing was buried on the property at subsequent meetings with Royall. Royall also contacted the *TBJ* article's author, who admitted that he had no evidence regarding the environmental problems referenced in the article.

In connection with the sale of the property, the Rays provided Royall with a topographical survey and other maps of the property. However, Royall testified that before the closing, the Rays did not give him a North Carolina Department of Transportation road construction plan (D.O.T. plan) showing a "drained pond, debris filled" on the outparcel. He also testified that none of the other maps provided to him showed the "debris pond." Royall testified that, before the closing, the Rays did not provide him with either the Phase I Environmental Assessment (Phase I) performed by ENSCI Environmental, Inc. in 1994 or the Phase I performed by Smith Environmental Technologies Corporation for the Midland Group in 1995, both of which indicated potential surface or subsurface contamination of the property. Furthermore, he testified that he would have conducted additional environmental investigations of the outparcel before the closing if he had been given the ENSCI Phase I report and that he would not have purchased the property if he had been aware of the Smith Phase I report or the D.O.T. plan showing the "debris pond." However, Royall testified on cross-examination that the Rays never encouraged him not to perform surveys and environmental tests on the property.

After the contract of sale was executed in September 1996, plaintiff hired GeoTechnologies, Inc. (GeoTechnologies) to perform a Phase I on the property. As evidence introduced at trial showed, a Phase I involves an examination of environmental records, an interview with the property owner and a visual inspection of the property but does not include any investigation into the property's subsurface conditions.

David Israel (Israel), a GeoTechnologies engineer, testified that he observed old vehicles, appliances, metal drums, concrete debris, asphalt and other material scattered throughout the property when he performed the Phase I for plaintiff. He testified that he did not observe any leaking or staining on the ground around the metal drums. Israel further testified that during the Phase I interview, Mr. Ray told him that he was unaware of any environmental problems on the property and that nothing had been buried there. He also testified that, if the Rays had shown him the D.O.T. plan, he would have recommended soil borings for the outparcel.

The GeoTechnologies Phase I report, dated 10 September 1996, stated that "significant grading activities have occurred on the site in the past which may have partially covered some debris or old waste related problems." However, the report did not recommend any additional environmental testing of the property.

In August 1997, Ed Hearn (Hearn), another engineer with GeoTechnologies, conducted a subsurface investigation and geotechnical study of the Winn-Dixie parcel for plaintiff. A geotechnical study involves taking soil borings and analyzing the composition of subsurface soil and rock to determine whether the property is suitable for and can support a certain structure. Soil borings typically are taken only on property for which a "known structure" is planned.

Some of the soil borings taken by GeoTechnologies on the Winn-Dixie parcel revealed "fill material" and "buried organics" up to depths of five feet. Hearn's report on the geotechnical study stated that the Winn-Dixie parcel was "covered with large amounts of miscellaneous metal, organic, and construction debris." The report further stated that "buried pits containing organic materials and other construction rubble" were found on the Winn-Dixie parcel. The report concluded that subsurface conditions were suitable for the proposed development.

David McPherson (McPherson), the grading foreman, testified that in January 1998, he observed car parts, underground storage

tanks and construction debris on the property. He testified that tires, rims, metal, brush and wire were also visible on the surface of the outparcel at that time. McPherson further testified that while he and a co-worker were clearing the outparcel to lay storm piping, they unearthed debris, tree stumps and metal, which delayed their work. He testified that the buried debris was similar to debris found on or near the surface of the outparcel.

In December 1999, Withers & Ravenel Engineering & Surveying, Inc. (W&R) discovered scrap metal, concrete and asphalt mixed with "organic rich soil" on the outparcel, as well as a motor oil stain under a crushed metal drum while installing subsurface utilities. This discovery prompted W&R to take soil samples on the outparcel, revealing contamination from petroleum and diesel fuel and other contaminants which affected the groundwater. W&R's report of its findings was introduced into evidence.

On cross-examination, Hearn testified that plaintiff did not seek his opinion as to whether a subsurface investigation of the outparcel was advisable. Further, Royall admitted on cross-examination that if 20-foot borings on the outparcel had been performed, plaintiff would have discovered the petroleum contamination prior to closing. Another of plaintiff's experts, Cameron Patterson, testified on cross-examination that he could not be certain that the subsurface debris problem would have been revealed even if soil borings had been taken on the outparcel but admitted it was possible. He also testified that if borings had been performed, they would have revealed the outparcel did not contain native soil.

Robert "Roddy" Jones, one of the principles in plaintiff, was called as an adverse witness by the Rays. He testified that the soil boring on the Winn-Dixie parcel, which showed top soil extending to a depth of five feet, indicated to him something had been buried at the particular location of that boring.

Ben Wilson (Wilson), the Rays' expert, specializing in subsurface environmental investigations, testified that he would have recommended performing one to two soil borings extending fifteen to twenty feet deep on the outparcel based on the presence of a creek near that portion of the property. He further testified that if soil borings had been performed on the outparcel, they would have revealed fill material. Wilson testified that the execution of both the Phase I and geotechnical study by Geotechnologies met the standard of care

for such investigations. He also testified that the W&R report contained insufficient data regarding the extent of the alleged soil contamination because only one to three percent of the excavated materials had been tested for contamination. Wilson testified that the limited scope of the W&R investigation rendered it an inadequate basis for determining the amount of soil and debris that would need to be removed to a landfill for disposal.

Regarding plaintiff's damages claim, Tim Fitzgerald, its witness experienced in construction costs, testified that the total cost related to the discovery of the buried debris and soil contamination on the property amounted to $1,031,501.13. Fitzgerald estimated that $538,749.00 of this total would be incurred in the future for loading, transporting and disposing of the debris and contaminated soil. He also testified that, although the W&R report on soil borings was the primary basis for his cost estimate, he consulted drawings and other documents provided by plaintiff and further verified the estimate with waste disposal experts.

Based on the discovery of buried debris and soil contamination on the outparcel, plaintiff sued defendants for negligent misrepresentation, breach of contract, fraud, unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 (2001), violation of the North Carolina Oil Pollution Control and Hazardous Substances Act, N.C. Gen. Stat. § 143-215.75-143-215.104U (2001), and punitive damages.

On 16 February 2001, the trial court denied the parties' cross-motions for summary judgment. At the close of plaintiff's evidence, defendants moved for directed verdict on all plaintiff's claims. The trial court entered a directed verdict dismissing all claims against defendant Estate of Beatrice Jones but denied the Rays' motion for a directed verdict. At the close of all evidence, the Rays renewed their motion for a directed verdict, and the trial court dismissed plaintiff's negligent misrepresentation claim. Plaintiff's claim under the North Carolina Oil Pollution Control and Hazardous Substances Act likewise was dismissed.

After denying the plaintiff's request for jury instructions on unfair and deceptive trade practices, the trial court instructed the jury on fraud and breach of contract. On 10 May 2001, the jury returned a verdict for plaintiff and awarded damages in the amount of $304,982.00 for breach of contract. Damages in the amount of $295,971.00 were awarded for the fraud claim. The trial court found the Rays committed unfair and deceptive trade practices based on the jury's finding of

fraud and trebled the fraud damages award under N.C. Gen. Stat. § 75-16 (2001).

On 31 May 2001, the Rays filed a motion for judgment notwithstanding the verdict (JNOV). Following a hearing on this motion, the trial court granted JNOV on the fraud and unfair and deceptive trade practices claims and denied JNOV on the breach of contract claim. Plaintiff appealed and the Rays cross-appealed the order and judgment.

[1] Plaintiff first contends the trial court erred in granting JNOV on its fraud claim because it presented sufficient evidence on each element of fraud to survive a directed verdict motion. The Rays argue, however, that plaintiff failed to present sufficient evidence that it reasonably relied on the Rays' alleged misrepresentations or that it exercised reasonable diligence in its investigation of the property, thus justifying JNOV on the fraud claim.

A motion for JNOV is essentially a renewal of a motion for a directed verdict. *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 515 S.E.2d 30, *aff'd*, 351 N.C. 92, 520 S.E.2d 785 (1999).

> The standard to be employed by a trial judge in determining whether to grant a judgment notwithstanding the verdict is the same standard employed in ruling on a motion for a directed verdict. The judge must consider the evidence in the light most favorable to the nonmovant and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant. All conflicts in the evidence are to be resolved in the nonmovant's favor, and he must be given the benefit of every inference reasonably to be drawn in his favor.

Williams v. Jones, 322 N.C. 42, 47-48, 366 S.E.2d 433, 437 (1988) (citations omitted). If, under this standard, there is more than a scintilla of evidence to support each element of the non-movant's claim, the motion for JNOV should be denied. *Couch*, *supra*.

It is well-settled that an actionable claim for fraud must include the following elements: " '(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Helms v. Holland*, 124 N.C. App. 629, 634, 478 S.E.2d 513, 516 (1996) (citation omitted). Additionally, reliance on alleged false representations must be reasonable. *Johnson v. Owens*, 263 N.C. 754, 140 S.E.2d 311 (1965), *C.F.R. Foods*,

Inc. v. Randolph Development Co., 107 N.C. App. 584, 421 S.E.2d 386, *disc. review denied*, 333 N.C. 166, 424 S.E.2d 906 (1992). Reliance is not reasonable if a plaintiff fails to make any independent investigation, *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E.2d 881 (1957), or if plaintiff is informed of the true condition of the property, *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 534 S.E.2d 233, *disc. review denied*, 353 N.C. 265, 546 S.E.2d 100 (2000). The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion. *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 513 S.E.2d 320 (1999).

Further, this Court has held that, to support a fraud claim, a plaintiff must demonstrate it was denied the opportunity to investigate the property or could not discover the truth about the property's condition by exercise of reasonable diligence. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 511 S.E.2d 309 (1999). A plaintiff also must show that it was induced to forego additional investigation by the defendant's misrepresentations. *Hearne v. Statesville Lodge No. 687*, 143 N.C. App. 560, 546 S.E.2d 414 (2001).

Plaintiff's evidence tended to show that the Rays lived near the property for a number of years before they acquired title to their tract in 1966. The Rays represented in the contract of sale that the property had not been used as a landfill or for the storage or disposal of hazardous materials. Evidence also showed that the Rays orally misrepresented to Royall and Israel that nothing had been buried on the property. Provisions of the contract of sale further required the Rays to turn over to plaintiff all pertinent information regarding the property. However, additional evidence showed that the Rays failed to apprise plaintiff of the existence of the D.O.T. plan showing a "debris pond" or the Phase I reports indicating potential soil contamination on the outparcel.

Further, plaintiff's evidence showed that it conducted an independent investigation of the property prior to the closing. With respect to plaintiff being induced to forego additional investigation, Royall testified that he would have conducted more environmental tests on the outparcel if he had been provided with the ENSCI Phase I report. Although there was conflicting evidence as to whether plaintiff should have performed soil borings on the outparcel and whether these additional borings would have revealed buried debris and soil contamination, it was for the jury to resolve the conflicting evidence.

In denying the Rays' motion for a directed verdict on the fraud claim at the close of plaintiff's evidence, the trial court noted that the determination as to the reasonableness of plaintiff's reliance and its investigation was an issue for the jury. At the close of all evidence, the trial court again denied the Rays' motion for a directed verdict on the fraud claim, finding that plaintiff had produced sufficient evidence to send the question to the jury. Further, the trial court properly instructed the jury on the elements of fraud as relating to the reasonableness of plaintiff's conduct.

Based on the foregoing evidence, we conclude plaintiff met its burden of producing sufficient evidence to withstand the Rays' motion for a directed verdict. Thus, we hold that the Rays' motion for JNOV was granted improvidently and remand this matter to the trial court for reinstatement of the jury's verdict on the fraud claim.

[2] Plaintiff next argues that the trial court erred in failing to instruct the jury and in granting JNOV on its unfair and deceptive trade practices claim. Our Supreme Court has held that

> N.C.G.S. § 75-1.1 declares unlawful "[u]nfair methods of competition in or affecting commerce." The case law applying Chapter 75 holds that a plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred. "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts . . . ." If a violation of Chapter 75 is found, treble damages must be awarded.

Bhatti v. Buckland, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) (citations omitted). This Court recently held that, in a claim for unfair and deceptive trade practices, "[t]he jury decides whether the defendant has committed the acts complained of. If it finds the alleged acts have been proved, the trial court then determines as a matter of law whether those acts constitute unfair or deceptive practices in or affecting commerce." *Durling v. King*, 146 N.C. App. 483, 487-88, 554 S.E.2d 1, 4 (2001) (citations omitted). Here, we have held that the trial court improvidently granted JNOV on plaintiff's fraud claim and have ordered the reinstatement of the jury's fraud verdict accordingly. Because a finding of fraud constitutes a violation of N.C. Gen. Stat. § 75-1.1, we need not address either plaintiff's contention that it has an independent claim for unfair and deceptive trade practices or that the trial court erred in denying plaintiff's requested jury instruction on that claim.

[3] In their cross-appeal, the Rays contend that the trial court erred in denying their motion for a directed verdict and their motion for JNOV on plaintiff's breach of contract claim. In support of this contention, the Rays argue that plaintiff's knowledge of the buried materials on the property prior to closing is fatal to the allegations of misrepresentation and non-disclosure which provide the basis for the breach of contract claim.

The Rays rely primarily on *Calloway v. Wyatt*, *supra*, to support their contention that plaintiff cannot avail itself of a breach of contract claim premised on the Rays' alleged misrepresentations. In *Calloway*, our Supreme Court held that the buyers could not rely on the seller's alleged misrepresentations because they had failed to make any independent investigation of the property despite evidence which should have aroused their suspicion that the representations were false. *Calloway*, *supra*, 246 N.C. at 135, 97 S.E.2d at 886; *see also Hearne*, *supra*, 143 N.C. App. at 562, 546 S.E.2d at 415 (holding that plaintiffs could not rely upon representations when they "failed to make any independent investigation of the property"), *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E.2d 565 (affirming directed verdict for defendant where plaintiff knew the property had been used as a trash dump but conducted no independent investigations), *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

Here, the contract of sale in paragraph five quoted above requires the Rays to provide to plaintiff all information pertinent to the property. Obviously, the D.O.T. plan showing a "debris pond" and the ENSCI and Smith Phase I reports indicating potential soil contamination on the outparcel, which the Rays did not provide to plaintiff, were pertinent pieces of information about the property.

Also, in paragraph eight of the contract of sale, the Rays made certain representations and warranties regarding the property. There was ample evidence before the jury that the Rays breached this provision of the contract of sale in failing to disclose and in failing to deliver the property as warranted. Although plaintiff had some knowledge prior to closing of debris and fill materials on the property, it conducted an independent investigation of the property's condition, unlike the *Calloway* plaintiffs. Because plaintiff presented evidence that the Rays violated the provisions of the contract of sale, we hold the trial court properly denied the directed verdict and JNOV motions on the breach of contract claim.

[4] The Rays further contend the breach of contract damages award should be reduced because plaintiff failed to prove future damages to a reasonable certainty. The Rays argue that plaintiff's witness based his cost projection on speculation.

The party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E.2d 578 (1987). While the claiming party must present relevant data providing a basis for a reasonable estimate, proof to an absolute mathematical certainty is not required. *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 553 S.E.2d 431 (2001), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002). Further, if a party seeks prospective damages arising out of a breach of contract, it may recover without proving the amount to an absolute certainty, as long as a reasonable showing has been made. *Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 258 S.E.2d 778 (1979). "Challenges to the quality of the data upon which an expert witness based his opinion go to the weight to be accorded that opinion, but are not generally grounds for its exclusion." *Horne v. Roadway Package Systems, Inc.*, 129 N.C. App. 242, 244, 497 S.E.2d 436, 438 (1998) (*citing Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978), *disc. review denied*, 296 N.C. 586, 254 S.E.2d 34 (1979)).

Plaintiff's witness, Fitzgerald, expressed the opinion that the future cost of disposing of contaminated soil and debris found on the outparcel would amount to $538,749.00. Fitzgerald testified that he based this projection on his experience in past remediations, the W&R report on soil borings revealing significant contamination, consultations with waste disposal experts and drawings and other documents relating to the property provided to him by plaintiff. He also testified that all of the soil in the portion of the outparcel found to be contaminated would need to be removed. The Rays' expert, Wilson, testified that the W&R report did not contain sufficient data to determine how much soil would need to be removed in order to estimate future costs associated with remediation.

The trial court properly instructed the jury that it should weigh the damages evidence introduced by both parties and that plaintiff had the burden of proving damages to a reasonable certainty, not a mathematical certainty. In the original judgment dated 10 May 2001, the trial court noted the jury's close examination of plaintiff's damages evidence and stated that "it is crystal clear and unequivocal

which items of damage claimed by State Properties, line by line, were awarded on the fraud claim and on the contract claim as well as which items were rejected by the jury in their entirety."

We conclude that plaintiff's evidence on damages was not so speculative to be inadmissible. We further conclude that plaintiff presented sufficient evidence to provide a basis for the jury's calculation of prospective damages to a reasonable certainty. Thus, we hold the trial court did not err in refusing to grant the Rays' motions for a directed verdict and JNOV.

We have carefully reviewed plaintiff's and the Rays' remaining assignments of error and find them to be without merit.

In summary, we reverse the trial court's granting of the Rays' motion for JNOV on the fraud claim. The trial court's amended judgment denying the Rays' motion for JNOV on the breach of contract claim is affirmed. We remand this case to the trial court for reentry of the original judgment entered 10 May 2001.

Affirmed in part, reversed and remanded in part.

Judges McCULLOUGH and TYSON concur.

NANCY YARBROUGH ALLEN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, RESPONDENT

No. COA01-1129

(Filed 31 December 2002)

1. Nurses—nurse aide—abuse—verbal threat—elderly nursing home resident

The trial court did not err in an action arising out of the alleged abuse of an elderly nursing home resident by affirming the Department of Health and Human Services' (DHHS) finding of fact that petitioner nurse aid threatened the nursing home resident after the resident hit petitioner, because: (1) petitioner has failed to include a copy of the Administrative Law Judge's recommended decision, the record shows the trial court reviewed the official record and weighed its contents, and our Court of

Appeals will not speculate and assume error where none appears; (2) even if the recommended decision was properly included in the record, the decision is only advisory and an agency such as DHHS is vested with full authority to accept or reject any or all of the findings of fact and conclusions of law contained in a recommended decision; (3) there was substantial evidence to support the subject finding when another nurse aid who was present at the time of the incident immediately reported the incident, testified regarding the incident, and maintained the same story; (4) contrary to petitioner's assertion that the trial court erred by making its own finding of fact regarding petitioner's statement, the trial court's finding was merely a recapitulation of DHHS's finding; (5) the evidence was probative of the ultimate issue of whether petitioner abused the nursing home resident; and (6) petitioner has failed to show prejudice.

2. Nurses—nurse aide—abuse—threat of violence—elderly nursing home resident—mental anguish

A de novo review revealed that the trial court did not err by concluding that petitioner nurse aid abused an elderly nursing home resident within the meaning of 42 C.F.R. § 488.301, because: (1) though the record disclosed various accounts of the exact statement made to the resident by petitioner, the evidence is uncontroverted that petitioner made some statement of a threatening nature to her patient; and (2) while there was no evidence of record that petitioner's threats resulted in physical harm or pain to the patient, petitioner's threat to do violence to the elderly Alzheimer's patient is sufficient evidence from which a rational factfinder could determine it was such as to cause that patient mental anguish.

Appeal by petitioner from order entered 6 August 2001 by Judge A. Leon Stanback, Jr. in Orange County Superior Court. Heard in the Court of Appeals 10 June 2002.

Daniel F. Read and Maria J. Mangano, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorneys General June S. Ferrell and Jane L. Oliver, for respondent-appellee.

BIGGS, Judge.

This appeal arises out of the entry of a finding of abuse of a patient by petitioner (Nancy Allen) a certified nurse aide, in the Nurse

Aide Registry and the Health Care Personnel Registry. The evidence tends to show that petitioner and Misty Gray, another nurse aide, were transferring a nursing home resident, M.M., (the resident's initials are used in this opinion to preserve her right to privacy under N.C.G.S. § § 131D-2(b)(4) and -21(6)), from her wheelchair to a shower chair for a bath, when M.M. became combative and hit petitioner on the hand. After the transfer was made, Gray went to the sink to wash her hands. As petitioner was removing M.M.'s sock, M.M. kicked her. In response, petitioner said, "If you kick me, I will knock the f—king hell out of you." Gray turned around and observed M.M. kicking petitioner's legs. Gray finished washing her hands, and exited the room to report petitioner's actions to Staff Development Coordinator Nurse Mariel Ramos. Later that day, petitioner approached Gray and asked, "You told didn't you?" Gray denied having reported the incident and told petitioner that Ramos had been standing outside of the shower room door when the incident occurred.

Ramos subsequently informed Susan King, the Director of Nursing, of the incident. After King confirmed Ramos' account of the incident with Gray, King went to the patient's unit to further investigate. King examined M.M. and although she noted some old bruises, she did not observe any new injuries. King's attempts to interview M.M., who had been diagnosed with Alzheimer's and seemed confused, were unsuccessful. King then held a meeting with petitioner, to obtain her version of the incident. Ramos and Robin Phillips, the Assistant Director of Nurses, were also present at this meeting. When confronted with the allegation that she had cursed M.M. in violation of nursing home policy, petitioner responded, "That's a damn lie." Petitioner indicated that she knew that it was Gray who had reported her. When King revealed that Gray told her that petitioner had threatened to "knock the fu—king hell out of [M.M.]," petitioner denied making such a statement. Petitioner explained that M.M. kicked at her and in response she said, "You've kicked the hell out of my hand and, if you kick me again, I'm going to have to pinch your foot off." King admonished petitioner, explaining that she considered the allegation to be very serious. She reiterated to petitioner that staff was not permitted to curse or threaten residents of the nursing home. In response to King's request, petitioner submitted a written statement of the incident, in which she said that M.M. tried to kick her, and that she told M.M., "You knocked the hell out of my hand. Quit trying to kick me. If you kick me in the face, I don't know what I will have to do to you."

King reported the incident to Health Care Personnel Registry Section (hereinafter "the HCPR section") of the Department of Health and Human Services, Division of Facility Services (DHHS). Bonnie Nottoli, R.N., an investigator for the HCPR section, was assigned to investigate the matter. During her investigation, Nottoli interviewed petitioner, King, Phillips, Ramos, and Betty Stevens, a former Quality Assurance Director and Administrator at the nursing home who had previously worked with petitioner. When interviewed by Nottoli, petitioner told her that the statement she made to M.M. was, "If you kick me in the face, little girl, I just don't know what I might have to do to you." Notolli also reviewed various nursing home documents pertinent to the incident. The investigator was unable to locate Gray for an interview.

Based upon the information obtained during Nottoli's investigation, the HCPR section concluded that on 12 August 1999, petitioner verbally abused M.M. by stating, "You've kicked the hell out of me and if you do it again I'll have to pinch your foot off." By letter dated 13 March 2000, the HCPR section notified petitioner that an allegation of abuse had been substantiated against her, and that the substantiated allegation would be entered into the Nurse Aide Registry and the Health Care Personnel Registry.

Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings to appeal the agency's decision on 24 March 2000. A hearing was conducted before an Administrative Law Judge (ALJ) on 24 May 2000. The ALJ recommended that the HCPR section's decision be upheld. Both petitioner and the HCPR section filed exceptions to the recommended decision, whereupon DHHS issued a final decision, affirming the HCPR section's determination that petitioner abused M.M. on the morning of 12 April 1999. Petitioner petitioned the Orange County Superior Court for judicial review, pursuant to N.C.G.S. § 150B-45. After hearing the arguments of counsel and reviewing the evidence of record, the superior court affirmed the final decision of DHHS. Petitioner appeals.

This Court must now review the superior court's order for errors of law. *Crowell Constructors, Inc. v. N.C. Dep't of E.H.N.R.*, 107 N.C. App. 716, 719, 421 S.E.2d 612, 613 (1992), *disc. review denied*, 333 N.C. 343, 426 S.E.2d 704 (1993). In conducting such review, we first " 'determine whether the trial court exercised the proper scope of review,' " and then " 'whether the trial court correctly applied this scope of review.' " *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000) (quoting *Whiteco Outdoor*

Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999)). The appropriate standard of review turns upon the nature of the error asserted by appellant. "If appellant argues that the agency's decision was based on an error of law, then '*de novo*' review is required. If, however, appellant questions (1) whether the agency's decision was supported by the evidence, or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." This Court's scope of review "is the same as that utilized by the trial court." *Wallace v. Board of Tr.*, 145 N.C. App. 264, 274, 550 S.E.2d 552, 558, *disc. review denied*, 354 N.C. 580, 559 S.E.2d 553 (2001).

" '*De novo*' review requires a court to consider a question anew, as if not considered or decided by the agency." *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 559, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). In conducting *de novo* review, "[t]he court may freely substitute its own judgment for that of the agency." *Dorsey*, 122 N.C. App. at 62, 468 S.E.2d at 559 (citation omitted). Conversely, " '[th]e "whole record" test does not allow the reviewing court to replace the [Agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.' " *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992) (quoting *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)), *aff'd*, 333 N.C. 786, 429 S.E.2d 716 (1993). Indeed, the 'whole record' test requires only that the trial court " 'examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by 'substantial evidence.' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)).

By her first, second, fourth, and eighth assignments of error, petitioner contends that (1) the superior court erred in affirming the DHHS's sixth finding of fact; (2) the court's review was limited to issues of law, and therefore, the court erred in making its own factual findings, and (3) the sixth finding of fact did not form the basis of the court's decision, and therefore, the finding was "irrelevant and unduly prejudicial."

These assignments of error and arguments require application of the "whole record" test, which the record reveals was the standard employed by the superior court. We next determine whether the supe-

rior court properly applied the "whole record" test in its review of DHHS's final order.

[1] DHHS's sixth finding of fact was as follows:

> On August 12, 1999 while Ms. Gray and Petitioner were transferring Resident M.M. from her wheelchair to the shower chair, the resident became combative and hit Petitioner on the hand. Petitioner responded to the resident by stating, "If you kick me, I will knock the f—king hell out of you." Ms. Gray promptly reported the incident to Ms. Phillips and Ms. King.

Petitioner contends that DHHS erred in making such a finding (and, in turn, that the superior court erred in affirming that finding) because the ALJ failed to make such a finding in his recommended decision. We note, however, that petitioner has failed to include the ALJ's recommended decision to facilitate review of this contention, in violation of N.C.R. App. P. 9(a)(2).

It is well settled that the appellant has the duty to see that the record on appeal is properly compiled, and to make error appear on the face of the record. *Tucker v. General Tel. Commission. of the Southeast*, 50 N.C. App. 112, 118, 272 S.E.2d 911, 915 (1980). Absent such a showing, this Court must presume that the tribunal below ruled properly. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 645 (1983). In the instant case, where petitioner has failed to include a copy of the ALJ's recommended decision, and the record shows that the superior court reviewed the official record in this case, and weighed its contents, we will not speculate and assume error where none appears. *See State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court[]").

Further, even if the recommended decision were properly included in the record, and it revealed that, as petitioner contends, the ALJ did not include the subject finding in his recommended decision, we note that a recommended decision is only advisory. *See Gray v. Orange County Health Dep't*, 119 N.C. App. 62, 72, 457 S.E.2d 892, 899, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 511 (1995) (G.S. § 150B-43 provides only judicial review of *final* agency decisions, and recommended decisions of the ALJ and State Personnel Commission were merely advisory); *see also Davis v. N.C. Dept. of Human Resources*, 110 N.C. App. 730, 737, 432 S.E.2d 132, 136 (1993) ("an agency has the ability to reject the recommended decision of an

administrative law judge"). "Even though the administrative law judge ha[s] already made findings of fact and conclusions of law, the Personnel Commission ha[s] the ability to make its own findings of fact and conclusions of law if it cho[oses] to do so." *Id.* An agency (in this case DHHS), as the ultimate factfinder, is vested with full authority to accept or reject any or all of the findings of fact and conclusions of law contained in a recommended decision of an administrative law judge, and make its own findings and conclusions. *Eury v. N.C. Employment Security Comm'n*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 388, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). Accordingly, DHHS cannot be said to have erred in making finding of fact #6, and the superior court cannot be said to have erred in affirming that finding, merely because the finding was not made by the ALJ.

More importantly, after reviewing the record as it is before us, we conclude that there was substantial evidence to support the subject finding. Petitioner denied having made such a statement during the nursing home's internal investigation and the HCPR section's subsequent investigation. However, Gray, who was present at the time of the 12 August 1999 incident, immediately reported the incident to her superiors at the nursing home. In addition, Gray testified regarding the incident. At all times, she maintained that petitioner threatened to "knock the f—cking hell out of [M.M]," if M.M. kicked her. In light of this evidence, we conclude the superior court did not err in affirming DHHS's sixth finding of fact.

As to petitioner's argument that the superior court erred in making its own finding of fact regarding the statement made to M.M. during the 12 August 1999 incident, we note that the superior court's finding was merely a recapitulation, as is permitted, of DHHS's finding of fact #6. The court was merely reiterating this finding in the course of conducting a *de novo* review of petitioner's claim that DHHS committed an error of law in concluding that petitioner abused M.M. *See Jordan*, 137 N.C. App. at 577, 528 S.E.2d at 929 (providing that it is the superior court's duty to "make its own findings of fact and conclusions of law" when conducting *de novo* review).

Finally, we reject petitioner's argument that finding of fact #6 was irrelevant and highly prejudicial. Rule 401 of the Rules of Evidence defines relevant evidence as that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.C.G.S. § 8C-1, Rule 401. As discussed earlier,

there was competent evidence in the record to support the finding and it was certainly probative of the ultimate issue of whether petitioner abused M.M. In addition, petitioner has failed to demonstrate prejudice. These assignments of error are, therefore, overruled.

[2] By her seventh and final assignment of error, petitioner argues that the superior court erred in concluding that petitioner abused M.M. Petitioner contends that, as a matter of law, petitioner's statement to M.M. is not sufficiently egregious to constitute abuse.

As acknowledged by petitioner, the issue presented by this assignment of error is one requiring *de novo* review, since petitioner asserts that the court's decision was legally infirm. The record shows that the superior court utilized *de novo* review in addressing this issue on appeal from DHHS's final decision, and therefore, we are left only to determine if the court properly applied that standard. We look then at DHHS's decision to determine whether an error of law was committed. *See In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) ("Where the trial court should have utilized *de novo* review, this Court will directly review the agency's decision under a *de novo* review standard[]").

The 12 August 1999 incident was investigated by the HCPR section, in accordance with N.C.G.S. § 131E-255 and 131E-256. *See* N.C.G.S. § 131E-255-257 (2001) (enacted following Congressional passage of the Omnibus Budget Reconciliation Act of 1987, 42 U.S.C. § 1395(c) *et seq.*). Federal regulations require that states list substantiated findings of abuse, neglect and misappropriation of resident property by nurse aides in their respective state registries. 42 C.F.R. § 483.156. In order to participate in Medicare and Medicaid programs, federal regulations require that health care facilities comply with a federal prohibition against hiring any nurse aide who has a finding of abuse, neglect, or misappropriation of property on the Nurse Aide Registry. 42 C.F.R. § 483.13(c)(1)(II)(B).

For purposes of investigating complaints of abuse, the HCPR section has adopted the federal definition of abuse:

> "Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

42 C.F.R. § 488.301 (incorporated by reference at 10 N.C.A.C. 3B.1001(1)). Petitioner contends that the "single isolated, albeit unwise and ill-advised remark" spoken by her to M.M. on 12 August

1999 could not have been intended to constitute "abuse," under 42 C.F.R. § 488.301, as incorporated by reference at 10 N.C.A.C. 3B.1001(1). The State, however, submits that such a position is wholly unsupported by any case or statutory law. In fact, the State references 42 U.S.C. § 1395i-3(g)(1)(D), in support of a contrary position. The State posits that this particular section of the United States Code, which allows nurse aides who have a single finding of neglect to apply to have that finding removed, supports a conclusion that Congress did intend that a single incidence of abuse be listed in the registry. We note also that neither the absence of threatening gestures or physical contact by the nurse aide, or the victim's awareness of resulting physical harm or mental anguish, is dispositive. The cases referenced by petitioner in support of arguments to the contrary involve either physical contact or different definitions of abuse, and are, therefore, neither instructive nor persuasive. As noted by the Health Care Financing Administration, in responding to a public comment that there should be a requirement that a long-term care resident actually perceive the conduct as abusive:

> We do not accept this comment. Our obligation is to protect the health and safety of every resident, including those who are incapable of perception or are unable to express themselves. *This presumes that instances of abuse of any resident, whether cognizant or not, cause physical harm, pain or mental anguish.*

59 F.R. § 56130 (1994) (emphasis added). While petitioner's behavior might not be the most egregious instance of abuse, like the District of Columbia Court of Appeals in *Hearns v. District of Columbia Dep't of Consumer & Regulatory Affairs*, we believe that in the context of this extremely regulated profession and the patient's dependency on a person in the trusted position of nurse aide, "the definition of 'abuse' . . . may fairly be understood to reach behavior short of more flagrant forms dealt with in other settings." 704 A.2d 1181, 1183 (1997).

In the instant case, the DHHS made the following findings:

1. At all times relevant to this contested case, Petitioner, a certified nurse aide, . . . was employed as a health care personnel at Sunbridge Nursing Home.

2. Sunbridge is a nursing home facility licensed by the State of North Carolina and as such is a health care facility as defined in N.C. Gen. Stat. § 131E-256(b)(6).

3. At all times relevant to this matter, Misty Gray was employed as a CNA at Sunbridge.

4. At all times relevant to this matter, Susan King was employed as the Director of Nurses at Sunbridge.

5. At all times relevant to this matter, Robin Phillips was employed as the Assistant Director of Nurses at Sunbridge.

6. On August 12, 1999, while Ms. Gray and Petitioner were transferring Resident M.M. from her wheelchair to the shower chair, the resident became combative and hit Petitioner on the hand. Petitioner responded to the resident by stating, "If you kick me, I will knock the f—king hell out of you." Ms. Gray promptly reported the incident to Ms. Phillips and Ms. King.

7. On behalf of Sunbridge, Ms. Phillips and Ms. King conducted the in-house investigation with respect to the allegation of abuse by Petitioner to Resident M.M. During the investigation, Ms. Phillips and Ms. King confronted Petitioner about the reported allegation of abuse. Petitioner denied making the statement, "If you kick me, I will knock the f—king hell out of you." Petitioner admitted to Ms. Phillips and Ms. King that she made the following statement to Resident M.M: "You kicked the hell out of me, if you do it again I'm going to pinch your damn foot off."

8. At the conclusion of the conference, it was requested that Petitioner provide a written statement of the incident. Petitioner testified that she provided a written statement to Sunbridge and the content of the statement which she made to Resident M.M. was as follows: Petitioner admitted making the following statement to M.M., "If you kick me in the face, I don't know what I might have to do."

9. On August 12, 1999, Ms. King submitted a report to the Health Care Personnel Registry Section which alleged that Petitioner had abused M.M.

10. Respondent reviewed the report submitted by Sunbridge with respect to the allegation of abuse and concluded that the allegation warranted investigation.

11. On behalf of Respondent, Bonnie Nottoli, investigated the allegation of abuse. As part of her investigation, Ms. Nottoli interviewed Petitioner. Petitioner denied making the statements as reported by Ms. Gray, Ms. Phillips and Ms. King. During it's inves-

tigation, Respondent determined that Petitioner verbally abused Resident ("M.M.") by saying to her, "You've kicked the hell out of me and if you do it again, I'll have to pinch your foot off."

12. By letter date[d] March 13, 2000, Respondent notified Petitioner that the Department had substantiated an allegation of abuse against Petitioner and that the substantiated finding would be entered into the Nurse Aide Registry and Health Care Personnel Registry. . . .

13. "Abuse" is defined by 42 CFR Part 488 Subpart E which is incorporated by reference, in 42 CFR 488.301, as follows:

> "Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

Based upon these findings, DHHS reached the following pertinent conclusions:

3. The North Carolina Department of Health and Human Services, Division of Facility Services, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-255 to maintain a Registry that contains the names of all nurse aides working in nursing homes who are subject to a finding by the Department that they abused a nursing home resident.

4. As a certified nurse aide, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-255.

5. The North Carolina Department of Health and Human Services, Division of Facility Services, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a Registry that contains the names of all health care personnel working in health care facilities who are subject to a finding by the Department that they abused a resident in a health care facility or who have been accused of abusing a resident if the Department has screened the allegation and determined that an investigation is warranted.

6. As a health care personnel, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

7. Sunbridge, a nursing home, is a health care facility as defined in N.C. Gen. Stat. § 131[E]-256(b)(6).

8. On August 12, 1999, Petitioner abused Resident M.M. when she stated to her, "You've kicked the hell out of me, and if you do it again, I'll have to pinch your foot off."

9. Respondent did not err in substantiating the finding of abuse against Petitioner.

DHHS then determined that a finding of abuse against petitioner had been properly listed in the Nurse Aide Registry and the Health Care Personnel Registry. We note that the superior court's findings and conclusions are essentially a restatement of those of DHHS.

Looking at this matter anew, as we are required to do on *de novo* review, we conclude that the superior court did not err in affirming DHHS's determination that petitioner abused M.M. Though the record discloses various accounts of the exact statement made to M.M. by petitioner, the evidence is uncontroverted that petitioner made some statement of a threatening nature to her patient M.M. While there was no evidence of record that petitioner's threats resulted in physical harm or pain to M.M., petitioner's threat to do violence to the elderly Alzheimer's patient is certainly sufficient evidence from which a rational factfinder could determine it was such as to cause that patient "mental anguish." *See Hearns v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 704 A.2d 1181, 1183 (1997) (reaching the same conclusion where nurse aide roughly pulled and rebuked an elderly patient, but there was no evidence to show that patient suffered physical harm or pain). Accordingly, we conclude that DHHS properly determined that petitioner's actions constituted abuse within the meaning of 42 C.F.R. § 488.301 (as incorporated by reference at 10 N.C.A.C. 3B.1001(1)). Therefore, the superior court did not err in affirming the decision of DHHS.

Having so concluded, the order of the superior court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

STATE OF NORTH CAROLINA v. CEDRIC WILSON, JR. AND HAYDEN CALVERT

No. COA01-1539

(Filed 31 December 2002)

1. Search and Seizure—traffic stop—cocaine—motion to suppress—probable cause

The trial court did not commit plain error in a trafficking in cocaine case by denying defendants' pretrial motions to suppress all evidence obtained as a result of the search of the vehicle in which they were riding even though defendants contend it was a pretextual stop, because: (1) the officers had probable cause to stop defendants' vehicle since it was traveling behind another vehicle at a distance of less than one car length in violation of N.C.G.S. § 20-152(a) and at a speed of sixty-nine miles per hour; and (2) probable cause meant the stop was not pretextual and further investigation was unnecessary for purposes of issuing a warning ticket.

2. Search and Seizure—traffic stop—cocaine—motion to suppress—reasonableness of length of detention

The trial court did not commit plain error in a trafficking in cocaine case by denying defendants' pretrial motions to suppress all evidence obtained as a result of the search of the vehicle in which they were riding even though defendants contend the detention of their vehicle was unreasonably long and violated their Fourth Amendment rights, because: (1) defendants were not initially stopped and detained by the officer for an unreasonably long period of time when the process took approximately seven to eight minutes and the officer's questions and actions were all reasonably related to the officer's underlying justification of issuing a warning ticket; and (2) the officer had reasonable suspicion to further detain defendants after the warning ticket was issued when the trained police officer with special knowledge in the area of illegal drugs knew defendant driver's actions were consistent with those of a drug trafficker.

3. Search and Seizure-traffic stop—cocaine—motion to suppress—voluntariness of consent

The trial court did not commit plain error in a trafficking in cocaine case by denying defendants' pretrial motions to suppress all evidence obtained as a result of the search of the vehicle in

which they were riding even though defendants contend defendant driver's consent to search the vehicle was not obtained freely and voluntarily, because: (1) defendant as the driver of the car and in apparent control of its operation was an acceptable person to give consent to the search in the absence of the vehicle's owner; and (2) there was no evidence that the officers at any point made a concerted effort to coerce defendants or displayed their authority in a manner that would make defendant driver feel as though he had no choice but to consent.

4. Drugs-trafficking in cocaine—constructive possession—sufficiency of evidence

The trial court did not err by denying a defendant's motion to dismiss the trafficking in cocaine charge against him even though he contends the State failed to present sufficient evidence of constructive possession, because: (1) power to control the vehicle where a controlled substance was found is sufficient in and of itself to give rise to the inference of knowledge and possession sufficient to go to the jury; (2) defendant was the driver of the vehicle where the drugs were found and aware of the circumstances by which he came into possession of the vehicle; (3) defendant was aware that his codefendant disappeared for a while upon arrival in Florida and returned later with a friend's car to drive back to Ohio; (4) the officer testified that defendant was extremely nervous when pulled over by the officers; and (5) there was evidence that the vehicle had a strong smell of air freshener.

5. Drugs-trafficking in cocaine—instructions on lesser-included offenses

The trial court did not err by failing to instruct the jury as to the three different levels of trafficking in cocaine under N.C.G.S. § 90-95(h)(3)(a-c), because: (1) the only difference between the greater and lesser levels of the offense relate to the amount of cocaine found; and (2) it is undisputed that the amount of cocaine discovered by the officers weighed 1,995 grams.

Appeal by defendants from judgments entered 3 May 2001 by Judge Sanford L. Steelman, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joan M. Cunningham, for the State.

Martin & Martin, P.A., by J. Matthew Martin and Harry C. Martin, for defendant-appellant Cedric Wilson, Jr.

The Law Firm of Charles L. Alston, Jr., by Charles L. Alston, Jr., for defendant-appellant Hayden Calvert.

HUNTER, Judge.

Defendants, Cedric Wilson, Jr. ("Defendant Wilson") and Hayden Calvert ("Defendant Calvert"), appeal from their convictions of two counts of trafficking in cocaine, felonies under Section 90-95(h) of the North Carolina General Statutes. We find no error.

The State's evidence tended to show that on 8 October 1999, Trooper R. D. Mountain ("Trooper Mountain") of the North Carolina Highway Patrol observed a white Dodge following another vehicle too closely. The Dodge was less than one car length behind the vehicle and traveling approximately sixty-nine miles per hour. Trooper Mountain proceeded to follow the Dodge, which had slowed its speed to approximately fifty miles per hour in a seventy mile-per-hour zone.

The driver of the vehicle, Defendant Wilson, pulled over immediately when signaled by the officer. Defendant Calvert was the only passenger in the car. Upon request, Defendant Wilson produced his Ohio driver's license and a Florida vehicle registration in the name of Calvin Smith. During this time, Trooper Mountain observed a road atlas in the back seat and screws missing from the dashboard. There was also a strong odor of air freshener coming from inside the vehicle. Trooper Mountain asked Defendant Wilson to return with him to the patrol car so as to issue Defendant Wilson a warning ticket for following too closely, a violation under Section 20-152 of the North Carolina General Statutes.

Once in the patrol car, Trooper Mountain ran checks on Defendant Wilson's license and the vehicle registration. Trooper Mountain observed that Defendant Wilson was "extremely nervous" while in the patrol car. Trooper Mountain asked Defendant Wilson about his trip to Florida and about the vehicle. Defendant Wilson told Trooper Mountain he had accompanied Defendant Calvert to Florida for the purpose of visiting Defendant Calvert's grandmother. Defendant Wilson explained that he and Defendant Calvert traveled from Ohio to Florida in a white Plymouth Sundance. Once in Florida, that vehicle broke down and Defendant Calvert borrowed his friend's vehicle for their return trip. Defendant Wilson stated that the owner of the Dodge was planning to fly to Ohio and pick up the vehicle.

Meanwhile, Officer Rodney Crater ("Officer Crater") and Sergeant William Grey ("Sergeant Grey") arrived at the scene. Officer Crater asked Defendant Calvert to exit the Dodge while his police dog, Zero, performed an "exterior sniff." Officer Crater described Defendant Calvert also as being very nervous. Sergeant Grey asked Defendant Calvert a few questions about his trip to Florida. Defendant Calvert told Sergeant Grey defendants had gone to Florida to visit his grandmother. He said the vehicle they were driving broke down and a friend loaned them the Dodge to return home. When asked what type of car defendants had driven to Florida, Defendant Calvert said, "[i]t's a Camry—no, it's an Acura."

Trooper Mountain issued Defendant Wilson a warning ticket. As Defendant Wilson proceeded to exit the patrol car, Trooper Mountain asked Defendant Wilson if he could ask him additional questions. Defendant Wilson consented. The additional questions related to illegal weapons and drugs. Trooper Mountain then asked Defendant Wilson if he could search the Dodge. Defendant Wilson agreed and signed a consent form. Another officer arrived at the scene after Defendant Wilson gave his consent.

While searching the vehicle's engine compartment, Sergeant Grey noticed the battery looked like it had been re-sealed. The battery seemed lighter than normal, and upon testing the inside depth of the battery, a false bottom was discovered. At that point, the officers and defendants drove to the nearest gas station to further inspect the battery. When the battery was opened, the officers found cocaine inside that was later determined to have a weight of 1,995 grams. Trooper Mountain testified at trial that immediately after finding the cocaine, Defendant Calvert stated, "it's mine." Trooper Mountain asked Defendant Calvert "what" and Defendant Calvert said "cocaine."

On 19 and 20 July 2000 respectively, Defendant Wilson and Defendant Calvert filed separate motions to suppress the cocaine, each arguing that the search and seizure was unlawful. Both defendants' motions were denied. Thereafter, when the cocaine was admitted into evidence at trial, neither defendant objected. On 3 May 2001, Defendants Wilson and Calvert were found guilty of trafficking in cocaine. Both defendants appeal.

Prior to addressing both defendants' assignments of error, we note that they filed a joint record on appeal in this case which failed to include Defendant Calvert's (1) Verdict forms, (2) Judgment and Commitment, and (3) Appellate Entries. On our own initiative, this

Court contacted Defendant Calvert's attorney and ordered these documents be "sent up and added to the record on appeal." N.C.R. App. P. 9(b)(5). Having received the necessary documents, we may now reach the merits of Defendant Calvert's assigned errors.

I.

Defendants first argue the trial court erred by denying their pretrial motions to suppress all of the evidence obtained as a result of the search conducted by the officers. Specifically, defendants contend the evidence should have been suppressed because (1) Trooper Mountain's stop of their vehicle was pretextual, (2) their detainment by the officers was unreasonably long, and (3) Defendant Wilson's consent to the search was not given voluntarily. However, both defendants failed to renew their objection to the admission of this evidence at trial. Thus, we must review their argument using the "plain error" rule. *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983).

The "plain error" rule:

> "[I]s always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial[.]" ' "

Id. (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

1. Pretextual Stop

[1] In ruling on defendants' motions to suppress, the trial court in the present case concluded "Trooper Mountain had a reasonable, articulable suspicion to stop defendants' vehicle for a violation of NCGS 20-152." Defendants argue that since probable cause is the requisite standard under this statute and there were no objective facts from which the court could have concluded probable cause existed, Trooper Mountain's stopping their vehicle was a mere pretext for investigating them for illegal drug possession. We disagree.

"Although the trial court's findings of fact are generally deemed conclusive where supported by competent evidence, 'a trial court's

conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*.' " *State v. Young*, 148 N.C. App. 462, 466, 559 S.E.2d, 814, 818 (2002) (alteration in original) (quoting *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001)), *appeal dismissed and disc. review denied*, 355 N.C. 500, 564 S.E.2d 233 (2002). After conducting such a review, we conclude probable cause was the requisite standard in this case and Trooper Mountain did have probable cause to stop defendants' vehicle.

In *Young*, Judge K. Edward Greene wrote a concurring opinion that addressed when reasonable suspicion or probable cause is required in the context of a traffic stop. His concurring opinion stated in pertinent part:

> While there are instances in which a traffic stop is also an investigatory stop, warranting the use of the lower standard of reasonable suspicion, the two are not always synonymous. A traffic stop made on the basis of a readily observed traffic violation such as speeding or running a red light is governed by probable cause. *See, e.g., State v. McClendon*, 130 N.C. App. 368, 374, 502 S.E.2d 902, 906 (1998) (officer had probable cause to stop vehicle and issue citation for speeding and following too closely), *affirmed*, 350 N.C. 630, 517 S.E.2d 128 (1999); *State v. Hamilton*, 125 N.C. App. 396, 399, 481 S.E.2d 98, 100 (officer had probable cause to stop the vehicle for the purpose of issuing seat belt citations because he had observed that both the driver and the defendant were not wearing seat belts), *disc. review denied*, 345 N.C. 757, 485 S.E.2d 302 (1997); *see also* N.C. Gen. Stat. § 15A-302(b) (1999) (an officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction). Probable cause is "a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity." *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167, *disc. review denied*, 350 N.C. 847, 539 S.E.2d 5 (1999). On the other hand, a traffic stop based on an officer's [reasonable] *suspicion* that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is classified as an investigatory stop, also known as a *Terry* stop. *See, e.g., State v. Kincaid*, [147] N.C. App. [94, 98], 555 S.E.2d 294, 297-98 (2001) (officer had reasonable suspicion to stop the defendant for a revoked license based on his

knowledge of the defendant); *Schiffer*, 132 N.C. App. at 26, 510 S.E.2d at 167 (deputy had reasonable suspicion to stop the defendant after noticing Florida tags and window tinting which the deputy believed was darker than permitted under North Carolina law). Such an investigatory-type traffic stop is justified if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot. *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982) (quoting *State v. Streeter*, 283 N.C. 203, 210, 195 S.E.2d 502, 507 (1973)).

Id. at 470-71, 559 S.E.2d at 820-21 (Greene, J., concurring). Having found this analysis of reasonable suspicion and probable cause to be instructive, we apply it to the case *sub judice*.

Here, Trooper Mountain testified at the suppression hearing and trial that he observed defendants' Dodge traveling behind another vehicle at a distance of less than one car length and at a speed of sixty-nine miles per hour. Section 20-152(a) provides "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." N.C. Gen. Stat. § 20-152(a) (2001). As referenced in Judge Greene's concurring opinion, our Supreme Court has held that where a "defendant's vehicle was . . . following too closely, which is a violation of N.C.G.S. § 20-152[] . . . the officers had probable cause to stop the vehicle[] and to issue a warning ticket . . . ." *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). Trooper Mountain's personal observation of the Dodge's speed and its following distance to another vehicle provided him with a sufficient blend of circumstances to establish that Trooper Mountain had probable cause to believe that defendants were in violation of Section 20-152. Since Trooper Mountain had probable cause that a traffic violation had occurred, further investigation was unnecessary for purposes of issuing Defendant Wilson a warning ticket. Thus, defendants' motion to suppress was properly denied because the stop was not pretextual; Trooper Mountain had probable cause to stop defendants' vehicle for following another vehicle too closely.

2. Detainment of Defendants

[2] Second, defendants argue the initial stop of their vehicle was unreasonably long thereby resulting in a violation of the Fourth Amendment of the United States Constitution.

Detentions protected by the Fourth Amendment include "brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). Such a stop must be based on a "reasonable suspicion," determined by looking at the totality of the circumstances. *Id.* " 'The scope of the detention must be carefully tailored to its underlying justification.' " *State v. Morocco*, 99 N.C. App. 421, 427-28, 393 S.E.2d 545, 549 (1990) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d. 229, 238 (1983)).

The evidence showed that defendants were not stopped and detained by Trooper Mountain for an unreasonably long period of time. Defendant Wilson's violation of Section 20-152(a) established the probable cause needed to initially stop the vehicle—meeting the lesser standard of reasonable suspicion. Once stopped, defendants were detained long enough for Trooper Mountain to ask Defendant Wilson questions about the vehicle and his travel plans, as well as check Defendant Wilson's license and the vehicle registration, both of which were out-of-state. While in the patrol car, Trooper Mountain observed that Defendant Wilson was extremely nervous. Once Trooper Mountain completed the required checks, he issued Defendant Wilson a warning ticket, and Wilson was free to leave. This process took approximately seven to eight minutes. Thus, these questions and actions were all reasonably related to Trooper Mountain's underlying justification of issuing a warning ticket.

Defendants further argue their detention subsequent to the issuance of the warning ticket was unreasonably long. The North Carolina Supreme Court has held that in order to further detain a person after a lawful stop, an officer must have a "reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *State v. McClendon*, 350 N.C. at 636, 517 S.E.2d at 134. These facts, as well as the rational inferences drawn from them, are to be "viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. at 441, 446 S.E.2d at 69-70. Again, the court must look to the totality of the circumstances to determine if a reasonable suspicion exists to allow further delay. *Id.*

As previously stated, the court concluded that Trooper Mountain had a reasonable suspicion to further detain defendants after the warning ticket was issued. The evidence established that (1) the vehicle contained a strong odor of air freshener; (2) an atlas was seen

in the back seat and screws were missing from the dashboard; (3) the vehicle was registered in Florida, but the driver was from Ohio; (4) there was a discrepancy in the defendants' descriptions of the vehicle left in Florida; and (5) Defendant Wilson was very nervous, tapping his hands and feet while in Trooper Mountain's patrol car. Additionally, Trooper Mountain, as a trained police officer with special knowledge in the area of illegal drugs, knew that Defendant Wilson's actions were consistent with those of a drug trafficker. Therefore, the evidence, based on the circumstances in the present case, provided Trooper Mountain with reasonable suspicion to further delay defendants.

3. Consent to Search

[3] Defendants' final argument regarding suppression of the evidence contends Defendant Wilson's consent was invalid because it was not obtained freely and voluntarily. We disagree.

The consent needed to justify a search may be given by the "person in apparent control of [a vehicle's] operation and contents at the time the consent is given." N.C. Gen. Stat. § 15A-222 (2001). When seeking to rely on the consent given to support the validity of a search, the State has "the burden of proving that the consent was voluntary." *State v. Morocco*, 99 N.C. App. at 429, 393 S.E.2d at 549. In determining whether this burden has been met, the court must look at the totality of the circumstances. *State v. Steen*, 352 N.C. 227, 240, 536 S.E.2d 1, 9 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

In the case *sub judice*, the totality of the circumstances established Defendant Wilson's consent was indeed given freely and voluntarily. Defendants were pulled over by one police officer. Three additional police officers arrived at the scene some time thereafter. With the exception of his short conversation with Sergeant Grey, Defendant Wilson only interacted with Trooper Mountain prior to giving his consent. Defendant Wilson, as the driver of the car and in apparent control of its operation, was an acceptable person to give consent to the search in the absence of the vehicle's owner. *See State v. McDaniels*, 103 N.C. App. 175, 405 S.E.2d 358 (1991). Additionally, Sergeant Grey spoke with Defendant Calvert while Officer Crater conducted an "exterior sniff" of the vehicle with Zero. The fourth officer did not arrive on the scene until after consent was given. There is no evidence that the officers, at any point, made a concerted effort to coerce defendants or displayed their authority in a manner that

would make Defendant Wilson feel as though he had no choice but to consent.

Accordingly, the trial court did not commit error, much less "plain error," in denying defendants' motions to suppress the evidence obtained from the search.

II.

[4] Defendant Wilson also argues that the trial court erred by denying his motion to dismiss the trafficking in cocaine charge against him because the State did not present sufficient evidence to convict him on the theory of constructive possession. We conclude that there was sufficient evidence and the trial court properly denied Defendant Wilson's motion to dismiss.

In order to survive a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, drawing every reasonable inference in favor of the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The evidence considered must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). Whether the evidence presented is substantial is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956).

With respect to Defendant Wilson's argument, "[o]ur statutes provide that a person who possesses twenty-eight grams or more of cocaine shall be guilty of the felony known as 'trafficking in cocaine.' The possession element of this felony can be proven by showing either actual possession or constructive possession." *State v. Siriguanico*, 151 N.C. App. 107, 110, 564 S.E.2d 301, 304 (2002) (citation and footnote omitted). In determining whether possession is constructive, this Court has held:

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

State v. McLaurin, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (citations omitted). Additionally, this Court has recognized that constructive possession can be inferred when there is evidence that a defendant had the power to control the vehicle where a controlled substance is found. *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). "[P]ower to control the [vehicle] where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury." *Id.*

When viewed in the light most favorable to the State, there is considerable evidence to support the State's theory of constructive possession. The evidence showed that Defendant Wilson was the driver of the vehicle where the drugs were found and aware of the circumstances by which he came into possession of the Dodge. By his own admission, Defendant Wilson was also aware that Defendant Calvert disappeared for a while upon arrival in Florida and returned later with a "friend's" car to drive back to Ohio. Moreover, Trooper Mountain testified that Defendant Wilson was "extremely nervous" when pulled over by the officers. Finally, there was evidence that the vehicle had a strong smell of air freshener. These additional circumstances tend to further incriminate Defendant Wilson when all reasonable inferences are made in favor of the State. Thus, the court did not err in denying the motion to dismiss, and the jury was entitled to hear an instruction as to the State's theory of constructive possession.

III.

[5] Finally, Defendant Calvert argues the trial court erred by its failure to instruct the jury as to the three different levels of trafficking in cocaine. We disagree.

A "[d]efendant is 'entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). When the offense is for trafficking in cocaine, the only difference between the greater and lesser levels of the offense relate to the amount of cocaine found. N.C. Gen. Stat. § 90-95(h)(3)(a-c) (2001). In the present case, it is undisputed that the amount of cocaine discovered by the officers weighed 1,995 grams. Since the weight of the cocaine was clear, the jury could not have convicted Defendant Calvert of a lesser level of trafficking in cocaine in the absence of evidence sup-

porting a lesser offense. Thus, the court did not err by failing to instruct the jury as to the different levels by which Defendant Calvert could have been found guilty of this offense.

For the aforementioned reasons, there was no error in the trial and convictions of defendants.

No error.

Judges WALKER and McGEE concur.

G. WAYNE OVERTON AND ABODE OF CAMDEN, INC., PETITIONERS-APPELLEES v. CAMDEN COUNTY, CAMDEN COUNTY BOARD OF COMMISSIONERS, AND THE CAMDEN COUNTY BOARD OF ADJUSTMENT, RESPONDENTS-APPELLANTS

No. COA02-276

(Filed 31 December 2002)

1. Zoning—conditional use permit—house storing business—ability to impose conditions

Although respondents contend the trial court erred in a zoning case by holding that the Board of Adjustment lacked authority to impose conditions upon its approval of petitioners' conditional use to operate their house storing business on the 1321 property, the language of the trial court does not restrict the Board of Adjustment's ability to impose conditions and in fact authorizes the imposition of conditions as long as those conditions are authorized by the Uniform Development Ordinance.

2. Zoning—conditional use permit—house storing business—nonconforming use—indirect regulation prohibited

The trial court did not err in a zoning case by striking conditions eleven and twelve of the conditional use permit issued by the Board of Adjustment for the 1321 property requiring all houses stored at the nonconforming 1330 site be relocated to the approved 1321 site within no more than sixty days and requiring that another conditional use permit be amended to reflect a change in business from the 1330 property to the 1321 property, because: (1) the Board may not impose conditions on a conditional use permit for the 1321 property in order to regulate indirectly what it is prohibited from doing directly under the Uniform

Development Ordinance, namely the 1330 property; and (2) the Board cannot require the business to be relocated from the 1330 property to the 1321 property as a condition of the conditional use permit for the 1321 property.

3. Zoning—conditional use permit—house storing business—reissuance of permit

The trial court did not err by striking invalid conditions eleven and twelve of the conditional use permit issued by the Board of Adjustment for the 1321 property and by ordering the Board of Adjustment to reissue a conditional use permit without these conditions attached, because there are no administrative decisions remaining and the same result would occur on remand.

Appeal by respondents from an order entered 25 October 2001 by Judge James R. Vosburgh in Superior Court, Camden County. Heard in the Court of Appeals 16 October 2002.

Hornthal, Riley, Ellis & Maland, L.L.P., by Donald I. McRee, Jr., for petitioners-appellees.

Herbert T. Mullen, Jr. and Shelley T. Eason, for respondents-appellants.

McGEE, Judge.

The Camden County Board of Commissioners (Board of Commissioners) adopted the Camden County Zoning Ordinance (CCZO) in December of 1993. At that time G. Wayne Overton and Abode of Camden, Inc. (petitioners) operated a house moving and storage business on property located at 1330 South NC 343 (the 1330 property) in Camden County, North Carolina. The Board of Commissioners assured petitioners on 18 July 1994 that petitioners could continue to operate their business as a nonconforming use under the CCZO.

At a meeting of the Board of Commissioners on 3 June 1996, the Commissioners discussed petitioners' use of the 1330 property and that the property had become an eyesore. The Board of Commissioners decided to tell petitioners that the 1330 property must be cleaned up within a reasonable time.

Petitioners applied for a conditional use permit to store houses for resale at 1321 South NC 343 (the 1321 property) on 12 October 2000. The 1321 property was across the highway from the 1330 prop-

erty. The Camden Uniform Development Ordinance (UDO) had been adopted in 1998, replacing the CCZO. The UDO was amended in 1999 to permit outside storage as a conditional use under the UDO. Petitioners' conditional use permit hearing was scheduled for 7:00 p.m. on 6 November 2000 before the Camden County Board of Adjustment (Board of Adjustment). The Board of Commissioners held a meeting on the morning of 6 November 2000 and discussed the fact that petitioners had not cleaned up the 1330 property as previously requested. The Board of Commissioners then passed a motion allegedly revoking petitioners' right to use the 1330 property for house storage. At the Board of Adjustment meeting that evening, petitioners stated that they now wanted to move the entire house storage operation to the 1321 property. Before the alleged revocation of petitioners' right to operate on the 1330 property, petitioners were seeking only to use the 1321 property as an additional storage location, not as a replacement site for the 1330 property. At the time of the hearing, both petitioners and the Board of Adjustment believed that the Board of Commissioners had revoked petitioners' right to operate a house storing business at the 1330 property.

The Board of Adjustment issued a conditional use permit to petitioners, authorizing use of the 1321 property for outdoor storage of up to twelve houses for twelve months, subject to certain stated conditions. Two of those conditions were that petitioners move the entire house storage operation at the 1330 property to the 1321 property within thirty days, eventually extended to sixty days, and that the conditional use permit of a third party for a mobile home on nearby property be amended to reflect the change in business from the 1330 property to the 1321 property. Petitioners were informed that failure to comply with the conditions imposed would result in nullification of the conditional use permit.

Petitioners wrote the Camden County Permit Officer on 27 November 2000 requesting, *inter alia*, that he clarify what permit the Board of Commissioners had previously issued for the 1330 property and by what authority the Board of Commissioners had revoked it. Petitioners filed a petition for writ of certiorari on 5 December 2000 requesting that the superior court review the Board of Adjustment's imposition of conditions and the Board of Commissioners' alleged revocation of their right to operate at the 1330 property. The superior court filed an order on 25 October 2001, holding that the Board of Commissioners' action attempting to revoke petitioners' right to operate at the 1330 property was a nullity and that two of the condi-

tions imposed by the Board of Adjustment on the conditional use permit for the 1321 property were null and void. The trial court ordered the Board of Adjustment to issue petitioners a new conditional use permit "without the imposition of conditions not authorized by the Camden County UDO." Respondents appeal from this order.

I.

Respondents have made no argument in their brief in support of their first assignment of error and it is therefore dismissed. N.C.R. App. P. 28(a) (2002). They also state they no longer challenge the portion of the trial court's order to which they assigned error in their second and third assignments and acknowledge that

> [b]y virtue of its nonconforming status, the Petitioners' original operation at 1330 South NC 343 did not require a zoning permit to continue and, in fact, it never received a zoning permit. Therefore, there was no permit for the Board of Commissioners to "revoke" at their November, 2000 meeting and any attempt to do so was a nullity. The trial court correctly found that the [Commissioners'] action was a nullity to the extent that it purported to revoke a nonconforming zoning permit. Camden County does not challenge this portion of the trial court's order.

Therefore, we also dismiss respondents' second and third assignments of error. N.C.R. App. P. 28(a).

II.

[1] Respondents first argue that the trial court erred in holding that the Board of Adjustment lacked authority to impose conditions upon its approval of petitioners' conditional use to operate their business on the 1321 property. The trial court's 25 October 2001 order states:

> This matter and Petitioners' October 12, 2000 application for a conditional use permit is [sic] herewith remanded to the Respondent Camden County Board of Adjustment for issuance of the conditional use permit with respect to Petitioners' property located at 1321 South NC Hwy 343, Shiloh Township, Camden County, North Carolina in accordance with this Order and without the imposition of conditions not authorized by the Camden County UDO.

This language by the trial court does not restrict the ability of the Board of Adjustment to impose conditions on the issuance of the conditional use permit for the 1321 property in general. It allows the

imposition of conditions, as long as those conditions are authorized by the UDO. N.C. Gen. Stat. § 153A-340(c) (2001) states that a board of adjustment "may impose reasonable and appropriate conditions and safeguards upon [conditional use] permits." A court will normally defer to a board of adjustment so long as a condition is reasonably related to the proposed use, does not conflict with the zoning ordinance, and furthers a legitimate objective of the zoning ordinance. *See Chambers v. Board of Adjustment*, 250 N.C. 194, 197, 108 S.E.2d 211, 213 (1959) (noting that Boards of Adjustment cannot waive requirements under a zoning ordinance); *Bernstein v. Board of App., Village of Matinecock*, 302 N.Y.S.2d 141, 146 (N.Y. Sup. Ct. 1969) ("The conditions imposed cannot go beyond the ordinance, which is the source of the Board's power, [t]hey must be directly related to and incidental to the proposed use of the property, and the conditions stated must be sufficiently clear and definite that the permittee and his neighbors are not left in doubt concerning the extent of the use permitted.") (citations omitted) (cited in *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986)); *see also* 3 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 61.49 (Supp. 2001).

Section 1915 of the UDO authorizes the Board of Adjustment to attach conditions in addition to those specified in the UDO that will ensure the development in its proposed location:

> (a) will not endanger the public health or safety; (b) will not injure the value of adjoining or abutting property; (c) will be in harmony with the area in which it is located; (d) will be in conformity with the Land Use Plan . . .; and, (e) will not exceed the county's ability to provide adequate public facilities[.]

The trial court is therefore not limiting the Board of Adjustment's ability to impose conditions only to those conditions explicitly provided in the UDO.

The general law of zoning indicates that a condition imposed on a conditional use permit is improperly imposed when it is not related to the use of the land, the control, ownership, or transfer of property, it unreasonably affects the way in which business on the property can be conducted, or it conflicts with a zoning ordinance. 3 Anderson, *American Law of Zoning* § 21.32 (4th ed. 1998). *See also Davidson County v. City of High Point*, 321 N.C. 252, 259, 362 S.E.2d 553, 558 (1997) (holding that a county may not attach conditions that impose limitations outside the scope of its authority).

The trial court simply ruled that the Board of Adjustment could not impose conditions that were in derogation of either the express conditions of the UDO, or the reasonable conditions permitted in addition to those expressly provided. The trial court did not rule that respondents could not impose conditions upon petitioner's conditional use permit. Respondents' argument lacks merit.

III.

[2] Respondents next argue that the trial court erred by striking conditions 11 and 12 of the conditional use permit issued by the Board of Adjustment for the 1321 property. The pertinent conditions of the conditional use permit are that a conditional use permit issued on 7 July 1997 to G. Overton concerning occupancy of a mobile home permitted at the Petitioners' old location be amended to apply to the newly permitted site; and that all houses stored at the nonconforming 1330 site be relocated to the approved 1321 site within no more than sixty days.

A.

Condition 12 of the conditional use permit required that all houses stored at the nonconforming 1330 site be relocated to the approved 1321 site within no more than sixty days. While the use of the 1330 property was made unlawful by the zoning ordinances in this case, as admitted by respondents, because the use existed prior to the adoption of the zoning ordinances, it was "grandfathered" in as a nonconforming situation. *See* UDO § 1401 & 1402. Nonconforming situations otherwise lawful at the enactment of the Camden zoning ordinances do not require a zoning permit to continue. *See id.*

Zoning ordinances may prohibit the enlargement of a nonconforming use. *Kirkpatrick v. Village Council*, 138 N.C. App. 79, 85, 530 S.E.2d 338, 342 (2000). The UDO prohibits nonconforming uses from expanding or increasing in size, changing uses, or resuming after discontinuance. Section 1404 of the UDO prohibits nonconforming uses from increasing the total amount of space devoted to a nonconforming use or extending the use to cover more land than the use occupied at the time the zoning ordinance was adopted. The definition of nonconforming situations in section 1401 of the UDO refers to an existing *lot* or structure or the use of an existing *lot* or structure. Therefore any prohibition on the expansion of a nonconforming use must be considered with this limitation in mind. The present case involves two separate lots, the 1330 property and the 1321 property. We agree

with petitioners that they are not seeking to expand or enlarge a nonconforming use on the 1330 property. Petitioners are seeking a new use on the 1321 property. Therefore the prohibition on expansion of a nonconforming use does not apply to the situation before us.

The only authority respondents had to regulate the 1330 property under the UDO was contained in section 1406. The Board of Adjustment could limit or otherwise regulate petitioners' use of the 1330 property if there was a change in the use of the property. However, in this case there was no such change in use of a nonconforming situation. The conditions imposed on a conditional use permit should not be inconsistent with the terms of the UDO. *See Chambers*, 250 N.C. at 197, 108 S.E.2d at 213 (noting that Boards of Adjustment cannot waive requirements under a zoning ordinance); *Bernstein*, 302 N.Y.S.2d at 146 ("The conditions imposed cannot go beyond the ordinance, which is the source of the Board's power.") (citations omitted) (cited in *Godfrey*, 317 N.C. 51, 344 S.E.2d 272 (1986)); *see also* 3 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 61.49 (Supp. 2001). The Board of Adjustment may not impose conditions on a conditional use permit for the 1321 property in order to regulate indirectly what it is prohibited from doing directly under the UDO, namely regulate the 1330 property. We hold that the Board of Adjustment was without authority to impose condition 12 on the conditional use permit for the 1321 property. Therefore, we affirm the portion of the trial court's order concluding the Board of Adjustment lacked authority to impose condition 12 and finding condition 12 to be null and void.

B.

Condition 11 of the conditional use permit required that another conditional use permit, previously issued to a third party on 7 July 1997 for property located at 187-C Thomas Point Road (Thomas Point Road conditional use permit), be amended to reflect a change in business from the 1330 property to the 1321 property.

We note that whatever rationale the Board of Adjustment had for requiring such a change no longer exists since, as stated above, the Board cannot require the business to be relocated from the 1330 property to the 1321 property as a condition of the conditional use permit for the 1321 property. Further, as held by the trial court, the Board of Commissioners' original action on 6 November 2000 to revoke petitioners' ability to operate their business on the 1330 property was invalid as well. As such, any argument that the amendment to the Thomas Point Road conditional use permit related to the use of the

1321 property since the business would no longer be located on the 1330 property, and that the original reference in the Thomas Point Road conditional use permit to the 1330 property was related to the business conducted is without merit.

The only methods the UDO provides for making changes to a conditional use permit are (1) that a "permitee may request the administrator authorize a minor change to a conditional use permit", (2) but all other amendments "must be processed as a new application and hearing before the board"; and (3) "through a revocation proceeding upon the permitee's failure to comply with the terms of the permit." In the present case there has been no request by the third party to amend the conditional use permit cited in condition 11, nor does the record show any violation of the terms of the third party's conditional use permit. The conditions imposed on a conditional use permit should be consistent with the terms of the UDO. *See Chambers*, 250 N.C. at 197, 108 S.E.2d at 213 (noting that Boards of Adjustment cannot waive requirements under a zoning ordinance); *Bernstein*, 302 N.Y.S.2d at 146 ("The conditions imposed cannot go beyond the ordinance, which is the source of the Board's power.") (citations omitted) (cited in *Godfrey*, 317 N.C. 51, 344 S.E.2d 272 (1986)); *see also* 3 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 61.49 (Supp. 2001). Assuming, *arguendo*, that condition 11 did relate to the use of the 1321 property, we find that the attempted modification of a third party's conditional use permit in condition 11 was inconsistent with the terms of the UDO. Therefore, we affirm the portions of the trial court's order concluding the Board of Adjustment lacked authority to impose condition 11 and finding condition 11 to be null and void.

IV.

[3] Respondents argue the trial court erred in striking conditions 11 and 12 and in ordering the Board of Adjustment to issue a conditional use permit without these conditions attached. Respondents cite *Chira v. Planning Board of Tisbury*, 333 N.E.2d 204, 209 (Mass. 1975), for the proposition that a trial court cannot order a permit reissued with or without specified conditions unless the same result would occur from a remand to the Board of Adjustment. Respondents argue that a court assumes an improper role when it modifies a conditional use permit by striking specific provisions in the conditional use permit. Further, respondents cite the boilerplate language found in condition 3 stating that if any of the conditions affixed to the permit are deemed invalid, the permit itself would become void.

Section 1302.1 of the UDO states that

> Subject to Subsection (2), the Board of Adjustment or the Board of Commissioners, respectively, shall issue the requested permit unless it concludes, based upon the information submitted at the hearing, that:
>
> (a) the requested Permit is not within its jurisdiction . . .; or,
>
> (b) the application is incomplete; or,
>
> (c) if completed as proposed in the application, the development will not comply with one (1) or more requirements of this Ordinance . . . .

At the Board of Adjustment's 6 November 2000 meeting, the Board of Adjustment specifically found that the requested permit was within its jurisdiction, the application was complete, and the proposed use complied with all of the requirements of the UDO. Therefore, none of the requirements in section 1302.1 of the UDO was violated by petitioner. However the requirement to issue a permit is dependent on satisfying section 1302.2 as well. Section 1302.2 of the UDO states:

> Even if the permit issuing board finds that the application complies with all other provisions of this Ordinance, it may still deny the permit if it concludes, based upon the information submitted at the hearing, that if completed as proposed, the development, more probably than not:
>
> (a) will materially endanger the public health or safety; or
>
> (b) will substantially injure the value of adjoining or abutting property; or,
>
> (c) will not be in harmony with the particular neighborhood or area in which it is to be located . . .; or,
>
> (d) will not be in general conformity with the Land Use Plan, Thoroughfare Plan, or other plan officially adopted by the board; or,
>
> (e) will exceed the county's ability to provide adequate public facilities, including, but not limited to, schools, fire and rescue, law enforcement, and other county facilities.

The Board of Adjustment voted unanimously that the proposed conditional use by petitioner met all five of these requirements. There is

no other provision in the UDO under which a Board of Adjustment can deny a conditional use permit for outside storage. Further, neither a board of adjustment, nor a board of commissioners can deny a conditional use permit on the basis that it "adversely affects the public interest" in general. *In re Application of Ellis*, 277 N.C. 419, 424-25, 178 S.E.2d 77, 80-81 (1970).

Although in other jurisdictions, due to separation of powers concerns, a court may not normally strike through the invalid portions of a conditional use permit and order a board of adjustment to reissue the permit without those invalidated conditions, where it is clear that the same action would have resulted from rehearing below or if no administrative decisions remain, the court may do so. *See, e.g., Belvoir Farms Homeowners Ass'n, Inc. v. North*, 734 A.2d 227, 232-33 (Md. 1999); *O'Donnell v. Bassler*, 425 A.2d 1003, 1008-09 (Md. 1981); *Chira v. Planning Board of Tisbury*, 333 N.E.2d 204, 209 (Mass. 1975); *Parish of St. Andrew's Protestant Episcopal Church v. Zoning Bd. of App.*, 232 A.2d 916, 919 (Conn. 1967). Whereas this is an issue of first impression in this State, we adopt the rule that a court may not properly modify a permit issued by a board of adjustment or board of commissioners unless there are no administrative decisions remaining or it is clear that the same result would occur on remand.

In the case before us, as indicated above, the Board of Adjustment made all the administrative decisions relating to the conditional use permit for the 1321 property. The UDO was amended in 1999 to permit outside storage as a conditional use under the UDO. The Board of Adjustment voted that every necessary requirement under the UDO was satisfied by petitioners and their proposed use of the 1321 property. The Board of Adjustment made the correct inquiry and made all of the necessary administrative determinations for issuance of a conditional use permit for the 1321 property.

Further, given the Board of Adjustment's determination that petitioners' proposed use satisfied all of the requirements under section 1302, and the language in section 1302 limiting denial of a conditional use permit to the failure of those criteria, the Board of Adjustment would be required by the terms of its own ordinance, the UDO, to issue the conditional use permit to petitioners on remand.

Therefore, the trial court did not err in striking the invalid conditions originally imposed by the Board of Adjustment and ordering

reissuance of the conditional use permit for the 1321 property without the two conditions attached.

We affirm the order of the trial court.

Affirmed.

Judges HUDSON and BIGGS concur.

NEUSE RIVER FOUNDATION, INC.; RICHARD J. DOVE; D. BOUTON BALDRIGE, D/B/A THE CAPE FEAR RIVERKEEPER; NEW RIVER FOUNDATION, INC.; TOM MATTISON, D/B/A THE NEW RIVERKEEPER; AND THE WATER KEEPER ALLIANCE, PLAINTIFFS v. SMITHFIELD FOODS, INC.; CARROLL'S FOODS, INC.; BROWN'S OF CAROLINA, INC.; MURPHY FARMS, INC.; WENDELL H. MURPHY, SR.; INDIVIDUALLY; WENDELL H. MURPHY, JR., INDIVIDUALLY; AND JOSEPH W. LUTER, III, DEFENDANTS

* * *

THOMAS E. JONES; BILL HARPER; MARY ANN HARRISON; NATALIE SALTER BAGGETT; DON WEBB; CHARLES ROGERS HUGHES; CRAIG CRUMPLER; SIDNEY WHALEY; MARGARET HANRAHAN JONES; DAVID LEE JONES; SETH AUSTIN WILLIS; ERIC MARK BLETTNER; FRED ROHDE; AND NEIL JULIAN SAVAGE, PLAINTIFFS v. SMITHFIELD FOODS, INC.; CARROLL'S FOODS, INC.; BROWN'S OF CAROLINA, INC.; MURPHY FARMS, INC.; WENDELL H. MURPHY, SR.; INDIVIDUALLY; WENDELL H. MURPHY, JR., INDIVIDUALLY; AND JOSEPH W. LUTER, III, DEFENDANTS

No. COA01-1204, COA01-1205

(Filed 31 December 2002)

Environmental Law— hog farms—swine lagoons and sprayfields—standing

The trial court did not err in a case seeking establishment of a court-approved trust to pay for the complete remediation of several of North Carolina's waterways as well as a prohibition of defendants' use of swine lagoons and sprayfields by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) based on lack of standing, because: (1) there is no North Carolina authority supporting the contention that injury to aesthetic or recreational interests alone, regardless of degree, confers standing on an environmental plaintiff; (2) none of these plaintiffs seeks individual compensation of the invasion of a more particular and more personal right that cannot

be considered merged in the general public right; (3) the Court of Appeals cannot prohibit an activity that the legislature has legally allowed; (4) N.C.G.S. § 114-2(8)(a) provides that only the state, through the Attorney General, is authorized to bring in a representative capacity for and on behalf of the using and consuming public actions deemed to be advisable in the public interest; and (5) there is no allegation that eminent domain is an issue here.

Appeal by plaintiffs from orders entered 27 March 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 20 August 2002.

Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure and defendants' motion to consolidate, COA01-1204 and COA01-1205 are consolidated for appeal and we address both this opinion.

Abrams & Abrams, P.A., by Douglas B. Abrams; Womble, Carlyle, Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., for plaintiff-appellants.

Ward and Smith, P.A., by Gary J. Rickner; McGuire Woods, LLP, by Anne Marie Whittemore; Cheshire, Parker, Schneider, Wells & Bryan, by Joseph B. Cheshire, V; and J. Phil Carlton for defendant-appellees.

THOMAS, Judge.

Plaintiffs filed suit in these cases seeking two forms of relief. They ask for the establishment of a "Court Approved Trust" to pay for the complete remediation of several of North Carolina's waterways as well as a prohibition of defendants' use of swine lagoons and sprayfields.

Plaintiffs do not pray for individual compensation.

The trial court dismissed their claims under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, concluding "all plaintiffs lack standing to prosecute any claims before this Court, that this Court lacks subject matter jurisdiction as to any claims pending, and that the complaint fails to state a single claim upon which this Court by law is authorized to grant relief." Plaintiffs appeal, arguing a common law right to bring their causes of action.

For the reasons herein, we affirm the trial court.

Plaintiffs can be divided into five categories: (1) river associations, including The Neuse River Foundation, Inc., The New River Foundation, Inc., and the Water Keeper Alliance ("river associations"); (2) persons employed by nonprofit organizations as monitors of the rivers ("riverkeepers"); (3) noncommercial users of the rivers; (4) riparian landowners who are downstream from the alleged pollution; and (5) commercial users of the rivers.

They filed suit against three hog farming companies, the companies' corporate parent, and some of the current and former officers of the companies (collectively, "defendants"). Plaintiffs, represented by the same attorneys, were divided as litigants between two fundamentally similar actions against the same defendants. The hearing at the trial level was a consolidation of the two, as is this appeal.

Plaintiffs allege defendants improperly handled hog waste, resulting in massive pollution and contamination of the Neuse, New, and Cape Fear Rivers, and those rivers' tributaries and estuaries. Their claims are based on negligence, trespass, strict liability, public nuisance, unfair and deceptive trade practices, private nuisance and the public trust doctrine.

The complaints contain comprehensive background information regarding injury to North Carolina's coastal plain. One, for example, alleges:

> Largely as a result of Defendants' activities, [North Carolina's] coastal plain has experienced an explosion in its hog population as traditional North Carolina style family hog farming has given way to mass production pork factories first conceived and devised by Defendants.
>
> . . .
>
> A Tradition of Land Stewardship and Animal Husbandry is Lost—The family farmer traditionally spreads the manure of a few hundred hogs as fertilizer on the same crop land from which he derives produce to feed his herd. In accordance with traditions of good land stewardship, animal husbandry and agricultural practices, the family farmer maintained a relatively small herd of hogs in an area sufficient to accommodate the hog waste without significant contamination. Traditional farmers thus achieve a rough balance by assimilating the nutrients in hog waste[.]
>
> . . .

> Defendant's hog farms quickly triumphed over family farmers in the market place.
>
> . . .
>
> Contaminated Lagoons—Whereas North Carolina hog farmers were once largely self-sufficient in producing and/or obtaining locally produced feed for their livestock on their own farms, Defendants' hog factories must import approximately 20,000 metric tons of feed each day from Midwestern grain producers.
>
> . . .
>
> The feces and urine of the hogs, instead of being purified through sewage treatment, fall through a slatted floor to a cellar below the warehouses which defendants periodically flush into open air earthen pits—euphemistically referred to as "lagoons."

The complaints go on to detail the harmful effects of the contamination and to request non-individualized, or public, forms of relief.

Plaintiffs now argue that such non-individualized forms of relief are appropriate and the trial court erred by finding they lack standing to pursue them. We disagree.

As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364 (1992).

> Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Id. (citations omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 717 (1990)).

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). Accordingly, defendants' standing argu-

ment implicates Rule 12(b)(1). *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). It is proper to conduct *de novo* review of a trial court's decision to dismiss a case for lack of standing. *Id.*

Standing is among the "justiciability doctrines" developed by federal courts to give meaning to the United States Constitution's "case or controversy" requirement. U.S. Const. Art. 3, § 2. The term refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 641 (1972). The "irreducible constitutional minimum" of standing contains three elements:

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61, 119 L. Ed. 2d at 364.

North Carolina courts are not constrained by the "case or controversy" requirement of Article III of the United States Constitution. Our courts, nevertheless, began using the term "standing" in the 1960s and 1970s to refer generally to a party's right to have a court decide the merits of a dispute. *See, e.g., Stanley, Edwards, Henderson v. Dept. of Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973). Standing most often turns on whether the party has alleged "injury in fact" in light of the applicable statutes or caselaw. *See Empire Power Co. v. North Carolina Dep't of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768 (1994); *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 180 (1993); *Greene v. Town of Valdese*, 306 N.C. 79, 88, 291 S.E.2d 630, 636 (1982); *N.C. Forestry Ass'n v. North Carolina Dept. of Natural Resources*, 154 N.C. App. 18, 571 S.E.2d 602 (COA01-1329, filed 19 November 2002); *Ray Bergman Real Estate Rentals v. NCFHC*, 153 N.C. App. 176, 568 S.E.2d 883 (2002); *In re Ezell*, 113 N.C. App. 388, 392, 438 S.E.2d 482, 484 (1994); *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890 (1980). Here, we must also examine the forms of relief sought. *See Friends of Earth, v. Laidlaw Env. S.*, 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought").

Prior to the utilization of the "standing" label by North Carolina's courts, our Supreme Court, in *Hampton v. Pulp Co.*, 223 N.C. 535, 27 S.E.2d 538 (1943), addressed whether a private party can maintain an action for damages caused by a public nuisance. According to the *Hampton* Court, it may be appropriate as long as the party has suffered an injury that "cannot be considered merged in the general public right[.]" *Hampton*, 223 N.C. at 543-44, 27 S.E.2d at 544. The *Hampton* Court held:

> [N]o individual may recover damages because of injury by public nuisance, unless he has received a special damage or unless the creator of the nuisance has thereby invaded some right which, upon principles of justice and public policy, cannot be considered merged in the general public right[.]

Id. The *Hampton* Court explained "[t]he real reason on which the rule denying individual recovery of damages is based . . . is that a purely public right is of such a nature that ordinarily an interference with it produces no appreciable or substantial damage[.]" *Id.* at 544, 27 S.E.2d at 544.

In *Hampton*, the injured riparian landowner asserted claims against an upstream manufacturing plant for trespass, damage to his fishing business, and diminution of his riparian property value due to the plant's pollution. The *Hampton* Court rejected a lack of standing argument:

> The law will not permit a substantial injury to the person or property of another by a nuisance, though public and indictable, to go without individual redress, whether the right of action be referred to the existence of a special damage, or to an invasion of a more particular and more important personal right. The personal right involved here is the security of an established business. The fact that plaintiff had such established antedating the nuisance, and that the injury had been done to this, takes him out of the rule and makes his damage special and peculiar.

Id. at 547, 27 S.E.2d at 545-46. Thus, "the existence of a special damage," is defined as the "invasion of a more particular and more personal right" that cannot be considered "merged in the general public right." *Hampton*, 223 N.C. 535, 27 S.E.2d 538. The more particular right in *Hampton* was the security of an established fishery business, as well as the (diminished) value of riparian property. *See also Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 40, 331

S.E.2d 717, 724 (1985) (riparian landowner has standing to pursue damages to his property for wastewater discharge in violation of a state permit).

Under North Carolina law, an environmental plaintiff must allege: (1) injury to a protected interest that cannot be considered merged in the general public right; (2) causation; and (3) proper, or individualized, forms of relief. *See Hampton*, 223 N.C. 535, 27 S.E.2d 538; *see also Biddix*, 76 N.C. App. 30, 331 S.E.2d 717 (holding the General Assembly's omission of a citizen suit provision does not preempt common law claims of nuisance and continuing trespass for damage to riparian landowner's property caused by wastewater discharges in violation of state permit).

Plaintiffs here contend that since each of them either owns property adjacent to, works on, protects, or has concern for the welfare of the rivers allegedly polluted by defendants, they all suffer special damages to a degree different from those suffered by the general public. However, there is no North Carolina authority supporting the contention that injury to aesthetic or recreational interests alone, regardless of degree, confers standing on an environmental plaintiff. *See Hampton*, 223 N.C. at 542, 27 S.E.2d at 543 (emphasizing the difference between injury to a fishery business owner, who has standing in an action opposing the proposed location of a bridge on the river, and recreational anglers, who do not); *but see Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636 (under the Federal Water Pollution Control Act, which has a citizen suit provision, environmental plaintiffs adequately allege injury in fact when they claim that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity). The environmental river associations, riverkeepers, and recreational fishermen, therefore, do not have standing to maintain an action against defendants under the circumstances alleged.

Certain plaintiffs do claim injury to their riparian property or businesses. They include eight riparian landowners, two commercial fishermen, and a marina owner. These plaintiffs conceivably could have standing to pursue individual recovery under North Carolina law for injury to their "more particular and more important personal right[s]." *Hampton*, 223 N.C. at 547, 27 S.E.2d at 545. Here, however, none of these plaintiffs seeks individual compensation for the "invasion of a more particular and more personal right" that cannot be considered "merged in the general public right." *Id.* Defendants, in response, contend plaintiffs do not have standing to seek the forms of

relief sought. *See Friends of Earth, Inc.*, 528 U.S. at 185, 145 L. Ed. 2d at 629 ("a plaintiff must demonstrate standing separately for each form of relief sought"); *Lewis v. Casey*, 518 U.S. 343, 358, n.6, 135 L. Ed. 2d 606 622 (1996) ("[S]tanding is not dispensed in gross."); *Los Angeles v. Lyons*, 461 U.S. 95, 75 L. Ed. 2d 675 (1983) (notwithstanding the fact that the plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief). The issue for them becomes, therefore, whether they are seeking proper, or individualized, forms of relief.

In their prayer for relief, plaintiffs seek: (1) "[a] judgment prohibiting forthwith Defendant's use of sprayfields and cesspools;" and (2) monetary damages to be deposited in a court-approved trust for the "complete cost of . . . the restoration and remediation" of the rivers.

As to defendants' lagoon waste management systems, they exist pursuant to express legislative authority. *See* N.C. Gen. Stat. § 143-215.10A through 215.10M (2001). Under the separation of powers doctrine, "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. Art. I, § 6. "[C]ourts will not enjoin as a nuisance an action authorized by valid legislative authority[.]" *Twitty v. State of N.C.*, 527 F.Supp. 778, 781 (E.D.N.C. 1981) (refusing to enjoin the operation of a toxic waste dump); *see also Rope Co. v. Aluminum Co.*, 165 N.C. 572, 576, 81 S.E. 771, 772 (1914) (refusing to enjoin the operation of a dam constructed "under express legislative authority").

In creating a permitting program for animal waste management systems, the North Carolina General Assembly stated the following purpose:

> The General Assembly finds that animal operations provide significant economic and other benefits to this State. The growth of animal operations in recent years has increased the importance of good animal waste management practices to protect water quality. It is critical that the State balance growth with prudent environmental safeguards. It is the intention of the State to promote a cooperative and coordinated approach to animal waste management among the agencies of the State with a primary emphasis on technical assistance to farmers. To this end, the General Assembly intends to establish a permitting program for animal waste management systems that will protect water quality

> and promote innovative systems and practices while minimizing the regulatory burden. . . .

N.C. Gen. Stat. § 143-215.10A (2001). In regulating the location of swine lagoons, the General Assembly also stated:

> The General Assembly finds that certain limitations on the siting of swine houses and lagoons for swine farms can assist in the development of pork production, which contributes to the economic development of the State, by lessening the interference with the use and enjoyment of adjoining property.

N.C. Gen. Stat. § 106-801 (2001).

It is not the role of the judicial branch of government to pre-empt the legislative branch's policy considerations and appropriate authorization of an activity. Wisely, the citizens of this state have not granted judges wide latitude to dictate public policy. *See, e.g., Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 680, 562 S.E.2d 82, 89 (2002). It is critical for our purposes to remain focused on North Carolina's timeless separation of powers doctrine rather than be distracted by public policy debate embedded in any ephemeral issue of a case. To even weigh the benefits of result here is no different than weighing a political advantage or personal gain prior to making a decision. They must all be rejected.

Plaintiffs do not contend the General Assembly exceeded its authority in violation of our state's constitution. Were that the case, it would be incumbent on us to fully examine the issue as part of our independent governmental function. Under the circumstances here, we decline to prohibit an activity the legislature has legally allowed.

Plaintiffs also demand that defendants pay the complete cost of clean-up and remediation of the named public waters with the funds to be deposited into a court-approved trust. Clearly, a court may award monetary damages to a property owner where a nuisance or trespass has caused damage to the party's property. *Hampton*, 233 N.C. 535, 27 S.E.2d 538; *Biddix*, 76 N.C. App. 30, 331 S.E.2d 717. Here, however, no plaintiff seeks individual recovery. Plaintiffs merely measure damages by the "complete cost of . . . the restoration and remediation" of public waterways.

The state is the sole party able to seek non-individualized, or public, remedies for alleged harm to public waters. Under the public trust doctrine,

> the State holds title to the submerged lands under navigable waters, "but it is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved."

State v. Forehand, 67 N.C. App. 148, 151, 312 S.E.2d 247, 249 (1984) (citation omitted); *see also Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 138 L. Ed. 2d 438, (1997) (stating that "navigable waters uniquely implicate [a state's] sovereign interests"). Only the state, through the Attorney General, is authorized to bring "in a representative capacity for and on behalf of the using and consuming public of this State" actions deemed to be "advisable in the public interest." N.C. Gen. Stat. § 114-2(8)(a) (2001). The state's exclusive authority to regulate its public trust waters thus limits the private rights of riparian landowners bordering such waters, subjecting them "to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers and navigable waters." *Jones v. Turlington*, 243 N.C. 681, 683, 92 S.E.2d 75, 77 (1956) (citation omitted).

Entire, or permanent damages, which are awarded for past, present, *and future* injury, are available only "[w]hen the defendant's right to continue the alleged nuisance or trespass is protected by its power of eminent domain, [so that] the remedy of abatement is not available to the landowner." *Wiseman v. Tomrich Construction Co.*, 250 N.C. 521, 524, 109 S.E.2d 248, 251 (1959). There is no allegation that eminent domain is an issue here. Plaintiffs' general prayer for "[a]ny other relief that the Court deems equitable and proper" does not, by itself, overcome the previously discussed deficiencies.

The trial court, therefore, properly granted defendants' motions to dismiss. There is no plaintiff here who has met the prerequisites of standing.

AFFIRMED.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. SHAWN KRISTOPHER HOLLIMAN

No. COA02-133

(Filed 31 December 2002)

1. **Appeal and Error—preservation of issues—different theory on appeal**

Although defendant contends the trial court erred in a first-degree murder case by denying defendant's motion to suppress his statement provided to police based on lack of probable cause to effectuate his seizure, this assignment of error was waived because defendant impermissibly presented a different theory on appeal than argued at trial.

2. **Homicide—first-degree murder—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder because the jury could infer from the evidence the elements of malice, intent, premeditation, and deliberation when: (1) defendant and the victim were not in agreement about the victim giving birth to a child; (2) the victim was expecting defendant to visit her on the night of her murder; (3) defendant drove with a friend to the victim's apartment complex, defendant walked toward the victim's apartment, and defendant returned to the car with a tear in his eye; and (4) the victim's body was found with two gunshot wounds to the back of her head.

3. **Indictment and Information— amendment—spelling of victim's name**

The trial court did not err in a first-degree murder case by allowing the State to amend the indictment to change the spelling of the name of the victim from "Tamika" to "Tanika," because: (1) the change in the indictment did not substantially alter the charge set forth in the indictment; and (2) the indictment sufficiently served the purpose of placing defendant on notice of the charge in order for him to prepare a defense.

4. **Evidence—hearsay—testifying to substance of same evidence**

The trial court did not err in a first-degree murder case by admitting hearsay evidence that defendant was the father of the victim's unborn child and that the victim was expecting a visit from defendant the night she was killed, because defendant later

testified to the substance of the same evidence without objection, thereby losing the benefit of his earlier objection.

5. Evidence—witness's written statement—incompetent corroborative testimony

Assuming arguendo that the trial court erred in a non-capital first-degree murder case by admitting into evidence a witness's written statement based on the fact that it did not corroborate the witness's trial testimony, the error was not prejudicial because: (1) defendant failed to object to the allegedly incompetent corroborative testimony at trial; and (2) defendant has not shown a reasonable possibility that without the statement the jury would have reached a different verdict given the other evidence including defendant's written confession.

Appeal by defendant from judgment entered 13 July 2001 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 13 November 2002.

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

Parish & Cooke, by James R. Parish, for defendant appellant.

TIMMONS-GOODSON, Judge.

Shawn Kristopher Holliman ("defendant") appeals from his conviction of first-degree murder. For the reasons discussed herein, we find no error by the trial court.

The State's evidence at trial tended to show the following: On 14 December 1999, Natalie Ann Fox ("Fox") returned to her apartment on Sykes Avenue which she shared with her seventeen-year-old daughter, Tanika Fox ("Tanika"). Upon arriving at her apartment, Fox found Tanika lying on the floor and called an emergency response unit. Officers from the Greensboro Police Department and paramedics responded to the call. Tanika was taken to Moses Cone Hospital where she was pronounced dead by Dr. Allen Davidson ("Dr. Davidson"). Tanika had suffered two gunshot wounds to the back of the head. Fox provided the following testimony: that she and Tanika shared the apartment; that she telephoned Tanika three times on the evening of 14 December 1999 and spoke to her by telephone twice; that Fox last placed a telephone call to Tanika at approximately 9:30 p.m. during her break at work,

but Tanika did not answer the phone; and that Tanika was pregnant at the time she was killed.

On 15 December 1999, Detective R.W. Saul ("Detective Saul") learned that defendant was possibly the father of Tanika's unborn child. Detective Saul also learned that the pregnancy caused some problems between Tanika and defendant, because he did not want Tanika to have the baby. Upon learning this information, Detective Saul visited defendant's home to interview him about Tanika's death. Defendant accompanied Detective Saul to the police station for the interview. Defendant informed Detective Saul and later testified at trial that on 14 December 1999, he worked from noon until 9:00 p.m.; returned to his mother's home; visited the home of Ricky Jones ("Jones"); drove to Goldsboro with a friend by the name of "Carlos;" and then returned to his mother's home in Greensboro. "Carlos" did not testify at trial.

On 18 January 2000, the police interviewed Jones, who provided a written statement. According to information tendered by Jones, defendant drove to his house on 14 December 1999; the two men left the house and drove to an apartment where defendant previously resided; and after entering the apartment and remaining for some period of time, defendant and Jones then drove to a parking lot on Sykes Avenue. Jones testified that he remained in the car while defendant walked across a parking lot toward an apartment complex. According to Jones, defendant returned to the car "five minutes later" with a "tear in [his] eye." According to Jones, he learned of Tanika's death on 15 December 1999.

As a result of the interview with Jones, Detective Saul conducted a second interview with defendant on 18 January 2000. Defendant was shown a picture of Tanika and was confronted with the statement given by Jones. Defendant then confessed to killing Tanika and provided a written statement detailing the events. On 21 February 2000, defendant was indicted for the first-degree murder of "Tamika R. Fox." On 9 July 2001, the State moved to amend the indictment to read "Tanika," as the previous indictment misspelled her first name. The trial court granted the motion to amend.

At trial, defendant denied involvement with Tanika's death. Defendant testified that he and Tanika had a sexual relationship; and that when he learned that she was pregnant, he discussed with her the abortion option, but she rejected the idea and was determined to have the baby. Defendant denied visiting Tanika on 14 December

1999. Tameka Harris ("Harris") and Christina Potts ("Potts") testified that on 14 December 1999 each spoke with Tanika over the telephone and she informed them that she was expecting a visit from defendant.

Upon conclusion of the evidence, the jury found defendant guilty of first-degree murder. Defendant was sentenced to a term of life imprisonment. Defendant appeals.

Defendant presents five assignments of error on appeal, arguing that the trial court erred by (1) denying his motion to suppress his statement; (2) denying his motion to dismiss the charge of first-degree murder; (3) allowing the State to amend the indictment before trial; (4) allowing impermissible hearsay testimony; and (5) allowing the admission of Jones' written statement.

[1] In his first assignment of error, defendant argues that the trial court erred by denying his motion to suppress his statement provided to police. Defendant asserts that his statement was inadmissible because his Fourth Amendment right to be free from unreasonable seizures was violated and there was no probable cause for his seizure. For the reasons stated herein, defendant has waived this assignment of error.

Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount' " in the appellate courts. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5-6 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988) (holding that where defendant relied on one theory at trial as basis for written motion to suppress and then asserted another theory on appeal, "no swapping horses" rule applied); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). According to Rule of Appellate Procedure 10(b)(1), in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make. N.C.R. App. P. 10(b)(1) (2002). "The defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal." *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)), *disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991).

In the instant case, the motion to suppress was heard in the trial court and defense counsel stated the following:

> . . . our allegation [is] that Dectective Saul at some point coerced [defendant's] confession. And frankly, Judge Eagles, that's the only legal basis that I can see in this case for suppressing the confession.
>
> . . . .
>
> . . . Of course, the problem is from the standpoint of Miranda. He was Mirandized. And he did sign the Miranda waiver form. So we can't argue that it was an un-Mirandized statement. We're not arguing that. We're arguing that it was coerced.

At trial, defendant argued that the statement should be suppressed, because it was coerced. For the first time on appeal, defendant asserts that the statement should be suppressed for lack of probable cause to effectuate his seizure. Because defendant impermissibly presents a different theory on appeal than argued at trial, this assignment of error was not properly preserved. Therefore, it is waived by defendant.

[2] By his second assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the charge of first-degree murder due to the insufficiency of evidence. In this assignment of error, defendant argues that the State's evidence was only sufficient for a charge of second-degree murder. We disagree.

In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). "A motion to dismiss on the ground of insufficient evidence should be denied if there is substantial evidence of each element of the crime, and that defendant [is] the perpetrator." *State v. Cozart*, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999); *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Evidence is substantial when a jury "could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). "The substantial evidence test requires a determination that 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. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993), *disc. review denied*, 336 N.C. 612, 447 S.E.2d 407 (1994).

"Murder in the first-degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Russell Council Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). " 'Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation.' " *Cozart*, 131 N.C. App. at 199, 505 S.E.2d at 909 (quoting *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994)). " 'Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.' " *Id.*

In defendant's written statement he gave the following information:

> I got off work a little before 9:00. Went home. Talked to my mother. Went to Cameron Avenue. Left. Went to Tanika's house. Asked her why are you putting me through this. How can I provide [for] three kids and I'm barely providing for two. Then I asked [Tanika] why do you want to have a baby by me anyway. And she said to make up for the last one. It seemed to be a way to get at me. So I lashed out and got a cold chill. And the next thing I know I pulled the gun out [and] shot. Then I ran with nothing but the sound of a gun in my mind.

Viewing the evidence in the light most favorable to the State, the jury could properly infer the elements of malice, intent, premeditation and deliberation from the evidence. The evidence tended to show that defendant and Tanika were not in agreement about her giving birth to a child and that Tanika was expecting defendant to visit her on the night of her murder. Further evidence showed that defendant and Jones drove to Tanika's apartment complex, defendant walked toward Tanika's apartment, and returned to the car "with a tear in his eye." Tanika's body was found with two gunshot wounds to the back of her head. We hold that there was substantial evidence from which a jury could find that defendant committed first-degree murder. Therefore, defendant's motion to dismiss was properly denied.

[3] In defendant's next assignment of error, he argues that the trial court erred in allowing the State to amend the indictment. We disagree.

The North Carolina General Statutes provide that an indictment may not be amended. N.C. Gen. Stat. § 15A-923(e) (2001). An amend-

ment to an indictment is " 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *State v. Hughes*, 118 N.C. App. 573, 576, 455 S.E.2d 912, 914 (1995) (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)); *see also State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478 (1978). The change in an indictment is scrutinized because, it is important that the defendant understand the charge in an indictment in order to defend himself against the allegation. *State v. Sisk*, 123 N.C. App. 361, 366, 473 S.E.2d 348, 352 (1996). Generally it is " 'true tha[t] an indictment need only allege the ultimate facts constituting the elements of the criminal offense.' " *State v. Thomas*, 153 N.C. App. 326, 570 S.E.2d 142, 147 (2002) (quoting *State v. Youngs*, 141 N.C. App. 220, 230, 540 S.E.2d 794, 801 (2000)). "The elements need only be alleged to the extent that the indictment (1) identifies the offense; (2) protects against double jeopardy; (3) enables the defendant to prepare for trial; and (4) supports a judgment on conviction." *Thomas*, 153 N.C. App. at 335, 570 S.E.2d at 147.

Defendant appears to rely on *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990), to further his argument against amending his indictment. This reliance is misplaced in that the *Bailey* Court held that where the defendant was neither misled nor surprised as to the nature of the charges, a change to the indictment of a surname is not an amendment within the meaning of N.C. Gen. Stat. § 15A-923(e). *Id.* at 476, 389 S.E.2d at 133; *see also State v. Marshall*, 92 N.C. App. 398, 401, 374 S.E.2d 874, 876 (1988) (holding that where the indictment inadvertently omitted the victim's last name, the defendant was neither misled nor surprised as to the nature of the charges and the change did not constitute an amendment). In *Bailey*, our Court affirmed the trial court's correction of indictments to properly reflect the name of the victim where the first and last name were originally reversed. *Id.*

In the present case, the name of the alleged victim set out on the original indictment was "Tamika." Prior to trial, the State moved to change the name to "Tanika." Defendant is misdirected in arguing that the amendment was fatal, as the change in the indictment did not substantially alter the charge set forth in the indictment. The evidence tended to show that defendant had a sexual relationship with "Tanika" and that Tanika was carrying defendant's unborn child. The evidence further showed that Tanika was murdered on 14 December 1999, and that defendant was being accused of her murder. The indictment sufficiently served the purpose of placing

defendant on notice of the charge in order for him to prepare a defense. We find no error.

[4] In his fourth and fifth assignments of error, defendant argues that the trial court erred by admitting hearsay evidence. At trial, Fox testified that defendant was the father of Tanika's unborn child. Harris and Potts testified that each spoke with Tanika on the night she was killed, and she informed them that she was expecting a visit from defendant. Defendant contends that the testimony from Fox, Harris and Potts was error. We disagree.

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). "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995).

On cross-examination and without objection, defendant gave the following testimony:

. . . .

Q: But in any event, the baby that [Tanika] was pregnant with in December of 1999, it's your understanding that was your child; is that right?

A: Yes. I knew it was a good possibility.

. . . .

Q: Well, you heard the testimony [Tanika] expected you to come over there on Tuesday night, didn't you?

A: Yes, I did.

Q: Two different witnesses?

A: Uh-huh.

Q: Do you know either one of those women?

A: Yes.

Q: Miss Harris?

A: Yes.

Q: Miss Potts?

A: Uh-huh.

. . . .

Q: You don't have any idea how they would have gotten the thought in their head that Tanika thought you were coming over there that night?

A: I have an idea. You know. I told Tanika that I might come over there.

The testimony given by Fox, Harris and Potts at issue here, was admitted over defendant's objection; however, as indicated by the above-noted passage, defendant later testified to the substance of the same evidence without objection. Defendant stated that he knew that Tanika was possibly carrying his child and that he told Tanika he "might" visit her on the night of her death. In so doing, defendant lost the benefit of his earlier objection. Therefore, we find no error.

[5] In his last assignment of error, defendant contends that the trial court erred in admitting into evidence the written statement of Jones. Defendant asserts that Jones' written statement did not corroborate Jones' trial testimony. We first note that defendant failed to object to the allegedly incompetent corroborative testimony at trial. Instead, defendant made a general broadsided objection to the statement.

"The law is well-settled that a witness's prior consistent statement may be admitted into evidence where the statements corroborate the witness's in-court testimony." *State v. Jones*, 110 N.C. App. 169, 173, 429 S.E.2d 597, 599 (1993). However, " '[i]n a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant *must* specifically object to the incompetent portions.' " *Jones*, 110 N.C. App. at 173, 429 S.E.2d at 600 (quoting *State v. Harrison*, 328 N.C. 678, 682, 403 S.E.2d 301, 304 (1991)) (emphasis added). "Where a defendant in a noncapital trial makes only a broadside objection to the allegedly incompetent corroborative testimony, the assignment of error is waived." *Id.*; *See State v. Benson*, 331 N.C. 537, 549, 417 S.E.2d 756, 764 (1992). We nevertheless elect to grant review of the issue. *See* N.C.R. App. P. 2 (2001).

Defendant contends that the most egregious error in admission of Jones' written statement was allowing the last portion of the statement wherein Jones states that ". . . when the next day came, lots of

people [were] calling me asking if [defendant] killed Tanika. The next day is when I moved to . . . is when I knew what happened on Sykes Avenue." Assuming for the benefit of argument that this was error, the error was not prejudicial to defendant. Given the other evidence which includes defendant's written confession, defendant has not shown that a reasonable possibility exists that without the statement the jury would have reached a different result.

For the reasons contained herein, we hold that the trial court did not err.

No error.

Judges BIGGS and BRYANT concur.

SYLVIA FRYE LONG, ADMINISTRATRIX OF THE ESTATE OF ESMAY FRYE STEVENSON, DECEASED, PLAINTIFF v. C. WAYNE JOYNER AND WIFE, CAROL JEAN JOYNER, DEFENDANTS v. CATAWBA VALLEY BANK AND D. STEVE ROBBINS, TRUSTEE, DEFENDANTS

No. COA02-433

(Filed 31 December 2002)

1. Appeal and Error— appealability—interlocutory order—order to pay attorney fees as a sanction

Although an order compelling discovery is generally not immediately appealable based on the fact that it is an appeal from an interlocutory order and an order to pay attorney fees as a sanction does not affect a substantial right, this order is appealable because the underlying legal issues in this case have been resolved by the parties in a settlement agreement and the trial court's order appealed in this case constitutes the only unresolved issue in the case.

2. Discovery— sanction for failure to comply—knowledge of attorney imputed to client

The trial court did not err in an action seeking to set aside a deed of 5 May 1997 that transferred land owned by an eighty-seven-year-old decedent to defendants prior to her death on the grounds of fraud, undue influence, and mental incapacity by

ordering payment of plaintiff's attorney fees in the amount of $1,980.00 as a sanction based on defendants' failure to answer interrogatories presented by plaintiff regarding defendants' expert witnesses even though defendants contend the information was not known by defendants personally and was only known by defendants' counsel, because: (1) knowledge of an attorney hired by a client and doing work on behalf of that client is imputed to the client; and (2) defendants have failed to show an abuse of discretion by the trial court.

3. Discovery— interrogatories—existence of expert opinions

The trial court did not abuse its discretion in an action seeking to set aside a deed of 5 May 1997 that transferred land owned by an eighty-seven-year-old decedent to defendants prior to her death on the grounds of fraud, undue influence, and mental incapacity by sanctioning defendants for their failure to answer plaintiff's interrogatories regarding the existence of expert opinions even though defendants contend the interrogatories exceeded the scope of matter that is discoverable under the expert witness rule of N.C.G.S. § 1A-1, Rule 26(b)(4), because Rule 26(b)(4) limits the amount of information a litigant can obtain through interrogatories concerning the substance of an expert opinion, but does not limit the request for information regarding the opinion's existence.

4. Discovery— interrogatories—expert witnesses—work product doctrine

The trial court did not abuse its discretion in an action seeking to set aside a deed of 5 May 1997 that transferred land owned by an eighty-seven-year-old decedent to defendants prior to her death on the grounds of fraud, undue influence, and mental incapacity by sanctioning defendants for their failure to answer interrogatories regarding their expert witnesses even though defendants contend compelling defendants to answer the interrogatories violated the attorney work product exception under N.C.G.S. § 1A-1, Rule 26(b)(3), because: (1) plaintiffs did not ask defendants for documents or tangible things, but instead inquired whether the experts hired by defendants had produced an opinion in written form; and (2) plaintiff did not ask for the work product of defendants' attorneys nor for the work product of defendants' expert witnesses.

5. Discovery— sanction for failure to comply—reasonableness of attorney fees

The trial court did not abuse its discretion in an action seeking to set aside a deed of 5 May 1997 that transferred land owned by an eighty-seven-year-old decedent to defendants prior to her death on the grounds of fraud, undue influence, and mental incapacity by ordering defendants to pay plaintiff's counsel the sum of $1,980.00 as a sanction for failure to answer interrogatories regarding their expert witnesses, because: (1) the affidavit of plaintiff's attorney revealed that the total amount of attorney fees awarded by the trial court corresponded with the charges incurred by plaintiff for the attorney's work in preparing and presenting the motion for sanctions; and (2) the trial court found the award to be reasonable and facts exist within the record that reasonably support that award.

Appeal by defendants from order entered 7 December 2001 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 13 November 2002.

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

Wyatt Early Harris Wheeler, L.L.P., by William E. Wheeler, for defendant-appellants.

EAGLES, Chief Judge.

C. Wayne and Carol Joyner ("defendants") appeal from an order compelling them to answer interrogatories presented by Sylvia Frye Long ("plaintiff"). The order also required defendants to pay plaintiff's attorney fees in the amount of $1,980.00 as a sanction pursuant to Rule 37 of the North Carolina Rules of Civil Procedure.

The evidence tends to show the following. Plaintiff is serving as administratrix of the Estate of Sylvia Frye Long ("decedent"). Decedent was plaintiff's aunt. Decedent was a widow who owned a parcel of land in Hickory, North Carolina. Defendant Wayne Joyner rented a portion of decedent's land and operated a used-car business on it. Defendants contend that decedent did not have a happy relationship with her family and did not want her family to inherit her land. Defendants state that decedent repeatedly contacted them about transferring her land to them.

According to defendants, they hired an attorney at decedent's prompting to set up the land transfer. The final paperwork and closing documents were signed on 5 May 1997. The land was transferred to defendants in exchange for defendants' promise to pay an annuity of $550 per month to decedent for the rest of her life. Defendants also agreed to pay the gift taxes resulting from the transfer. A gift tax was paid because the value of the land was greater than the value of the annuity paid to decedent. Decedent's annuity was valued at $33,552. Defendants state that the land had a value of $220,000, while plaintiff contends that the land was worth at least $325,000. The attorney who prepared the deed and closing documents repeatedly asked decedent if she wanted another lawyer to represent her exclusively. She refused. He stated that decedent was fully competent despite being eighty-seven years old at the time of the transaction.

After the land transfer, decedent would visit defendants once a month to pick up her annuity check. This process continued until decedent's hospitalization in June 2000. On 6 July 2000, decedent was declared incompetent. Plaintiff was appointed her guardian. Plaintiff filed this action seeking to set aside the deed of 5 May 1997 on the grounds of fraud, undue influence, and mental incapacity. On 16 March 2001, decedent died. Plaintiff became decedent's administratrix.

On 22 February 2001, plaintiff sent her first set of interrogatories to defendants. Interrogatory #4 requested a summary of any expert opinions, while interrogatory #5 asked defendants to identify any written opinions produced by experts. Defendants submitted answers to the interrogatories on 4 April 2001. Defendants responded to interrogatories #4 and 5 with the following sentence: "No decision has been made at this time by the Joyner Defendants as to any expert witnesses."

After the defendants filed their answers to plaintiff's interrogatories, defendants' counsel hired Dr. Paul McGann and Dr. Todd Antin as consultants on the case. On 28 August 2001, defendants' counsel filed a supplemental answer to plaintiff's interrogatories that identified Dr. McGann and Dr. Antin as possible experts for trial. Defendants objected to interrogatory #5, stating that "no such opinions [had] been provided to the Joyner Defendants, and any such opinions which may have been provided to counsel for said Defendants would constitute attorney work product and is otherwise beyond the scope of permitted discovery."

On 7 September 2001, plaintiff sent a second set of interrogatories to defendants, requesting more information about the two doctors' opinions. Interrogatory #8 asked for a listing of the records provided to Dr. McGann or Dr. Antin for review in formulating their expert opinions. Plaintiff's interrogatory #9 asked "whether their [sic] exists a written opinion by Dr. McGann and/or Dr. Antin as to their respective conclusion, whether or not the same was provided to the Joyner Defendants or their attorney." Interrogatory #10 requests the date, location and means of communication of the doctors' opinions, if no written form of the opinions exists. Interrogatory #11 asked defendants to identify journals, texts, studies, or other medical information defendants' experts used to formulate their opinions. Finally, interrogatory #12 asks whether a written opinion exists, regardless of whether it is in defendants' possession.

Defendants again objected to giving the information about their expert witnesses that was requested in these interrogatories. Plaintiff moved to compel defendants to respond to the interrogatories. On 31 October 2001, the trial court ordered defendants to fully respond to plaintiff's interrogatories #9, 10 and 12 within 20 days. Defendants filed an objection and response to this order, stating that the only information defendants had regarding Dr. McGann and Dr. Antin's opinions was relayed to them by their attorney. Defendants contend that this information was protected by the attorney-client privilege. Defendants did not contact Dr. McGann or Dr. Antin personally, instead relying on their attorney to communicate with the doctors. Defendants objected to answering plaintiff's interrogatories because they had no knowledge of the doctors' conversations with their attorney.

Plaintiff filed a motion requesting sanctions against defendants for their refusal to answer the interrogatories. Defendants' attorney filed his answer to the interrogatories. Defendants reiterated that they could not answer the interrogatories personally because only their attorney had the requested information. The trial court imposed sanctions upon defendants for their failure to comply with the discovery order on 31 October 2001. The trial court ordered payment of the plaintiff's attorney fees in the amount of $1,980.00 as defendants' sanction. Subsequently, the parties settled the underlying claim regarding the deed transfer. Defendants appeal the order to pay attorney fees as a sanction.

[1] As a preliminary matter, we note that defendants are appealing an order compelling discovery and a sanction for failure to comply with

that discovery order. "As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment." *Benfield v. Benfield*, 89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988) (citing *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. rev. denied*, 318 N.C. 505, 349 S.E.2d 859 (1986)); *see Cochran v. Cochran*, 93 N.C. App. 574, 378 S.E.2d 580 (1989); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 353 S.E.2d 425 (1987).

Certain sanctions have been deemed immediately appealable because they affect a substantial right under G.S. § 1-277 or § 7A-27(d)(1). *See Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976) (civil or criminal contempt); *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192, *disc. rev. denied*, 309 N.C. 319, 307 S.E.2d 162 (1983) (order striking pleadings); *Transportation, Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977) (denial of request to depose out of state witness). However, an order to pay attorney's fees as a sanction does not affect a substantial right. *See Benfield*, 89 N.C. App. at 419, 366 S.E.2d at 503; *Cochran*, 93 N.C. App. at 577, 378 S.E.2d at 582. "The order granting attorney fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced, or be less than adequately protected by exception to entry of the interlocutory order." *Cochran*, 93 N.C. App. at 577, 378 S.E.2d at 582.

Ordinarily, defendants' appeal from the sanction order would be dismissed as interlocutory. But here, the underlying legal issues in this case have been resolved by the parties in a settlement agreement. The trial court's order appealed in this case constitutes the only unresolved issue in the case and therefore is appealable. Accordingly, we choose to address the merits of defendants' appeal.

[2] Defendants argue that the trial court erred in finding that defendants' responses to interrogatories #9, 10, and 12 failed to comply with the court's discovery order. We disagree.

Defendants contend that the information plaintiff requested regarding the expert witnesses was not known by defendants personally. Defendants argue that only defendants' counsel had the information required to answer plaintiff's interrogatories. This argument has no merit. The knowledge of an attorney hired by a client and doing work on behalf of that client is imputed to the client. *Rogers v. McKenzie*, 81 N.C. 164 (1879). Therefore the knowledge held by

defendants' attorney was imputed to them. Although they did not hire the expert witnesses or interview the doctors, defendants were receiving the benefit of the doctors' consultation with their attorney. The attorney acts as an agent for the client. "In this jurisdiction there is a presumption in favor of an attorney's authority to act for the client he professes to represent." *Greenhill v. Crabtree*, 45 N.C. App. 49, 51, 262 S.E.2d 315, 316, *aff'd per curiam by an equally divided court*, 301 N.C. 520, 271 S.E.2d 908 (1980). This presumption of attorney authority and knowledge by the client arises with regard to the procedural matters in a lawsuit. *See id.* Choosing expert witnesses and obtaining their testimony is a procedural pre-trial exercise typically left to the attorney. In this case, defendants' attorney was presumed to be working on the defendants' behalf when he hired expert witnesses and obtained their opinions for use at trial. Accordingly, the attorney's actions can be imputed to his clients in this instance. The sanction against defendants pursuant to Rule 37 could only be reversed upon a showing of an abuse of discretion by the trial court. *See Graham v. Rogers*, 121 N.C. App. 460, 466 S.E.2d 290 (1996). Defendants have failed to show an abuse of discretion in the trial court's order for them to answer interrogatories regarding their attorney's hiring of expert witnesses. Accordingly, this assignment of error is overruled.

[3] Defendants next contend that the trial court erred by requiring them to answer plaintiff's interrogatories because the interrogatories exceeded the scope of matter that is discoverable under the expert witness rule of the North Carolina Rules of Civil Procedure. G.S. § 1A-1, Rule 26(b)(4) (2001). We disagree.

"It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480, *disc. rev. denied*, 293 N.C. 589, 239 S.E.2d 264 (1977). Therefore, our review of the trial court's application of G.S. § 1A-1, Rule 26(b)(4) is limited to determining whether an abuse of discretion occurred. Here, there was no abuse of discretion by the trial court.

G.S. § 1A-1, Rule 26(b)(4) states, in pertinent part:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the

> facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

G.S. § 1A-1, Rule 26(b)(4) (2001). Plaintiff requested in her first set of interrogatories the identity of defendants' expert witnesses, the subject matter of their testimony, the substance of facts and opinions of the expert, and a summary of the basis for those facts and opinions. Defendants provided this information in a supplemental answer on 27 August 2001. However, defendants did not answer plaintiff's interrogatory #5, which questioned the existence of any written opinions produced by defendants' experts. In plaintiff's second set of interrogatories, interrogatories #9, 10 and 12 similarly asked defendants whether a written opinion by either of their experts existed. Plaintiff inquired, if no written opinion existed, how defendants learned of the opinions of their expert witnesses. Upon defendants' failure and refusal to answer questions about the existence of expert opinions, defendants were sanctioned by the trial court.

The sanctions against defendants for failure to answer interrogatories #9, 10 and 12 were not assigned in violation of Rule 26(b)(4). Rule 26(b)(4) limits the amount of information a litigant can obtain through interrogatories concerning the *substance* of an expert opinion, but does not limit the request for information regarding the opinion's *existence*. When the trial court ordered defendants to answer the interrogatories in question, it did not abuse its discretion. Accordingly, this assignment of error is overruled.

[4] Defendants argue that the trial court's order to compel them to answer interrogatories violated the attorney work product exception to the North Carolina Rules of Civil Procedure. G.S. § 1A-1, Rule 26(b)(3) (2001). We disagree.

Rule 26(b)(3), also called the "work-product rule," forbids the discovery of documents and other tangible things that are "prepared in anticipation of litigation" unless the party has a substantial need for those materials and cannot "without undue hardship . . . obtain the substantial equivalent of the materials by other means." G.S. § 1A-1, Rule 26(b)(3) (2001). Defendants contend that plaintiff's interrogatories #9, 10 and 12 violate this rule. However, plaintiff did not ask defendants for documents or tangible things. Instead, plaintiff inquired whether the experts hired by defendants had produced an opinion in written form. Plaintiff did not ask for the work product of defendants' attorneys, nor for the work product of defendants' expert witnesses. Accordingly, plaintiff's interrogatories did not violate Rule

26(b)(3). The trial court did not abuse its discretion by sanctioning defendants for their failure to answer these interrogatories. This assignment of error is overruled.

[5] Finally, defendants contend that the trial court abused its discretion by ordering defendants to pay plaintiff's counsel the sum of $1,980.00 as a sanction. Defendants argue that plaintiff's counsel did not submit the proper paperwork to the court to support his charged fee. Also defendants argue that the trial court did not make the necessary findings of fact to support its award of fees. We disagree.

The assignment of a sanction by the trial court for a litigant's failure to follow a discovery order can be reversed only upon a showing of an abuse of discretion. *See Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001), *appeal dismissed, disc. rev. denied*, 355 N.C. 348, 563 S.E.2d 562 (2002). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason." *Id.* Rule 37(a)(4) requires that upon a successful motion for an order to compel discovery, the moving party should be paid "reasonable expenses incurred in obtaining the order, including attorney's fees." G.S. § 1A-1, Rule 37(a)(4) (2001). In addition, "to be reasonable, the record must contain findings of fact to support the award of any expenses." *Benfield*, 89 N.C. App. at 422, 366 S.E.2d at 504.

Here, the trial court specifically found that:

> 11. The Plaintiff has incurred attorney fees in the prosecution of her Motion for Sanctions and is entitled to attorney fees. The Plaintiff's counsel has filed an Affidavit as to attorney fees.

The trial court concluded that plaintiff was "entitled to attorney fees . . . in the sum of $1,980.00, which said sums are reasonable and which such fees were caused by the failure of the Joyner Defendants to fully respond [to plaintiff's interrogatories]." The total amount of attorney's fees awarded by the trial court corresponded with the charges incurred by plaintiff for one attorney's work in preparing and presenting the motion for sanctions, according to plaintiff's attorney's affidavit. Therefore, the trial court found the award of attorney's fees to be reasonable and facts exist within the record that reasonably support that award. This assignment of error is overruled. Since the trial court did not commit reversible error in awarding plaintiff attorney's fees, we affirm.

Affirmed.

Judges GREENE and HUDSON concur.

JAMES C. HEWETT PETITIONER v. THE COUNTY OF BRUNSWICK AND THE ZONING BOARD OF ADJUSTMENT OF THE COUNTY OF BRUNSWICK, RESPONDENTS

No. COA02-162

(Filed 31 December 2002)

Zoning— ordinance revision—mining—special exception permit

The trial court did not err by reversing the Board of Adjustment's decision to deny petitioner's request for modification to a 1997 special exception permit to operate a mine in the pertinent county and by remanding the matter back to the Board with directions to grant petitioner a special exception permit, because: (1) petitioner carried his burden of showing compliance with the standards and conditions required by the ordinance when he produced a current Department of Environment, Health, and Natural Resources permit for the activities contemplated and the 1997 ordinance had no other more stringent conditions specified; (2) the ordinance's use of the term "appropriate conditions and safeguards" cannot be used to justify unbridled discretion; and (3) it is apparent that had petitioner requested to amend his original permit prior to the ordinance's revision on 2 October 2000, such would have been approved as respondent county had no grounds to deny the request.

Appeal by respondents from judgment entered 27 September 2001 by Judge James R. Vosburgh in Brunswick County Superior Court. Heard in the Court of Appeals 9 October 2002.

Baxley and Trest, by Roy D. Trest, for petitioner appellee.

Brunswick County Attorney Huey Marshall and Assistant County Attorney J. Mark Seagle, for respondent appellants.

McCULLOUGH, Judge.

This case concerns the status of petitioner James C. Hewett's special exception permit to operate a mine in Brunswick County, North Carolina. The facts leading to this appeal are as follows: On 3 March

1997, Mr. Hewett submitted an application to Brunswick County for a special exception permit to mine sand and other materials on five acres of his land, which was zoned as rural property and was located off State Road 1125 within the Brunswick County limits. The Board unanimously voted to approve Mr. Hewett's application and granted him a special exception permit on 31 March 1997. Along with the special exception permit, the Zoning Administrator sent Mr. Hewett a letter stating that "any changes in the permit makes the special exception void and of no effect." Thereafter, Mr. Hewett applied for and obtained a mining permit from the North Carolina Department of Environment, Health, and Natural Resources, Division of Land Resources, Land Quality Section (DENR). Mr. Hewett's DENR permit was granted on 14 May 1997.

Shortly after he began operating his sand mine, Mr. Hewett discovered marl and began extracting it from the mine. Mr. Hewett purchased a crusher to process the marl in April 2000. He began using the crusher the following month and powered it using a diesel generator. Mr. Hewett contacted DENR and successfully amended his permit to allow such activity. The amended DENR permit (dated 17 July 2000) allowed Mr. Hewett to extract and crush marl, mine up to twenty acres, and dig to a depth of fifty feet.

During July 2000, Mr. Hewett contacted Brunswick Electrical Membership Corporation (Brunswick Electrical) and requested a three-phase electrical hookup for his crusher; he was told he first had to obtain an electrical permit from the Brunswick County Planning Department. Until Mr. Hewett contacted the Brunswick County Planning Department, the Department did not know Mr. Hewett was doing anything other than operating a five-acre sand pit, as stated in his 1997 special exception permit and application.

On 2 October 2000, the Brunswick County Board of Commissioners (the Board) adopted a zoning amendment which designated mining operations in the County as either Class 1 or Class 2 mines. A Class 1 mine was described as

> [a] place where soil or other unconsolidated material (i.e. sand, marl, rock, fossil deposits, peat fill, or topsoil) is removed to be used off-site, *without* further on-site processing (i.e. use of conveyor systems; screening machines; crushing; or other mechanical equipment). It does not involve dewatering or the use of explosives and has an affected land area of no greater than 20 acres.

In rural areas, including the property upon which Mr. Hewett's mine was located, only Class 1 mines were permitted. When Mr. Hewett began extracting marl and processing it (by crushing and dewatering) he was operating a Class 2 mine under the new ordinance. The ordinance in effect from 1997 to 2 October 2000 was silent on this issue.

During October 2000, the Brunswick County Planning Department informed Mr. Hewett that he would not receive an electrical permit until he applied for and was granted a modification to his original 1997 special exception permit. Mr. Hewett filed numerous documents with the Brunswick County Planning Department to obtain the necessary modification, and a hearing on the matter was held before the Board on 9 November 2000. During the hearing, sworn testimony was received from Mr. Hewett, his representative Mr. Harvey Lee Hall, and two neighboring property owners. Mr. Hewett was permitted to make any statements he wished and was also allowed to ask questions of anyone present, including the Board itself. The Zoning Administrator read the findings of fact aloud and the Board members discussed and filled out a Special Exception Permit Board Consideration Worksheet. On 1 December 2000, the Board unanimously denied Mr. Hewett's request and stated the denial would take effect whether Mr. Hewett's request was deemed a request for modification of his 1997 special exception permit or a request for a new special exception permit.

On 14 December 2000, Mr. Hewett filed a petition pursuant to N.C. Gen. Stat. § 153A-45 requesting relief from the Board's denial of his request for a permit. Brunswick County answered and requested a dismissal. The matter was heard on 24 September 2001. The trial court made a number of findings of fact and concluded:

> 1. That the Petitioner's mining operation was in conformity with the Brunswick County Zoning Ordinance as it then existed when he began the operation of the crushing machine which was prior to the amendment to the Brunswick County Ordinance on October 2, 2000;
>
> 2. That the decision of the Board of Adjustment in denying the petitioner's request for a modification to his Special Exception permit is arbitrary, oppressive, and capricious in that it attempts to make a distinction between the lawful operation of the crushing machine pursuant to diesel generated power and power provided through a permanent electrical connection;

> 3. That *reviewing the record as a whole* it appears that the Petitioner has established that [] the denial of his request for a Special Exception was a manifest abuse of authority by the Brunswick County Board of Adjustment[.]

(Emphasis added.) In the decretal portion of the judgment, the trial court reversed the Board's decision, remanded the case to the Board, and instructed the Board that Mr. Hewett was entitled to a special exception permit. Brunswick County and the Board appealed.

On appeal, respondents argue the trial court committed reversible error by (I) drawing up conclusions of law that were contrary to and unsupported by the evidence presented and testimony given at the Board of Adjustment hearing; and (II) ordering that Mr. Hewett be granted a new permit or a modification of his original permit on the ground that the order is contrary to the findings. Upon review, we affirm the decision of the trial court.

In the present case, the Board functioned as a quasi-judicial body when it considered Mr. Hewett's request. *See Refining Co. v. Board of Aldermen*, 284 N.C. 458, 469, 202 S.E.2d 129, 136-37 (1974). The superior court reviews decisions of the Board "by proceedings in the nature of certiorari," N.C. Gen. Stat. § 160A-381(c) (2001), and functions as an appellate court rather than as a trier of fact. *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000). Our Supreme Court has established the following superior court guidelines for reviewing special zoning request decisions:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 272, 533 S.E.2d at 527.

"[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." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994). *See also Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 219, 488 S.E.2d 845, 849, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). The standard of review depends upon the nature of the error of which the petitioner complains. If the petitioner complains that the Board's decision was based on an error of law, the reviewing court conducts a *de novo* review. *C.C. & J. Enter., Inc. v. City of Asheville*, 132 N.C. App. 550, 552, 512 S.E.2d 766, 769 (1999). If the petitioner complains that the Board's decision was not supported by the evidence or was arbitrary and capricious, the reviewing court uses the whole record test. *Id.* "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. *See also Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 347, 543 S.E.2d 169, 174 (2001).

Respondents contend that each of the trial court's three conclusions of law were contrary to and unsupported by the evidence presented by the parties at the Board hearing. They maintain the trial court should have allowed the Board's decision to stand because it was a proper exercise of its power, rather than an arbitrary and capricious act.

For his part, petitioner Hewett does not differentiate between the arguments presented by the County and the Board; rather, he makes an argument which encompasses all aspects of the case. Mr. Hewett first argues no application for modification was required of him because at the time he tried to obtain an electrical permit for his crushing machine, Brunswick County did not differentiate between Class 1 and Class 2 mines. The distinction took effect on 2 October 2000, at which time Mr. Hewett was already a permittee. He contends he did not have to request a modification of his original permit under the Brunswick County zoning ordinance, as the zoning ordinance in effect at the time he received his initial special exception permit issuance (in 1997) allowed him to extract a number of items, including marl.

Mr. Hewett maintains that had he applied to modify his Brunswick County permit prior to 2 October 2000, the Board and Brunswick County would have been obligated to issue a modified permit, as a denial would have constituted an arbitrary and capricious act. Mr. Hewett further argues he passed all mining inspections required by DENR and that, with his DENR-approved permit, he was therefore substantively in compliance with both state and county requirements. He believes the Board improperly voided his original permit. During the 24 September 2001 motion hearing in Brunswick County Superior Court, he contended he should have been "grandfathered in" after the zoning ordinance was changed on 2 October 2000 to include classifications for Class 1 and Class 2 mines. Consequently, on appeal, Mr. Hewett believes the trial court acted properly by reversing the Board's decision and by remanding the matter back to the Board with directions to grant him a special exception permit.

We must first determine the appropriate scope of review the trial court should have employed in reaching its conclusions of law. After the Board denied his request for a modification to the 1997 special exception permit, Mr. Hewett petitioned the Brunswick County Superior Court for review and alleged the following errors:

> A. The Board of Adjustment failed to make proper findings of fact and conclusions of law as required;
>
> B. The Board of Adjustment failed to follow procedure as established by N.C.G.S. § 153A-345;
>
> C. The decision of the Board of Adjustment is not supported by competent, material and substantial evidence;
>
> D. The appropriate due process rights of the petitioner were not protected;
>
> E. The decision of the Board of Adjustment is arbitrary and capricious;
>
> F. Such other regards as will be shown by the record.

Upon examination, we believe the language of the judgment indicates that the trial court applied the "whole record" test in concluding that the Board abused its authority in denying Mr. Hewett the special exception permit. This is the appropriate standard of review when the trial court determines that the Board acted in an arbitrary and capricious manner or abused its authority. *C.C. & J. Enters., Inc.*, 132 N.C. App. at 552, 512 S.E.2d at 769.

Respondents further argue that the trial court erred in concluding "[t]hat reviewing the record as a whole it appears that the Petitioner has established that [] the denial of his request for a Special Exception was a manifest abuse of authority by the Brunswick County Board of Adjustment[.]" We agree with the trial court's conclusion and find that the record shows the Board failed to consider petitioner Hewett's application to modify his permit and instead voided the permit, an act that exceeded its authority. The Board went on to examine Mr. Hewett's application under the new ordinance that became effective on 2 October 2000.

When the Board reviewed Mr. Hewett's application, it stated it was treating Mr. Hewett's application as both a request for modification of his original 1997 permit and as a request for a new permit. The record reveals the Board rejected Mr. Hewett's application as a request for modification because Mr. Hewett had performed activities in violation of the terms of his original permit. The Board concluded that such acts made his original permit void and rendered it impossible to issue a modified permit, as the Board could not modify a voided permit. In reaching this conclusion, the Board relied on its 31 March 1997 letter: "If any of the conditions affixed or any part thereof is held invalid or void, then this permit shall be void and of no effect." The Board then treated Mr. Hewett's application as a request for a new permit, but refused to grant his request because, under the new ordinance, he was operating a Class 2 mine on rural property—a prohibited act under the new ordinance.

In this ruling the Board erred. First, the language relied on by the Board is vague and does not support the interpretation now advanced by respondents. More importantly, however, is the fact that nowhere in the statutes delegating the zoning authority to the counties is any such power delegated. *See* N.C. Gen. Stat. §§ 153A-340 and 153A-345 (2001). Mr. Hewett's failure to abide by the conditions originally set forth in his 1997 application and permit subjected his operation to civil and/or criminal penalties. N.C. Gen. Stat. § 74-64 (2001). While the legislature allows counties to impose "appropriate conditions and safeguards" upon conditional use permits such as the one at issue in this case, N.C. Gen. Stat. § 153A-340(c), both that statute and N.C. Gen. Stat. § 153A-345(c) make clear that any such conditions must be specified in the ordinance.

From the date of the approval of the 1997 permit until 2 October 2000, the Brunswick County ordinance provided:

D. Special Exceptions Permissible by the Zoning Board of Adjustment

After public notice and hearing, and subject to appropriate conditions and safeguards, the Zoning Board of Adjustment may permit:

* * * *

(4) Extraction of sand, marl, rock, fossil deposits, peat, fill or topsoil.

The ordinance did not define any specific "appropriate conditions and safeguards." The only conditions imposed are contained in the Findings of Fact attached to Brunswick County's permit of 31 March 1997. Those conditions were as follows:

4) The applicant is mandated to meet all of the requirements of the North Carolina Department of Environment, Health and Natural Resources, Division of Environmental Management, Division of Land Resources, Division of Erosion and Sedimentation Control, and the U. S. Army Corps of Engineers. The necessary permits must be obtained from the regulating agencies.

At the time of his application to amend his 1997 permit, Mr. Hewett was in full compliance with these conditions. Instead of voiding the original permit, the Board should then have considered Mr. Hewett's application in light of the standards in effect prior to 2 October 2000.

A special use permit is "one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." *Refining Co.*, 284 N.C. at 467, 202 S.E.2d at 135. "[A]n applicant has the initial burden of showing compliance with the standards and conditions required by the ordinance for the issuance of a conditional use permit." *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 217, 261 S.E.2d 882, 887 (1980). However,

[w]hen an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Refining Co., 284 N.C. at 468, 202 S.E.2d at 136. *See also Signorelli v. Town of Highlands*, 93 N.C. App. 704, 707, 379 S.E.2d 55, 57 (1989).

Here, Mr. Hewett carried his burden when he produced a current DENR permit for the activities contemplated and the 1997 ordinance had no other, more stringent conditions specified. Under *Refining Co.*, Mr. Hewett was then entitled to the issuance of a special exception permit. The ordinance's use of the term "appropriate conditions and safeguards" cannot be used to justify unbridled discretion. *See* 8 McQuillin, Mun. Corp. § 25.165 (rev. 3d ed. (2000)) pp. 614-15. It is apparent that had Mr. Hewett requested to amend his original permit prior to the ordinance's revision on 2 October 2000, such would have been approved, as Brunswick County had no grounds to deny the request. In denying the current application, the Board abused its authority, and the trial court properly ordered that the Board issue the permit. In light of this conclusion, it is unnecessary to address respondents' other arguments. Accordingly, the judgment of the trial court is

Affirmed.

Judges TYSON and THOMAS concur.

STATE OF NORTH CAROLINA v. ANDREW BOYD JORDAN, DEFENDANT

No. COA02-49

(Filed 31 December 2002)

Constitutional Law— Establishment Clause—religious institution—police power of state—driving while impaired—driving with revoked license

The trial court did not err by granting defendant's motion to dismiss the charges of driving while impaired and driving with a revoked license on the ground that permitting a Pfeiffer University employee to act as a police officer fostered excessive governmental entanglement with religion and violated the Establishment Clause of the First Amendment to the United States Constitution, because the facts of this case revealed that

the university was a religious institution and therefore N.C.G.S. Chapter 74E is unconstitutional as applied in this case. U.S. Const. amend. I.

Appeal by State of North Carolina from judgment entered 2 August 2001 by Judge Mark Klass in Stanly County Superior Court. Heard in the Court of Appeals 10 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Brian L. Blankenship, for the State.

Stowers & James, P.A., by Paul M. James, III, for defendant-appellee.

HUDSON, Judge.

Appellee Andrew Boyd Jordan ("Jordan") was stopped by campus police at Pfeiffer University and charged with driving while impaired and driving with a revoked license. Jordan filed a motion to dismiss the charges, on the ground that permitting a Pfeiffer University employee to act as a police officer fostered excessive governmental entanglement with religion and violated the Establishment Clause of the United States and North Carolina constitutions. The district court granted the motion to dismiss, a decision that the superior court affirmed on appeal. For the reasons set forth in the following opinion, we affirm.

BACKGROUND

On April 20, 2000, Jordan was driving on the grounds of Pfeiffer University in Misenheimer, North Carolina, when a police officer stopped him. The officer was employed by the Pfeiffer University Police Department, which is an agency certified as a campus police agency pursuant to N.C. Gen. Stat. § 74E. The officer charged Jordan with driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1, and driving while license revoked, in violation of N.C. Gen. Stat. § 20-28.

Jordan filed a motion to dismiss in the district court. Relying on *State v. Pendleton*, 339 N.C. 379, 451 S.E.2d 274 (1994), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995), Jordan claimed that permitting a Pfeiffer University police officer to enforce North Carolina law fostered excessive entanglement with religion and violated the Establishment Clause of the First Amendment to the United States Constitution and Article I, Section 19 of the North Carolina

Constitution. The district court agreed and found that the stop of Jordan was an impermissible delegation of state police power to a religious institution and, therefore, constituted excessive governmental entanglement. The court dismissed the action.

The State appealed to the superior court, which held an evidentiary hearing. Jordan introduced evidence to show, inter alia, that Pfeiffer University is affiliated with the Western North Carolina Annual Conference of the United Methodist Church. Pfeiffer University operates a police department, and all members of the department are commissioned as police officers by the Attorney General of North Carolina pursuant to N.C. Gen. Stat. § 74E. The court also heard testimony from Pfeiffer officials who explained both the school's relationship with the Methodist church and the extent of religious-based requirements for students at Pfeiffer.

After hearing the evidence, the superior court affirmed the district court's findings. The State now appeals to this Court.

ANALYSIS

The State argues that Jordan's rights under the First Amendment to the United States Constitution were not violated when a Pfeiffer University police officer stopped and charged Jordan pursuant to N.C. Gen. Stat. § 74E. Pfeiffer is not a religious institution, the State contends, and, therefore, university officials may wield the State's police power without violating the First Amendment. The State also contends that Article I, Section 19 of the North Carolina Constitution is not implicated here because that provision addresses equal protection and religious discrimination, not excessive entanglement.

N.C. Gen. Stat. § 74E, in pertinent part, reads as follows:

> A public or private educational institution or hospital, a State institution, or a corporation engaged in providing on-site police security personnel services for persons or property may apply to the Attorney General to be certified as a company police agency. A company police agency may apply to the Attorney General to commission an individual designated by the agency to act as a company police officer for the agency.

N.C. Gen. Stat. § 74E-2(b). "Company police officers . . . have the same powers as municipal and county police officers to make arrests . . . and to charge for infractions" within a limited territorial jurisdiction. N.C. Gen. Stat. 74E-6(c). The territorial jurisdiction of

campus police officers includes not only campus property but also "that portion of any public road or highway passing through or immediately adjoining" campus property. N.C. Gen. Stat. § 74E-6(d).

A.

Ordinarily, when a statute is challenged on constitutional grounds, we first evaluate the law under the state constitution before engaging in federal review. *State v. Pendleton*, 339 N.C. 379, 383, 451 S.E.2d 274, 277 (1994). In *Pendleton*, the defendant argued that § 74E violated both the United States and North Carolina constitutions, but the North Carolina Supreme Court only evaluated the statute under federal law. "[W]here a law has been applied in such a manner as to be a manifest violation of the federal constitution as interpreted by the Supreme Court of the United States, state constitutional review may be unnecessary and dilatory." *Id.* Following the lead of our Supreme Court, we turn directly to Jordan's federal constitutional claims.

B.

The United States Supreme Court has articulated the following three-pronged test to determine whether a statute violates the Establishment Clause of the First Amendment:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive governmental entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 755 (1971) (citations and quotation marks omitted). This analysis is known as the *Lemon* test.

Neither of the first two prongs is at issue here. Our analysis of the relevant prong—whether the statute fosters an excessive entanglement with religion—has been eased considerably by our Supreme Court's decision in a similar case, *State v. Pendleton*, 339 N.C. 379, 451 S.E.2d 274 (1994). There, the defendant, an undergraduate student at Campbell University, was arrested for driving while impaired on a public highway near that university's campus in Buies Creek, North Carolina. The arresting police officer was employed by Campbell's campus police force and commissioned pursuant to the predecessor of N.C. Gen. Stat. § 74E. Campbell is closely affiliated with the Baptist State Convention of North Carolina.

The defendant challenged the stop and argued that the statute was unconstitutional because it permitted employees of a religious institution to be commissioned and to function as police officers and thereby authorized a religious institution to exercise the police power of the State. Relying on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L. Ed. 2d 297 (1982), the North Carolina Supreme Court employed a two-part inquiry to determine whether the law was unconstitutional: (1) whether the police power is an important, discretionary governmental power within the Supreme Court's meaning in *Larkin*; and (2) whether the particular uncontroverted evidence in the case before it supported the trial court's conclusion that Campbell University is a religious institution of the type contemplated by the Court in *Larkin*. *Pendleton*, 339 N.C. at 386, 451 S.E.2d at 278. If the Court answered both questions in the affirmative, it was "required to hold that the statute, as applied on the particular facts of this case, is unconstitutional on the ground that it violates the Establishment Clause." *Id.*

In *Larkin* itself, the United States Supreme Court held that the delegation of a state's alcohol licensing power to religious institutions was unconstitutional. Specifically, a Massachusetts statute gave to the governing bodies of churches and schools the power to effectively veto liquor license applications for establishments within a 500-foot radius of the churches and schools. As the Supreme Court explained, "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Larkin*, 459 U.S. at 127, 74 L. Ed. 2d at 307. Thus, a "clear rule" was established that a "state may not delegate an important discretionary governmental power to a religious institution or share such power with a religious institution." *Pendleton*, 339 N.C. at 386, 451 S.E.2d at 278.

Accordingly, the Supreme Court in *Pendleton* first turned to the question of whether the police power is an important discretionary governmental power. *Id.* at 386, 451 S.E.2d at 278. The Court held that it was, on the grounds that the United States Supreme Court had already made that determination. *Id.* at 386, 451 S.E.2d at 278-79 (citing *Foley v. Connelie*, 435 U.S. 291, 297-98, 55 L. Ed. 2d 287, 293-94 (1978), as holding that the "exercise of police authority calls for a very high degree of judgment and discretion" and that police are "clothed with authority to exercise an almost infinite variety of discretionary powers" and are vested with "plenary discretionary powers"). "Under this unmistakable mandate of the Supreme Court of the

United States in *Foley*," the *Pendleton* Court concluded, "we are required to conclude that the police power is an important discretionary governmental power." *Id.* at 386, 451 S.E.2d at 279.

Second, the Court in *Pendleton* was required to determine, based on the specific uncontroverted evidence at hand, whether Campbell University was a "religious institution" within the meaning of that phrase as employed by the United States Supreme Court in *Larkin*. The facts found by the superior court, and relied upon by the Supreme Court, included the following: Each undergraduate student at Campbell is required to take Religion 101, a basic Bible course with special emphasis on the birth and development of the Israelite nation and the life and times of Jesus Christ. Students must take an additional religion course, and all of the elective religion courses offered are centered around the Judeo-Christian religion. Students are required to adhere to a code of ethics, arising out of the university's statement of purpose that states, in pertinent part:

> *The basic principles which guide the development of Christian character and govern Christian behavior are to be found in the Scriptures. Moral law is the gift of God and is fully revealed in the teachings of Jesus Christ.*
>
> *The student, by virtue of his enrollment, agrees to abide by the rules and moral precepts which govern the University community.*
>
> *Because of the University's commitment to the lordship of Christ over every area of life, wholehearted obedience to moral law as set forth in the Old and New Testaments and exemplified in the life of Christ applies to every member of the University community, regardless of position.*

The Dean of Student Life at Campbell administers the code of ethics. The same dean also has complete supervisory power over the chief of the campus police force.

Campbell's mission, as set forth in its university bulletin, is to:

> *Provide students with the option of a Christian world view;*
>
> *Bring the word of God, mind of Christ, and power of the Spirit to bear in developing moral courage, social sensitivity, and ethical responsibility that will inspire a productive and faithful maturation as individuals and as citizens; . . .*

Affirm the University's commitment to the belief that truth is never one-dimensional but in wholeness is revelatory, subjective, and transcendent as well as empirical, objective, and rational, and that all truth finds its unity in the mind of Christ . . . .

Moreover, the Baptist State Convention of North Carolina recommends members of the Campbell Board of Trustees to the Baptist State Convention for election.

After reviewing the facts found by the superior court, the Supreme Court agreed that Campbell, indeed, was a religious institution. "[W]here a trial court has found that an institution's secular purposes and religious mission are 'inextricably intertwined'—as the Superior Court found from uncontroverted and substantial evidence in this case—we have no choice but to treat it as a religious institution for First Amendment purposes." *Id.* at 390, 451 S.E.2d at 281. Because the State neither objected to the trial court's findings nor took exception to them on appeal, the Court in *Pendleton* "presumed [them] to be supported by competent evidence and binding on appeal." *Pendleton*, 339 N.C. at 389, 451 S.E.2d at 280 (citation and quotation marks omitted). The Court also considered itself bound by the trial court's conclusions of law because they were "required as a matter of law by the findings or correct as a matter of law in light of the findings." *Id.* (citation and quotation marks omitted). Thus, the Supreme Court was "compelled" to conclude that the superior court did not err when it found that Campbell University was a religious institution, as defined by the Supreme Court in *Larkin*, and that, as a consequence, N.C. Gen. Stat. § 74E was unconstitutional as applied. *Id.*

C.

Turning to the case at hand, we must determine whether the trial court properly determined that Pfeiffer is a religious institution in accordance with the United States Supreme Court's decision in *Larkin*. If it is, N.C. Gen. Stat. § 74E, as applied to the university, is unconstitutional. *Pendleton*, 339 N.C. at 386, 451 S.E.2d at 278.

Here, the district court found that the stop of Jordan by the Pfeiffer University police officer was unconstitutional because (1) the authority granted to Pfeiffer University by Chapter 74E is an impermissible delegation of the State's police powers to a religious institution and (2) the exercise of those powers creates excessive

governmental entanglement with that religious institution. The superior court then affirmed the district court's order.

Unlike the court in *Pendleton*, however, the superior court did not articulate any findings of fact to support its conclusion that Pfeiffer is a religious institution. Absent a request by a party, the trial court is not required to make findings of fact to support a ruling on a motion to dismiss. *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 723, 556 S.E.2d 592, 594-95 (2001). When the trial court does not make findings of fact, this Court, on appeal, presumes that there were sufficient facts to support the judgment. *Id.*, 556 S.E.2d at 595. If these presumed factual findings are supported by competent evidence, they are conclusive on appeal. *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001).

Here, the State did not request that the superior court make findings of fact. Accordingly, the dispositive issue before us is the sufficiency of the evidence to support a determination that Pfeiffer is a religious institution.

At the hearing on the motion to dismiss in superior court, Pfeiffer's president described Pfeiffer as affiliated and sponsored by the Western Carolina Conference of the United Methodist Church. He also described Pfeiffer's purpose and mission as being a "model church related institution preparing servant leaders for life long learning" and agreed that "Pfeiffer University strives to encourage Christian values within the context of its educational goals."

The university's Board of Trustees, its governing body, must have at least six of its 44 members from the Women's Missionary Society of the Western Carolina Conference of the United Methodist Church. The director of the Council of the Western Carolina Conference of the United Methodist Church is required to be a member of the Board of Trustees. Upon election to the Board, the names of newly elected trustees are submitted to the Western Carolina Conference of the United Methodist Church for approval, although the Conference does not have the power to block the election of a board member.

In addition, Pfeiffer closes its administrative offices every Wednesday morning so that employees may attend chapel services during regular working hours. Undergraduate students may obtain cultural credits toward graduation by attending those same services, although they can earn the required credits in other, secular ways. Students must take at least two courses in religion, Christian educa-

tion, or philosophy, at least one of which must be a course from the religion department. The dean of student development and the university president at Pfeiffer exercise supervisory authority over the Pfeiffer campus police force.

After careful review, we hold that the record reveals sufficient evidence to support the superior court's determination that Pfeiffer is a religious institution. As such, the provisions of N.C. Gen. Stat. § 74E, as applied here, are unconstitutional. We emphasize, however, that our conclusion is narrowly drawn and is based only upon the specific evidence presented here. We do not decide the status of Pfeiffer University for any other purpose or any other case. We merely hold, based on the record before us, that the order of the Superior Court holding Chapter 74E to be unconstitutional as applied in this case was proper.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the superior court.

Affirmed.

Judges TIMMONS-GOODSON and CAMPBELL concur.

TAMI D. GUERRIER, PLAINTIFF v. SCOTT R. GUERRIER, DEFENDANT

No. COA01-1461

(Filed 31 December 2002)

1. **Appeal and Error— appealability—interlocutory order—contempt order—substantial right**

   Although defendant's appeal from a civil contempt order and an enforcement order for sanctions is an appeal from interlocutory orders, the orders affect a substantial right and are therefore immediately appealable.

2. **Divorce— equitable distribution—custodian of children's investment accounts**

   The trial court erred by entering an order removing defendant father as custodian of his children's investment accounts created

pursuant to the Uniform Transfer to Minors Act (UTMA) under the parties' original equitable distribution judgment and by requiring defendant to repay funds removed from those accounts, because: (1) under UTMA, only the clerk of superior court has the original jurisdiction to enter orders relating to the removal of the custodian of accounts created under UTMA, N.C.G.S. § 33A-18(f); and (2) in this case the motions seeking to remove defendant as custodian and to reimburse plaintiff mother for the monies removed from those accounts were filed in district court, which did not have jurisdiction, and were addressed by the trial court.

3. Appeal and Error— appealability—civil contempt enforcement order appeal pending—child support order

The trial court did not err in a civil contempt hearing by entering an enforcement order sanctioning defendant father for his failure to comply with the parties' original child support order even though defendant's appeal of the contempt order was pending, because although the general rule under N.C.G.S. § 1-294 provides that notice of appeal divests the trial court of jurisdiction from proceeding upon the judgment appealed from or upon the matter embraced therein, N.C.G.S. § 50-13.4(f)(9) provides an exception to that rule and states that orders for the payment of child support are enforceable pending appeal including any sanctions entered pursuant to an order of civil contempt.

4. Appeal and Error— preservation of issues—different argument than basis in assignment of error

Although defendant contends his appeal to the Court of Appeals from a contempt order divested the trial court of jurisdiction to enter orders filed on 17 and 21 September 2001, this assignment of error is dismissed because the argument asserted in the brief relies on a different basis from that asserted in the assignment of error.

Judge BIGGS concurring in part and dissenting in part.

Appeal by defendant from orders filed 25 June 2001, 24 July 2001, 17 September 2001, and 21 September 2001 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 10 September 2001.

Tate K. Sterrett, and Kary C. Watson, for plaintiff appellee.

Joe T. Millsaps for defendant appellant.

GREENE, Judge.

Scott R. Guerrier (Defendant) appeals from orders filed: 25 June 2001 finding him in civil contempt for failure to comply with prior orders but delaying enforcement of contempt sanctions (the contempt order); 24 July 2001 enforcing the sanctions imposed by the contempt order (enforcement order); 17 September 2001 declaring Tami D. Guerrier's (Plaintiff) interest in Defendant's G.E. Savings and Security Program account (401(k) account); and 21 September, a Domestic Relations Order regarding the 401(k) account and mandating a Qualified Domestic Relations Order (QDRO) be entered at a subsequent date.

On 5 January 2001, Plaintiff filed a motion for contempt alleging Plaintiff and Defendant had previously been divorced and Defendant had failed and refused to comply with both a previously entered consent equitable distribution and alimony order and a child support order.[1] With respect to violation of the child support order, it was alleged Defendant had failed to pay child support, including a portion of the uninsured medical and dental bills. With respect to violations of equitable distribution, it was alleged Defendant had failed to transfer a portion of his 401(k) account to Plaintiff, failed to pay Plaintiff a portion of income derived from certain assets, and failed to provide Plaintiff with copies of income statements for certain investments held for the children pursuant to the Uniform Transfers to Minors Act (UTMA). Plaintiff requested Defendant be held in contempt of court.

On 26 January 2001, Plaintiff filed a "Motion to Enforce Child Support Order and Equitable Distribution Judgment." This motion alleged Defendant withdrew monies from the funds held pursuant to UTMA,[2] and unlawfully withdrew funds from the 401(k) account. Plaintiff requested Defendant be removed as custodian of the children's UTMA accounts; a judgment be entered against Defendant in the amount of the funds withdrawn from the UTMA accounts and the funds withdrawn from the 401(k) account; possession of and title to the parties primary residence; and entry of a QDRO assigning Plaintiff all of the interest in the 401(k) account.

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1. Neither party appealed from the divorce judgment or original child support or equitable distribution judgment and alimony order.

2. The UTMA accounts were classified as marital property in the equitable distribution judgment. The accounts are owned by the children, not by either party, and thus it would appear they were not properly classified as either spouse's marital property. That, however, is not an issue raised by the parties to this appeal.

On 1 May 2001, the trial court rendered the contempt order holding Defendant in civil contempt for failure to comply with the child support order and equitable distribution judgment. The order and judgment were reduced to writing and filed on 25 June 2001 and required: Defendant to reimburse Plaintiff for past child support and one-half of the children's medical expenses under the child support order; repayment of the funds removed from the children's investment accounts under the equitable distribution judgment; and committed Defendant to the custody of the Mecklenburg County Sheriff until such time as Defendant complied with the contempt order. Commitment, however, was stayed to give Defendant an opportunity to purge himself of contempt by compliance with the order and judgment. On 23 July 2001, Defendant filed notice of appeal from the contempt order.

On 24 July 2001, the trial court entered the enforcement order: concluding Defendant remained in contempt of court for failure to comply with the child support order and equitable distribution judgment; sanctioning Defendant $100.00; entering judgments for the amount of the funds removed from the children's investment accounts; and removing Defendant as custodian of the children's investment accounts. Defendant filed notice of appeal to the enforcement order on 27 July 2001. Following Defendant's notices of appeal to the contempt and enforcement orders, the trial court entered the 17 September 2001 order declaring Plaintiff's interest in Defendant's 401(k) account, and on 21 September 2001, entered a further order dealing with this account. Defendant gave separate notices of appeal to these orders.

The issues are whether: (I) being held in contempt of court affects a substantial right; (II) being removed as custodian of the children's investment accounts affects a substantial right; (III) the trial court had jurisdiction to remove Defendant as custodian of the children's investment accounts created pursuant to UTMA, and require reimbursement of the monies removed from those accounts; and, (IV) the appeal of the contempt order divested the trial court of jurisdiction to enter the enforcement order.

I

[1] The contempt order is interlocutory for two reasons: (1) it did not resolve all the matters before the trial court in this case, i.e., removal of the custodian of the UTMA account; and, (2) it delayed the entry of

the sanction of imprisonment. The appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable. *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976); *see Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000).

Accordingly, Defendant's appeal of the contempt order is properly before this Court and should be addressed.[3]

II

Defendant's appeal from the enforcement order is also interlocutory because the order failed to resolve all the issues before the trial court in this case. This appeal, however, also affects a substantial right and is thus properly before this Court. *See Schout v. Schout*, 140 N.C. App. 722, 726, 538 S.E.2d 213, 216 (2000) (partial summary judgment requiring the custodian of a UTMA account to transfer funds was immediately appealable).

III

[2] Defendant argues the trial court erred in entering an order removing him as custodian of the children's investment accounts created pursuant to UTMA under the original equitable distribution judgment and requiring him to repay funds removed from those accounts. We agree.

Under UTMA, only the clerk of superior court has the original jurisdiction to enter orders relating to the removal of the custodian of accounts created pursuant to UTMA. N.C.G.S. § 33A-18(f) (2001) (renunciation, resignation, death, or removal of custodian; designation of successor custodian); N.C.G.S. § 33A-1(4) (2001) ("court" when used in UTMA means the clerk of superior court). The clerk also has original jurisdiction to order an accounting and determine the personal liability of the custodian. N.C.G.S. § 33A-19 (2001). When an issue of fact is raised before the clerk, the clerk then "shall transfer the proceeding to the appropriate court." N.C.G.S. § 1-301.2(b) (2001).

In this case, the motions seeking to remove Defendant as custodian of the children's investment accounts and reimburse Plaintiff for the monies removed from those accounts were filed in district court and were addressed by the trial court. There is, however, nothing in

3. The only aspect of the contempt order Defendant claims as error relates to the UTMA account.

this record showing these matters were ever before the clerk of superior court. Accordingly, the district court was without jurisdiction to remove Defendant as custodian of the children's UTMA accounts and without jurisdiction to order Defendant to reimburse Plaintiff for the monies removed from these accounts. These portions of the contempt and enforcement orders must therefore be vacated.

IV

[3] Defendant argues the trial court erred in entering the enforcement order sanctioning him for failure to comply with the original child support order because his appeal of the contempt order was pending. We disagree.

The general rule provides that notice of appeal divests the trial court of jurisdiction from proceeding "upon the judgment appealed from, or upon the matter embraced therein." N.C.G.S. § 1-294 (2001). An exception to that rule provides that orders for the payment of child support are enforceable pending appeal, and this includes any sanctions entered pursuant to an order of civil contempt. N.C.G.S. § 50-13.4(f)(9) (2001). The appellate court may enter a writ of supersedeas staying enforcement of contempt sanctions. *Id.; see* N.C.R. App. P. 23.

In this case, Defendant appeals from the entry of a civil contempt order seeking in part to enforce a child support order. The sanction of $100.00 entered by the trial court in the enforcement order, was entered in an effort to effectuate the child support order and thus was well within the jurisdiction of the trial court.[4]

[4] Defendant finally argues his appeal to this Court from the contempt order divested the trial court of jurisdiction to enter the orders filed on 17 September 2001 and 21 September 2001. We need not address this argument because the argument asserted in the brief to this Court relies on a basis different from that asserted in the assignment of errors set forth in the record on appeal. *See State v. Purdie*,

4. To the extent the enforcement order sought to address issues relating to violation of the equitable distribution judgment, i.e., change of custodian on the UTMA account, ordering reimbursement for monies improperly taken from the accounts, the trial court was without jurisdiction. This is so because, unlike child support, child custody, and alimony, there is no statute on equitable distribution stating that orders of the trial court remain enforceable pending appeal. Accordingly, notice of appeal from the contempt order did divest the trial court from entering further orders on these matters. We have, however, vacated these orders in light of another jurisdictional problem. *See* section III of this opinion.

93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989) (when argument in brief does not correspond to assignment of error, the assignment of error should be deemed abandoned); N.C.R. App. P. 28.

Accordingly, we (1) vacate the portions of the contempt and enforcement orders removing Defendant as custodian of the children's investment accounts and requiring him to reimburse Plaintiff for funds removed from those accounts; (2) affirm the portions of the enforcement orders holding Defendant in civil contempt for failure to comply with a child support order and imposing sanctions on Defendant for the non-compliance; and (3) dismiss Defendant's appeal from the 17 September 2001 and 21 September 2001 orders.

Vacated in part, affirmed in part, and dismissed in part.

Judge WYNN concurs.

Judge BIGGS concurs in part and dissents in part.

BIGGS, Judge concurring in part and dissenting in part.

Because I do not agree with the majority that the appeal of "any contempt order" automatically affects a substantial right and is immediately appealable, I respectfully dissent. However, I agree with the majority's determinations regarding the UTMA accounts, and concur with those portions of the majority opinion.

The determination of whether an interlocutory appeal affects a substantial right must be made on a case by case basis. *McCallum v. North Carolina Coop. Extensive Serv. of N.C. State Univ.*, 142 N.C. App. 48, 542 S.E.2d 227 (2001). What constitutes a substantial right is strictly construed, *Flitt v. Flitt*, 149 N.C. App. 475, 561 S.E.2d 511 (2002), and "[t]his Court [North Carolina Supreme Court] . . . [has] adopted the dictionary definition of substantial right: a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999).

Moreover, "it is the appellant's burden to present argument in his brief to this Court to support acceptance of the appeal, as it 'is not the duty of this Court to construct arguments for or find support of appellant's right to appeal from an interlocutory order.' " *Jeffreys v.*

Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). N.C.R. App. P. 28(b)(4) (effective 31 October 2001) requires the appellant's brief to include a "statement of grounds for appellate review[,]" and directs that "[w]hen an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." Defendant's brief fails to acknowledge that his appeal is interlocutory, and presents no argument that a substantial right is affected.

In certain instances immediate appeal may lie from a finding of contempt. *See, e.g., Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999) (order if contempt for failure to disclose documents that are subject to an absolute statutory privilege affects a substantial right and may be immediately appealed), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000). However, this does not mean that every contempt order is immediately appealable. In the present case, the majority does not state what substantial right of appellant's is implicated by this appeal, and I discern no substantial right of defendant's that would be lost by delaying appeal until the trial court entered orders pertaining to the other issues raised in plaintiff's motion, with the exception of those related to the UTMA accounts.

This Court has not previously held that a right of immediate appeal arises from every order of civil contempt, and should not do so in the present case. Rather, we should continue to evaluate all interlocutory appeals on a case-by-case basis.

Accordingly, for the reasons set forth herein, I respectfully dissent in part and concur in part.

KAREN ANN BLANKENSHIP AND MIKE THOMPSON, PLAINTIFFS v. TOWN AND COUNTRY FORD, INC. AND FORD CREDIT LEASING COMPANY, INC., DEFENDANTS

No. COA02-191

(Filed 31 December 2002)

1. Process and Service— place of business—return of service—default judgment

The trial court did not abuse its discretion in an action for failure to disclose damage to a vehicle under N.C.G.S. § 20-71.4, fraud, and unfair and deceptive trade practices by denying

defendant company's N.C.G.S. § 1A-1, Rule 60(b)(4) motion to set aside a default judgment as void for lack of service of process, because: (1) the return of service on the summons and complaint show that it was delivered by a deputy sheriff to defendant at its place of business and that a copy was left with defendant's general manager; and (2) although defendant submitted affidavits from the company's general manager, the receptionist, and the controller denying the receipt of the summons and complaint, the return of service filed with the clerk of court indicated proper service of process.

2. Judgments— default—motion to set aside entry of default

The trial court did not abuse its discretion in an action for failure to disclose damage to a vehicle under N.C.G.S. § 20-71.4, fraud, and unfair and deceptive trade practices by failing to set aside an entry of default, because defendant failed to answer or otherwise respond to the complaint within thirty days after service of summons and complaint as required by N.C.G.S. § 1A-1, Rule 12(a)(1).

3. Arbitration and Mediation— arbitration—motion to set aside default judgment—failure to assert right to arbitration

The trial court did not abuse its discretion in an action for failure to disclose damage to a vehicle under N.C.G.S. § 20-71.4, fraud, and unfair and deceptive trade practices by denying defendant's motion to set aside a default judgment even though defendant contends the trial court lacked jurisdiction based on the fact that the parties were subject to mandatory arbitration with respect to issues raised in plaintiffs' complaint, because defendant failed to assert its right to arbitrate.

4. Judgments— default—motion to set aside default judgment

The trial court did not err in an action for failure to disclose damage to a vehicle under N.C.G.S. § 20-71.4, fraud, and unfair and deceptive trade practices by entering and refusing to vacate a default judgment even though defendant contends that it was void and irregular based on plaintiffs' alleged failure to state a claim and alleged failure to comply with N.C.G.S. § 1-75.11(1), because: (1) plaintiff wife's affidavit, supported by plaintiff husband's affidavit, established the sale of the pertinent vehicle by defendant company who engaged in the business of selling vehicles in North Carolina; and (2) plaintiffs' affidavits demonstrated

grounds for personal jurisdiction over defendant and met the requirements of N.C.G.S. § 1-75.11(1).

5. Damages and Remedies— compensatory damages—treble damages

The trial court's award of compensatory damages for each of the alleged violations of N.C.G.S. § 75-1.1 and N.C.G.S. § 20-71.4 and its treble damages awards under both N.C.G.S. § 75-16 and N.C.G.S. § 20-348(a)(1) are remanded for a determination and findings as to whether defendant company's conduct amounts to unfair and deceptive trade practices under N.C.G.S. § 75-1.1 and a violation of N.C.G.S. § 20-71.4 regarding failure to disclose damage to a vehicle, as well as an intent to defraud under N.C.G.S. § 20-348(a)(1).

Appeal by defendant Town and Country Ford, Inc. from default judgment entered 6 August 2001 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2002.

David Q. Burgess for plaintiffs-appellees.

Parker Poe Adams & Bernstein, L.L.P., by Harvey L. Cosper, Jr., Michael S. Malloy and William L. Esser IV, for defendant-appellant Town and Country Ford, Inc.

WALKER, Judge.

Plaintiffs voluntarily dismissed their claims against Ford Credit Leasing Company, Inc. pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) prior to entry of the default judgment, leaving Town and Country Ford, Inc. as the sole defendant on appeal.

On 1 March 2000, Town and Country Ford, Inc. (defendant) purchased the subject used vehicle at auction. Defendant sold the vehicle to plaintiff Karen Ann Blankenship (Blankenship) for $14,848.50 on 30 April 2000. As part of the sale, defendant issued Blankenship a North Carolina Damage Disclosure Statement indicating that it neither knew nor reasonably should have known of a collision or other occurrence involving the vehicle resulting in damages in excess of 25 percent of its value at the time of any such collision or occurrence. The record also contains an agreement signed by Blankenship to arbitrate certain issues, including alleged unfair trade practices and punitive damages.

Blankenship and her husband, plaintiff Mike Thompson (Thompson) claimed to experience several problems relating to the "structural integrity" of the vehicle and took it to two other dealerships for an assessment of needed repairs. Employees of one dealership were of the opinion that the vehicle had been involved in at least one collision that had caused extensive damage to the front and rear of the vehicle in excess of 25 percent of the vehicle's value.

In his affidavit, Thompson alleged that he contacted defendant by telephone on 17 December 2000 regarding the problems with the vehicle and whether it had been involved in a collision. Further, he alleges that, in response to his telephone calls, defendant's employees referred him to other employees or failed to return his telephone messages. Thompson also alleges that on 21 December 2000, he and Blankenship went to defendant's dealership to inquire about problems with the vehicle; however, their concerns were not addressed at that time.

Plaintiffs filed suit against defendant, alleging failure to disclose damage to the vehicle pursuant to N.C. Gen. Stat. § 20-71.4 (2001), fraud and unfair and deceptive trade practices and claiming punitive damages. Upon plaintiffs' motion, the clerk of superior court ordered an entry of default against defendant for failure to appear, answer or otherwise respond to the complaint within the time allowed by law. Plaintiffs then filed a motion and notice of hearing for default judgment. In support of the motion for default judgment, Blankenship and Thompson submitted affidavits stating that the vehicle was appraised at $4,900 when they attempted to sell it in August 2001 and that the vehicle was worth only $6,200 at the time of purchase, $8,648.50 below the original purchase price.

The trial court entered default judgment against defendant on 6 August 2001, finding it had violated N.C. Gen. Stat. § 75-1.1 (2001) and N.C. Gen. Stat. § 20-71.4. The judgment also ordered defendant to pay $8,648.50 in compensatory damages for each of the statutory violations and then trebled these damages under both N.C. Gen. Stat. § 75-16 (2001) and N.C. Gen. Stat. § 20-348(a)(1) (2001). The total amount of the judgment was $51,891, plus $3,930 in attorney fees.

On 5 September 2001, after receiving a copy of the default judgment, defendant moved to set aside the entry of default and default judgment. After a hearing, the trial court denied defendant's motion, concluding that defendant was properly served with process giving

the trial court jurisdiction, that defendant waived its right to arbitrate by failing to demand it prior to the entry of default and default judgment and that defendant had not shown mistake, inadvertence, surprise, excusable neglect or other extraordinary circumstances to justify setting aside the default judgment under N.C. Gen. Stat. § 1A-1, Rule 60 (2001). Further, defendant had not shown good cause to set aside entry of default under N.C. Gen. Stat. § 1A-1, Rule 55 (2001).

1. Service of Process

[1] Defendant first contends that the trial court erred in denying its motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2001) to set aside the default judgment because it was void for lack of service of process. The granting of a Rule 60(b) motion is within the trial court's sound discretion and is reviewable only for abuse of discretion. *Gentry v. Hill*, 57 N.C. App. 151, 154, 290 S.E.2d 777, 779 (1982). Abuse of discretion is shown only when "the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted). If there is "competent evidence of record on both sides" of the Rule 60(b) motion, it is the duty of the trial court to evaluate such evidence, *Sawyer v. Goodman*, 63 N.C. App. 191, 193, 303 S.E.2d 632, 634, *disc. review denied*, 309 N.C. 823, 310 S.E.2d 352 (1983), and the trial court's findings supported by competent evidence are conclusive on appeal. *Gentry*, 57 N.C. App. at 154, 290 S.E.2d at 779.

Here, the return of service on the summons and complaint shows that it was delivered by a Mecklenburg County deputy sheriff to defendant at its place of business in Charlotte and that a copy was left with its General Manager, David Smith (Smith). Although defendant submitted affidavits from Smith, its receptionist and its controller denying the receipt of the summons and complaint, the trial court found proper service of process on defendant as indicated by the return of service filed with the clerk of court. Because there is competent evidence in the record to support this finding, we hold the trial court did not abuse its discretion in concluding proper service of process was made on defendant. Therefore, the trial court properly denied defendant's Rule 60(b)(4) motion to set aside the default judgment as void for lack of service of process.

2. Entry of Default

[2] Defendant argues that the trial court erred in failing to set aside the entry of default. On 4 June 2001, plaintiffs' attorney filed a motion

for entry of default asserting that defendant had failed to answer or otherwise respond to the complaint within thirty days after service of summons and complaint as required by N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2001).

N.C. Gen. Stat. § 1A-1, Rule 55(a) (2001) provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

"To set aside an entry of default, good cause must be shown." *Silverman v. Tate*, 61 N.C. App. 670, 673, 301 S.E.2d 732, 734 (1983). The trial court's decision whether good cause has been shown is reviewable by this Court only for abuse of discretion. *Id.*

Upon careful examination of the record, we conclude the trial court did not abuse its discretion in denying the motion to set aside entry of default.

3. Arbitration Agreement

[3] Defendant next argues that the trial court erred in denying its motion to set aside the default judgment because the trial court lacked jurisdiction since the parties were subject to mandatory arbitration with respect to issues raised in plaintiffs' complaint. Here, the record contains an agreement signed by Blankenship to arbitrate certain issues, including unfair and deceptive trade practices and punitive damages.

Arbitration pursuant to a valid agreement may be compelled by a court only upon application by a party to the agreement. N.C. Gen. Stat. § 1-567.3 (2001); *see also Adams v. Nelsen*, 313 N.C. 442, 329 S.E.2d 322 (1985) (refusing to compel arbitration where defendants failed to apply to the court to exercise their contractual remedy to arbitrate), *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984) (compelling arbitration upon motion of a party to agreement).

Plaintiffs chose to file suit against defendant rather than seek arbitration pursuant to the agreement. It was incumbent upon defendant to assert its right to arbitrate. Because defendant failed to assert its right to arbitrate, this Court is not compelled to enforce the arbitration agreement. Moreover, we hold that the trial court did not err

in denying the motion to set aside the default judgment based on the existence of an arbitration agreement.

4. Default Judgment

[4] Defendant further contends the trial court erred in entering and refusing to vacate the default judgment because it was void and irregular. Specifically, defendant contends that plaintiffs failed to state a claim and also failed to comply with N.C. Gen. Stat. § 1-75.11(1) (2001).

In cases where a defendant fails to appear within the time allowed by law and personal jurisdiction is claimed over defendant, the court shall, before entering default judgment, require "proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant." N.C. Gen. Stat. § 1-75.11(1).

Here, Blankenship's affidavit, supported by Thompson's affidavit, establishes the sale of this vehicle by defendant, who is engaged in the business of selling vehicles in this State. Thus, plaintiffs' affidavits demonstrate grounds for personal jurisdiction over defendant and meet the requirements of N.C. Gen. Stat. § 1-75.11(1).

5. Damages

[5] Defendant further contends the trial court's award of compensatory damages for each of the alleged violations of N.C. Gen. Stat. § 75-1.1 and N.C. Gen. Stat. § 20-71.4, as well as treble damages awards under both N.C. Gen. Stat. § 75-16 and N.C. Gen. Stat. § 20-348(a)(1) are duplicative and not authorized by law.

In its default judgment, the trial court awarded damages as follows: "1. $25,945.50 for violation of N.C. Gen. Stat. § 75-1.1, consisting of compensatory damages of $8,648.50, which are hereby trebled pursuant to N.C. Gen. Stat. § 75-16; 2. $25,945.50 for violation of N.C. Gen. Stat. § 20-71.4, consisting of compensatory damages of $8,648.50, which are hereby trebled pursuant to N.C. Gen. Stat. § 20-348(a)(1); . . . ."

A plaintiff is entitled to compensatory damages which "are demonstrable and capable of being alleged in a sum certain by a plaintiff." *Hunter v. Spaulding*, 97 N.C. App. 372, 380, 388 S.E.2d 630, 635 (1990). Here, Blankenship's affidavit stated the purchase price of the vehicle as $14,848.50 and established the actual value of the vehicle

at the time of the purchase as $6,200, amounting to a difference of $8,648.50.

To support the trial court's award of treble damages under both statutes, plaintiff cites *Wilson v. Sutton*, 124 N.C. App. 170, 476 S.E.2d 467 (1996), *disc. review denied*, 345 N.C. 354, 483 S.E.2d 192 (1997), for the proposition that trebling damages under N.C. Gen. Stat. § 75-16 and N.C. Gen. Stat. § 20-348(a)(1) has been upheld by this Court as not being duplicative. In *Wilson*, the jury found that:

> (1) the van had been damaged in excess of twenty-five percent of its fair market retail value; (2) the Sutton defendants failed to disclose this fact to plaintiffs in writing, and intended to defraud plaintiffs; and (3) plaintiffs were injured as a proximate result of the Sutton defendants' conduct in the amount of $3,300.00.

Wilson, *supra*, at 173, 476 S.E.2d at 469.

Here, there are no findings by the trial court regarding whether defendant's conduct amounts to an unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1, a failure to disclose damage to the vehicle in violation of N.C. Gen. Stat. § 20-71.4 or an intent to defraud under N.C. Gen. Stat. § 20-348(a)(1). Without these findings, we are unable to determine whether defendant's conduct entitles plaintiff to damages under the applicable statutes.

Therefore, we remand this case to the trial court for a determination and findings as to whether defendant's conduct amounts to an unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1 and a violation of N.C. Gen. Stat. § 20-71.4, as well as an intent to defraud under N.C. Gen. Stat. § 20-348(a)(1). On remand, plaintiffs and defendant may present evidence on issues relating to damages under the applicable statutes. *See Hunter*, *supra* (holding that, in a case alleging unfair and deceptive trade practices and fraud and resulting in default judgment on the fraud claim, the trial court erred by submitting the punitive damages question to the jury without permitting defendant to put on evidence).

Although the record here shows that defendant was properly served and plaintiff followed existing law in obtaining both the entry of default and default judgment without notice to defendant, we urge the legislature to review the applicable statutes to again determine whether in each instance, before obtaining entry of default and before obtaining a default judgment, notice to defendant should be required.

Affirmed in part; reversed in part and remanded.

Judges McCULLOUGH and CAMPBELL concur.

DEBORAH M. LAKEY, EMPLOYEE-PLAINTIFF v. U.S. AIRWAYS, INC., EMPLOYER-DEFENDANT AND INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA (ALEXSIS, SERVICING AGENT), CARRIER-DEFENDANTS

No. COA02-244

(Filed 31 December 2002)

1. **Workers' Compensation— failure to give written notice of injury—actual knowledge**

The Industrial Commission did not err in a workers' compensation case by excusing plaintiff employee from providing written notice of her injury within thirty days as required by N.C.G.S. § 97-22, because: (1) failure of an employee to provide written notice of her injury will not bar the claim where the employer has actual knowledge of the injury; and (2) defendants failed to show how they were prejudiced by any delay in written notification.

2. **Workers' Compensation— approval of treatment—change of physicians**

The Industrial Commission did not abuse its discretion in a workers' compensation case by approving the treatment by and through plaintiff employee's chosen physician because where an injured employee is released to work by her approved physician but is still suffering from the injury, the Court of Appeals has held that the employee's unilateral decision to change physicians was not grounds for finding that the employee unjustifiably sought other treatment.

3. **Workers' Compensation— findings of fact—approval of payment within reasonable time**

The Industrial Commission did not err in a workers' compensation case by allegedly failing to find facts required by N.C.G.S. § 97-25 concerning whether plaintiff sought approval of payment for compensation within a reasonable time, because the trial court made a sufficient determination that plaintiff requested

approval of her physicians and treatment within a reasonable time.

4. Workers' Compensation— new injury—abuse of discretion standard

The Industrial Commission did not abuse its discretion in a workers' compensation case by concluding that plaintiff employee's 17 July 1997 injury was a new injury instead of an aggravation of plaintiff's previous back injury.

Appeal by defendants from judgment entered 17 September 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 October 2002.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Robert H. Stevens, Jr. and John A. Payne, for defendants-appellants.

WALKER, Judge.

On 29 May 1992, plaintiff, a flight attendant for defendant U.S. Airways, suffered a back injury when she was hit by a beverage cart during in-flight turbulence. Plaintiff and defendants entered into a Form 21 agreement which was approved by the North Carolina Industrial Commission (Commission) on 2 October 1992. The agreement noted that plaintiff suffered a "Low Back Sprain," that plaintiff's "average weekly wage . . . at the time of said injury, including overtime and all allowances, was $413.73" and that defendants would pay plaintiff $275.82 beginning 30 May 2001 and continuing for "necessary weeks." Plaintiff returned to work in September 1992, and the parties entered into Form 26 agreements awarding plaintiff benefits for recurrent periods of total disability from 2 November 1992 through 5 December 1995.

On 3 January 1996, plaintiff was released to work 60 hours per month with no restrictions. Between that time and 6 February 1997, plaintiff had some periods where, due to increased back pain, she was taken out of work or confined to light duties. However, on 19 March 1997, Dr. Howard Jones, plaintiff's approved physician, noted "she has been working approximately 55 hours a month and . . . doing very well . . . . She will . . . increase to 65 hours duty in June 1997, and back to full 75 hours in July 1997 . . . . We will provide no permanent restrictions otherwise." By 1 July 1997, plaintiff was released to full-time status and was scheduled to work up to 80 hours per month.

On 17 July 1997, plaintiff's aircraft encountered turbulence, and plaintiff fell against the aircraft's galley wall, injuring her lower back. As a result, she saw Dr. Jones for follow-up treatments. Dr. Jones referred plaintiff to other physicians for various treatments, and although still complaining of pain on 20 January 1998, Dr. Jones released her absent full recovery because he had exhausted his treatments.

On 11 December 1997, plaintiff filed a Form 18 alleging she suffered a new injury arising from the 17 July 1997 incident. In the alternative, she alleged a change in condition. Based on plaintiff's previous wage level, defendants reinstituted disability benefits at $275.82 per week on 15 December 1997.

Beginning 21 May 1998, plaintiff saw her family physician, Dr. Maria Dichoso-Wood, who referred her for chiropractic and psychiatric therapy. According to plaintiff, this treatment proved helpful. Dr. Dichoso-Wood also referred plaintiff to a chronic back pain specialist and a pain specialist. The resulting treatments provided some relief to plaintiff; however, she has continued to experience lower back and leg pain such that she is prevented from earning wages in any employment.

On 30 July 1998, plaintiff filed a Form 33 requesting approval for her continuing medical treatments and for disability benefits. Defendants opposed approval on the ground that they have "provided plaintiff with necessary medical compensation." The matter was heard before the deputy commissioner, who found that plaintiff had suffered a new injury as a result of the incident on 17 July 1997. The deputy commissioner approved plaintiff's medical treatment and disability benefits of $494.53 per week based on an average weekly wage of $741.76. Defendant appealed to the Full Commission, which affirmed the deputy commissioner's award, except for payment of a whirlpool to be installed by plaintiff that was not prescribed as treatment.

Defendants contend the Commission erred (1) in excusing plaintiff from providing notice of her injury within 30 days as required by N.C. Gen. Stat. § 97-22 (2001), (2) in failing to find facts required by N.C. Gen. Stat. § 97-25 (2001) concerning whether plaintiff sought approval of payment for compensation within a reasonable time, (3) in approving the treatment by and through Dr. Dichoso-Wood and (4) in concluding that plaintiff's 17 July 1997 injury was a new injury.

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). We note the Commission has the "exclusive authority to find facts necessary to determine workers' compensation awards," and we will not disturb those findings if supported by any competent evidence. *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992).

[1] First, defendants contend the Commission failed to find facts as required by N.C. Gen. Stat. § 97-22, which provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, . . . unless it can be shown that the employer, his agent, or representative, had knowledge of the accident, . . . but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

This statute requires an injured employee to give notice of her injury to her employer within 30 days in order to obtain compensation for that injury. *Id.*; *Singleton v. Durham Laundry Co.*, 213 N.C. 32, 195 S.E. 34 (1938); *Westbrooks v. Bowes*, 130 N.C. App. 517, 528, 503 S.E.2d 409, 416 (1998). However, an employee may be excused from giving notice where (1) she has a reasonable excuse for not giving notice and (2) the employer is not prejudiced by the delayed notice. *Westbrooks*, 130 N.C. App. at 528, 503 S.E.2d at 416; *see Pierce v. Autoclave Block Corp.*, 27 N.C. App. 276, 278, 218 S.E.2d 510, 511 (1975).

Failure of an employee to provide written notice of her injury will not bar her claim where the employer has actual knowledge of her injury. *Davis v. Taylor-Wilkes Helicopter Serv., Inc.*, 145 N.C. App. 1, 11, 549 S.E.2d 580, 586 (2001); *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13, 18, 262 S.E.2d 347, 350 (1980). Additionally, the burden is on the employer to show that it was prej-

udiced. *Westbrooks*, 130 N.C. App. at 528, 503 S.E.2d at 417. Possible prejudice occurs where the employer is not able to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury and where the employer is unable to sufficiently investigate the incident causing the injury. *Jones v. Lowe's Companies*, 103 N.C. App. 73, 404 S.E.2d 165 (1991).

Here, the Commission found, "even if plaintiff failed to give written notice of her accident within 30 days, defendants had notice of the same and have failed to meet the burden of proof that any such failure to give timely written notice of her July 17, 1997 accident prejudiced defendants." Also, the Commission found that plaintiff's injury occurred on defendant U.S. Airways' aircraft, an incident report was made by defendants following the flight and plaintiff saw defendants' appointed physician concerning the injury twice within the 30 days following the injury.

Furthermore, the Commission found that defendants failed to assert how they were prejudiced by any delay in written notification. Although defendants assert they were prejudiced because they treated plaintiff's injury as an aggravation of a pre-existing injury, rather than a new injury or re-injury, defendants have failed to assert how this distinction resulted in prejudice. We find sufficient competent evidence to support the Commission's finding that defendants had actual knowledge of plaintiff's injury and were not prejudiced by any delay in notification.

[2] Next, regardless of whether plaintiff's requests for approval were made within a reasonable time, defendants contend that the Commission abused its discretion in approving the treatment provided by physicians chosen by plaintiff. Defendants argue that plaintiff provided no basis for arbitrarily changing physicians and that Dr. Jones, plaintiff's approved physician, was still available to plaintiff.

Although an employer that has accepted an employee's injury as compensable generally has the right to direct the medical treatment, this right is not unlimited. *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 626, 540 S.E.2d 785, 789 (2000). However, "an injured employee may select a physician of [her] own choosing to attend, prescribe and assume the care and charge of [her] case" subject to the approval of the Commission. N.C. Gen. Stat. § 97-25. This provision gives an injured employee, even in the absence of emergency, the right to choose her own physician. *See Schofield v. Great Atlantic & Pacific*

Tea Co., 299 N.C. 582, 264 S.E.2d 56 (1980). However, that right is subject to the Commission's approval of that physician. *Id.*; *Lucas v. Thomas Built Buses, Inc.*, 88 N.C. App. 587, 364 S.E.2d 147 (1988).

The Commission has discretion to approve an injured employee's request for approval of a physician. *Kanipe*, 141 N.C. App. at 626, 540 S.E.2d at 789; *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (1996). This Court will disturb the Commission's determination on this issue only upon a finding of manifest abuse of discretion. *Deskins v. Ithaca Industries, Inc.*, 131 N.C. App. 826, 509 S.E.2d 232 (1998); *Franklin*, 123 N.C. App. at 207, 472 S.E.2d at 387.

Here, plaintiff was released by Dr. Jones on 20 January 1998. Although Dr. Jones saw plaintiff again on 5 May 1998 and offered to see her as needed, in his release he stated, "I am at a loss to provide additional information regarding possible diagnostic or therapeutic interventions." Because she continued to suffer from back and leg pain, plaintiff then sought treatment from Dr. Dichoso-Wood and other health care providers beginning 21 May 1998.

Where an injured employee was released to work by her approved physician but was still suffering from her injury, this Court held that the employee's unilateral decision to change physicians was not grounds for finding that she unjustifiably sought other treatment. *Deskins*, 131 N.C. App. at 832, 509 S.E.2d at 236. Here, also, plaintiff was released to work by her approved physician while still suffering from pain. Therefore, we do not find that the Commission abused its discretion in allowing approval of plaintiff's physicians.

[3] Defendants also contend the Commission erred in failing to find facts required by N.C. Gen. Stat. § 97-25. Specifically, defendants argue the Commission did not make findings concerning whether plaintiff requested authorization to procure her own physician within a reasonable time. However, the Commission found:

> The medical treatments provided by Drs. Dichoso-Wood and McLean, as well as by the pain specialists, have been reasonable and have helped give plaintiff some relief from her lower back and left leg pain resulting from her July 17, 1997 accident. *Plaintiff's motion to have these physicians assume her care therefore is reasonable and should be approved.*

(emphasis added). This determination is sufficient to find that plaintiff requested approval of her physicians and treatment within in a reasonable time. *See Schofield*, 299 N.C. at 594, 264 S.E.2d at 64.

[4] Finally, defendants contend the Commission erred in finding that plaintiff's 17 July 1997 injury was a new injury. Defendants argue that the 17 July 1997 injury was only an aggravation of plaintiff's previous back injury. In order to determine the amount of plaintiff's award, the Commission must determine whether plaintiff's injury is compensable as a new injury or whether it is the aggravation of a previous injury.

In reviewing this issue for an abuse of the Commission's discretion, we note that this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. *Timmons v. North Carolina DOT*, 351 N.C. 177, 522 S.E.2d 62 (1999). Rather, we can only determine whether the record contains sufficient evidence to support the Commission's findings. *Id.*

Regarding the occurrence of a new injury, the Commission found:

> 15. By late June 1997, defendant-employer scheduled plaintiff to work full-time as a flight attendant for 81 hours during the month of July 1997, and plaintiff agreed to return to work as a full-time flight attendant and to work the 81 hours as scheduled. By July 1, 1997, plaintiff had in fact returned to work as a full-time flight attendant, working around 80 hours a month, as authorized by Dr. Jones.
>
> 16. On July, 1997, during U.S. Airways Flight No. 3618 while over Solberg, N.J. at about 30,000 feet, the aircraft on which plaintiff was working as a full-time flight attendant encountered turbulence. In his incident report, the pilot referred to this as an "uncommanded roll of 20 to 30 degrees," which caused the aircraft to shutter and buffet. Plaintiff was standing in the galley area at the time, and was thrown off balance and knocked back hard against the galley wall, striking her lower back and legs. She immediately felt pain in her lower back, buttocks, left hip and leg.
>
> 17. The events of July 17, 1997 when the aircraft hit unexpected air turbulence and caused plaintiff to strike her lower back and legs against the aircraft's wall and injure her lower back

and legs constituted an interruption of plaintiff's work routine and an injury by accident arising out of and in the course of her employment.

18. As a result of the accident on July 17, 1997, plaintiff suffered additional injury to her lower back, resulting in severe lower back pain and left leg pain. Due to her ongoing back and leg pain, plaintiff has been unable to continue to work as a flight attendant. She has been unable to earn wages in the same or any other employment since July 18, 1997.

Although some evidence favors defendants, the Commission is the finder of facts and must determine the weight to be given the evidence presented. *Id.* In their depositions, Dr. Jones stated plaintiff's 17 July 1997 incident resulted in an "injur[y]" due to "a direct blow to her back," and Dr. McLean concurred that the 17 July 1997 incident "more likely than not caus[ed] a disabling lower back injury in Mrs. Lakey" and that "the events of July 17, 1997 probably caused a new back injury." Furthermore, plaintiff had been released to work a full-time schedule and was on track to work at least 70 hours per month. Therefore, we find there is sufficient evidence to support the Commission's determination that plaintiff suffered a new injury on 17 July 1997.

Affirmed.

Judges McCULLOUGH and CAMPBELL concur.

MARTIN ARCHITECTURAL PRODUCTS, INC., PLAINTIFF-APPELLEE v. MERIDIAN CONSTRUCTION COMPANY; INCOTECH, INC.; JOHN T. MORE, III, INDIVIDUALLY; AND DUKE UNIVERSITY FEDERAL CREDIT UNION, DEFENDANTS-APPELLANTS

No. COA02-326

(Filed 31 December 2002)

1. Liens— materialman—claim of lien—subrogation—cancellation

The trial court erred by granting summary judgment for plaintiff on its claim seeking judgment on a lien against the pertinent property by way of subrogation of other liens against the property and the case is remanded with instructions to grant summary judgment in favor of defendant federal credit union, because

plaintiff cancelled its claim of lien against the real property and therefore there is no genuine issue of material fact.

2. Liens— materialman—notice of claim of lien on funds— setoff for attorney fees not allowed

The trial court did not err by granting summary judgment to plaintiff materialman on its claim for lien on funds in the amount of $14,895.04 because even assuming there was a breach of contract, defendant could not set off its attorney fees from the amount owed on the contract in order to defeat plaintiff's lien.

Appeal by defendant Duke University Federal Credit Union from judgment entered 31 October 2001 by Judge Narley Cashwell in Durham County Superior Court. Heard in the Court of Appeals 30 October 2002.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for plaintiff-appellee.

Smith Debnam Narron Wyche Story & Myers, L.L.P., by Byron L. Saintsing and Caren D. Enloe, for defendant-appellant Duke Federal Credit Union.

McGEE, Judge.

Meridian Construction Company (Meridian) entered into a contract with Duke University Federal Credit Union (DUFCU) on 18 November 1998 for general contracting services concerning building renovations and improvements to property (construction project) leased by DUFCU, located at 1400 Morreene Road, Durham, North Carolina (the property). Martin Architectural Products, Inc. (plaintiff) entered into a subcontract with Meridian to provide doors, door frames, hinges, locks, finish hardware, toilet accessories and related hardware materials necessary for the construction project.

Meridian assigned its contract with DUFCU for the construction project to Incotech, Inc. (Incotech) on 9 March 1999 and thereafter Incotech served as the substitute general contractor. Plaintiff first provided materials to the construction project on 16 March 1999. DUFCU served Incotech with a notice of termination of contract on 8 September 1999. The notice stated that if Incotech did not cure the listed defaults by 15 September 1999, Incotech would be in default and DUFCU would deduct from the balance owed to Incotech all costs to complete the construction project and any damages associ-

ated with Incotech's breach, including attorney's fees. The project architect for the construction project certified DUFCU's cause to terminate the contract with Incotech on 24 September 1999 as required by paragraph 14.2.2 of the contract's general terms and conditions. DUFCU's president, G. Lee Fogle, stated in an affidavit that a contract balance of $54,752.47 remained due as of 7 July 1999. DUFCU made no further payments on the contract.

Incotech filed suit against DUFCU seeking the remainder of the amount due under the contract. In arbitration, it was determined that Incotech was not entitled to additional payment under the contract because its contractor's license was limited to $250,000.00, and Incotech had already been paid for work in excess of that limit. The arbitrator made no determination as to whether Incotech was actually in breach of the contract.

DUFCU entered into a separate contract with O.C. Mitchell, Jr., Inc. (Mitchell) for completion of the improvements to the property. Plaintiff claimed that it provided materials to Mitchell which were used to complete the construction project, and that the total amount due for labor and materials it provided to the construction project was $14,895.04. DUFCU admitted that plaintiff furnished some materials to Incotech for the construction project.

Plaintiff filed a claim of lien and a notice of claim of lien on funds as to the property on 10 January 2000 and served copies on DUFCU. The amount of lien claimed was $14,895.04. Plaintiff filed a complaint against defendants on 12 May 2000 seeking recovery of $14,895.04 plus interest from defendants for labor and supplies furnished to the construction project. Plaintiff alleged that DUFCU was holding sums owed to it under the contract with Meridian and/or Incotech for services it provided in connection with the construction project. Plaintiff further alleged that it is entitled to be paid, to the extent of its claims, any sums owed under the construction project contract to Meridian or Incotech.[1]

Plaintiff also alleged that Meridian and Incotech have perfected lien rights against the property pursuant to N.C. Gen. Stat. §§ 44A-17 *et. seq.* Plaintiff claimed that it should be entitled to enforce those

1. The ruling of the arbitrator has no bearing on the ability of plaintiff to collect on any amounts owed to Incotech since the arbitrator's ruling was limited to a determination that Incotech was not licensed to collect beyond its $250,000 limit. *See Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970); *Zickgraf Enterprises, Inc. v. Yonce*, 63 N.C. App. 166, 167-68, 303 S.E.2d 852, 853 (1983).

liens against the property and that it is entitled to a judgment directing sale of the property to satisfy debts to plaintiff to the extent of its claims.

DUFCU filed a motion to dismiss, motion to consolidate, and an answer on 19 July 2000. DUFCU sought to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) for lack of personal jurisdiction, under N.C. Gen. Stat. § 1A-1, Rules 12(b)(4) and (5) for insufficient process and insufficient service of process, under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) for failure to join necessary parties. In the alternative, DUFCU requested the trial court consolidate the present case with *Michael S. Williams, dba E & W Electrical Contracting of Durham v. Incotech, et al.*, Durham County No. 00 CVS 00148.

Plaintiff filed a notice of cancellation of lien on 26 October 2000 against the property in Durham County, cancelling its lien against the property it originally filed on 10 January 2000. Plaintiff's claim of lien on funds was still pending.

In an order dated 14 November 2000, the trial court denied DUFCU's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(2), 12(b)(4), and 12(b)(5). DUFCU filed a second answer on 18 December 2000 and a motion for summary judgment on 24 August 2001. Plaintiff filed its motion for summary judgment on 27 September 2001, seeking judgment on all claims, relying on various discovery materials.

Following a hearing on plaintiff's and defendants' motions for summary judgment on 10 October 2001, the trial court granted summary judgment for plaintiff as to its claims against all defendants and denied defendants' motions for summary judgment. The trial court ordered that plaintiff "have and recover of the Defendants, jointly and severally, the sum of $14,895.04, plus interest on that sum at the rate of 12% per annum from August 31, 1999, as well as the costs of this action." DUFCU appeals.

I.

[1] DUFCU first argues the trial court erred in granting summary judgment for plaintiff as to its sixth claim for relief seeking judgment on a lien against the property by way of subrogation of Meridian and/or Incotech's liens against the property. DUFCU argues that

plaintiff cancelled its claim of lien against the real property, and therefore the trial court erred in granting summary judgment for plaintiff as to its sixth claim for relief. We agree.

"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.' " *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001)). The record shows plaintiff did cancel its claim of lien against the property, even though it never dismissed its sixth claim for relief; therefore, there is no genuine issue of material fact and DUFCU is entitled to judgment as a matter of law on this claim. We therefore reverse in part the trial court's grant of summary judgment for plaintiff and remand to the trial court with instructions to enter an order granting summary judgment for DUFCU as to plaintiff's sixth claim for relief.

II.

[2] In its remaining assignments of error DUFCU argues that the trial court erred in denying its motion for summary judgment because there is no genuine issue of material fact and DUFCU is entitled to judgment as a matter of law; in the alternative, DUFCU argues the trial court erred in granting summary judgment to plaintiff because at a minimum there is a genuine issue of material fact as to whether there are any remaining funds to which plaintiff's lien on funds can attach.

It is undisputed that on 10 January 2000, plaintiff filed both a claim of lien and a notice of claim of lien on funds in the amount of $14,895.04. DUFCU received this notice of claim of lien on funds whereupon the lien on funds became effective. N.C. Gen. Stat. § 44A-18(6) (2001) ("A lien upon funds granted under this section is perfected upon the giving of notice in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice."). Upon receipt of such notice, DUFCU was "under a duty to retain any funds subject to the lien or liens under this Article up to the total amount of such liens as to which notice has been received." N.C. Gen. Stat. § 44A-20(a) (2001). It is undisputed that at the time of the receipt of notice of plaintiff's lien on funds, DUFCU still owed an amount exceeding $14,895.04 under the terms of the construction project contract. Therefore, N.C.G.S. § 44A-20 required

DUFCU to retain at least the $14,895.04 claimed by plaintiff upon receipt of notice of the lien.

However, in *Builders Supply v. Bedros*, our Court allowed the amount owed to the subcontractor in that case to be determined in light of setoffs paid by the owner required to finish the construction following a breach by the contractor. 32 N.C. App. 209, 212, 231 S.E.2d 199, 201 (1977). DUFCU claims in the present case that following a breach by Incotech, it was required to spend an additional $25,846.07 in order to bring Incotech's work into conformity with the contract specifications. If this cost was permitted to be setoff against the $54,752.47 contract balance owed Incotech at the time of its termination, $28,906.40 would remain due under the contract. Therefore, having not made any additional payments on the contract, DUFCU should still have retained an amount in excess of the $14,895.04 claimed by plaintiff.

DUFCU also seeks to include in its setoff costs, the attorney's fees it claims resulted from the termination of the Incotech contract. DUFCU claims it incurred $46,046.37 in attorney's fees and costs as a result of the alleged breach by Incotech. DUFCU asserts that these expenses were the result of approximately 340 hours of work by attorneys, as well as other costs of litigation necessitated by multiple lawsuits and arbitration filed by Incotech and its subcontractors against DUFCU following the alleged breach by Incotech. If these attorney's fees and costs were included in any setoff amount, there would be no money owed on the Incotech contract, and therefore, no funds to which plaintiff's lien could attach.

As correctly stated by DUFCU, the general rule in North Carolina is that a party may not recover its attorney's fees unless authorized by statute. *Bailey v. State*, 348 N.C. 130, 159, 500 S.E.2d 54, 71 (1998) (citing *Horner v. Chamber of Commerce*, 236 N.C. 96, 97, 72 S.E.2d 21, 22 (1952)); *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980); *Harborgate Prop. Owners Ass'n, Inc. v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 297-98, 551 S.E.2d 207, 212 (2001), *disc. review denied*, 356 N.C. 301, 570 S.E.2d 506 (2002). DUFCU has not cited any such statute, and a review of the North Carolina General Statutes shows no statute that specifically allows for recovery of attorney's fees due to the alleged breach of a construction contract by a contractor. *Hicks v. Clegg's Termite & Pest Control, Inc.*, 132 N.C. App. 383, 384-86, 512 S.E.2d 85, 86-87, *disc. review denied*, 350 N.C. 831, 538 S.E.2d 196

(1999) (noting that the General Assembly could have included breach of contract claims in the General Statutes' exceptions but chose not to do so, thus refusing to read such a claim into the language of N.C. Gen. Stat. § 6-21.1); *see also Winston-Salem Wrecker Ass'n v. Barker*, 148 N.C. App. 114, 121, 557 S.E.2d 614, 619 (2001) ("Because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, N.C.G.S. § 6-21.5 must be strictly construed.") (citing *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991)). Furthermore, recovery of attorney's fees, even when authorized by statute is within the trial court's discretion and will only be reviewed for an abuse of that discretion. *Phillips v. Warren*, 152 N.C. App. 619, 629, 568 S.E.2d 230, 236-37 (2002) (citing *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 226, 319 S.E.2d 650, 655, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984)); *Jones v. Wainwright*, 149 N.C. App. 869, 872, 561 S.E.2d 594, 596 (2002).

In contrast, the

> purpose of the materialman's lien statute is to protect the interest of the supplier in materials it supplies; the materialman, rather than the mortgagee, should have the benefit of materials that go into property and give it value. To implement this purpose, courts should construe the statute so as to further the legislature's intent.

Carolina Builders Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 239, 324 S.E.2d 626, 629, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985); *see also Southeastern Steel Erectors v. Inco, Inc.*, 108 N.C. App. 429, 432, 424 S.E.2d 433, 463 (1993) ("[T]he primary purpose of a lien statute is 'to protect laborers and materialmen who expend their labor and materials upon the buildings of others.' ") (citations omitted); *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 492, 411 S.E.2d 916, 920 (1992) ("The purpose of this lien statute is to protect the interest of the contractor, laborer or materialman."). Considering the strong public policy in favor of protecting laborers and materialmen who supply labor and materials to building projects, as evidenced in the materialman's lien statutes, compared with the prohibition against awarding attorney's fees in the absence of a statutory provision, we hold that, assuming there was a breach of contract by Incotech, DUFCU could not setoff its attorney's fees from the amount owed on the contract and thereby defeat plaintiff's lien. To allow such an action would serve to frustrate the purposes of the lien laws in North Carolina.

In summary, we reverse the trial court's grant of summary judgment for plaintiff on its sixth claim for relief and remand with instructions to grant summary judgment to DUFCU as to that claim. We affirm the trial court's grant of summary judgment for plaintiff on its fifth claim for relief.

Reversed and remanded in part; affirmed in part.

Judges HUDSON and THOMAS concur.

STATE OF NORTH CAROLINA v. TERESA LYNN SHOOK

No. COA01-1582

(Filed 31 December 2002)

1. Drugs— trafficking in cocaine—weight—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in cocaine even though defendant contends there was insufficient evidence of the weight element, because: (1) the State offered evidence of the actual measured weight of the substances as well as the testimony of a detective to assist the jury in determining which item tested corresponded with each item seized from defendant; and (2) a reasonable jury in considering this evidence would find that defendant possessed and transported 28 grams or more of cocaine.

2. Drugs— attempted trafficking in cocaine—weight—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted trafficking in cocaine even though defendant contends there was insufficient evidence of the weight element, because: (1) defendant accepted an undercover detective's order for one ounce of cocaine and then possessed, transported, sold, and delivered cocaine to fill this order; (2) the sole reason that defendant did not deliver the requisite amount was that defendant shorted the detective and procured less than the one ounce purchased; and (3) the evidence provided by a detective and the laboratory report are sufficient for a rea-

sonable jury to conclude that the cocaine procured was 27.1 grams, less than the 28 grams required for a completed trafficking offense.

3. Drugs— jury instructions—no plain error

The trial court did not commit plain error in a trafficking in cocaine, attempted trafficking in cocaine, and possession with intent to manufacture, sell and deliver marijuana case by its jury instructions, because there is no support for the conclusion that the jury would probably have reached a different verdict had the instructions been given differently.

Appeal by defendant from judgment entered 20 April 2000 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 19 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Osborn & Tyndall, P.L.L.C., by Amos Granger Tyndall, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted by the Forsyth County Grand Jury on 2 August 1999 for six counts of trafficking in cocaine and one count of possession with intent to manufacture, sell and deliver marijuana. Defendant was tried by a jury at the 17 April 2000 session of the Forsyth County Superior Court, Judge William H. Freeman ("Judge Freeman") presiding. On 20 April 2000, the jury returned verdicts finding the defendant guilty of two counts of trafficking in cocaine, four counts of attempting to traffic in cocaine and one count of possession with intent to manufacture, sell or deliver marijuana. Judge Freeman sentenced the defendant to 48 to 58 months in prison. Defendant appeals.

On 4 May 1999 Brian Barr ("Barr"), a police informant, arranged a drug deal between defendant and Detectives Travis Shelton ("Detective Shelton") and P.K. Hamby ("Detective Hamby"), undercover officers with the Vice and Narcotics Division of the Forsyth County Sheriff's Department. Barr contacted defendant, picked her up, and drove her to meet Detective Hamby at a local McDonald's restaurant. Defendant offered to obtain a small amount of cocaine from her supplier for demonstration purposes. Defendant then drove

Barr's car to the North Hills Townhouses while Barr and Detective Hamby drove to the Cue 'N Spirits to meet defendant. Defendant met Detective Hamby at the Cue 'N Spirits and offered to sell one ounce[1] of cocaine for $1,000.00. Detective Hamby gave defendant $1,000.00, and defendant returned to the townhouses and then back to Detective Hamby purportedly with one ounce of cocaine.

Defendant then informed Detective Hamby that her supplier had four more ounces of cocaine for sale as well as some marijuana. Detective Hamby gave defendant an additional $1,000.00 and asked her to bring back as much cocaine as was for sale, noting that he would pay the remaining money upon delivery. Defendant returned to the townhouses and then returned to the Cue 'N Spirits with the drugs for sale, accompanied by Juan Flores ("Flores"). Defendant arranged to meet Detective Hamby at the McDonald's to complete the transaction.

As defendant began to drive to the McDonald's, Lieutenant Marc Fetter ("Lieutenant Fetter") stopped the car. Detective Shelton also arrived to assist in the search. During the search the police found two plastic baggies of cocaine on the front seat, approximately one ounce of cocaine and drug paraphernalia in defendant's purse, and a large black trash bag of marijuana on the back seat. Detective Shelton gathered the evidence and weighed it using portable scales. The evidence was then sent to the toxicology laboratory at Reynolds Health Center for analysis.

Defendant asserts the trial court erred by denying defendant's motion to dismiss the charges of trafficking in cocaine and attempting to traffic in cocaine due to insufficient evidence and by failing to clearly instruct the jury.

I. Motion to Dismiss for Insufficient Evidence

The question for this Court is "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is 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

1. The Court takes judicial notice that an ounce is equal to 28.350 grams. The American Heritage College Dictionary 844 (3d ed. 1997).

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).

"Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony . . . known as 'trafficking in cocaine.' " N.C. Gen. Stat. § 90-95(h)(3) (2001). "Sale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under N.C.G.S. § 90-95(h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished." *State v. Garcia*, 111 N.C. App. 636, 641, 433 S.E.2d 187, 190 (1993).

[1] Defendant asserts the State failed to provide sufficient evidence of the weight element for the offenses of trafficking in cocaine and attempted trafficking in cocaine. To meet its burden, the State "must either offer evidence of its actual, measured weight or demonstrate that the quantity of [the controlled substance] itself is so large as to permit a reasonable inference that its weight satisfied this element." *State v. Mitchell*, 336 N.C. 22, 28, 442 S.E.2d 24, 27 (1994). However, "[t]here is nothing in the statute which requires the 28 grams to be in one container." *State v. King*, 99 N.C. App. 283, 290, 393 S.E.2d 152, 156 (1990).

Regarding the charges of trafficking in cocaine, the burden is on the State to prove the defendant possessed and transported 28 grams or more of cocaine. The State offered evidence of the actual, measured weight of the substances as well as the testimony of Detective Shelton to assist the jury in determining which item tested corresponded with each item seized from defendant. The laboratory report noted the controlled substances found as follows:

Item #1: Cocaine (acid form) in two (2) bags, weighing a total of 54.1 grams.

Item #2: Marijuana in five (5) bags, weighing a total of 2,218.2 grams (4.8 pounds).

Item #3: Cocaine (acid form), weighing 27.1 grams.

Item #5: a. Cocaine (acid form), weighing 27.1 grams.

b. Cocaine (acid form), weighing 0.7 grams.

c. Cocaine (base form), commonly known as crack cocaine, weighing 0.1 grams.

Detective Shelton testified that he found two plastic baggies of a white powder on the front seat of the car, which he weighed at the scene and placed in a brown evidence bag. He measured the total weight as approximately 57 grams. Detective Shelton then testified he found a large black trash bag in the back seat containing five freezer bags of marijuana. Detective Shelton next testified he received the original nearly 28 grams of cocaine from Detective Hamby. Finally Detective Shelton testified he searched defendant's purse and found two plastic baggies containing cocaine and a matchbox containing crack. Defendant asserts that because the lab report does not denote specifically where each substance was seized from defendant there is insufficient evidence of the quantity of the substance for each charge.

Taking the evidence in the light most favorable to the State, the State has proven that the first two baggies of cocaine Detective Shelton found on the front seat of the car are Item #1, the marijuana found on the back seat is Item #2, the approximately one ounce from the sale to Detective Hamby is Item #3, and the baggies of cocaine and matchbox of crack from defendant's purse are Items #5a-c. A reasonable jury in considering this evidence could find that defendant possessed and transported 28 grams or more of cocaine and therefore is guilty of one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation. Therefore the trial court did not err in denying defendant's motion to dismiss.

[2] Defendant next asserts that the trial court erred in failing to grant defendant's motion to dismiss for insufficient evidence to support the four charges of attempted trafficking in cocaine. "[A]ny person who attempts or conspires to commit any offense defined in this Article is guilty of an offense that is the same class as the offense which was the object of the attempt." N.C. Gen. Stat. § 90-98 (2001). There must be substantial evidence that the defendant intended to traffic in cocaine and performed an overt act, beyond mere preparation, towards committing the crime. *State v. Gray*, 58 N.C. App. 102, 106, 293 S.E.2d 274, 277 (1982).

Defendant again asserts the State failed to provide sufficient evidence of the weight element of the charge. The four convictions are based upon defendant's procurement of the original one ounce of cocaine which defendant sold to Detective Hamby for $1,000.00. Taking the evidence in the light most favorable to the State, defendant accepted Detective Hamby's order for one ounce of cocaine, and then possessed, transported, sold and delivered cocaine to fill this

order. The sole reason that defendant did not deliver the requisite amount was that the defendant shorted Detective Hamby and procured less than the one ounce (28.350 grams) purchased. As with the charges for trafficking in cocaine, the evidence provided by Detective Shelton and the laboratory report are sufficient for a reasonable jury to conclude that the cocaine from the first transaction is listed as Item #3, and the amount of cocaine procured was 27.1 grams, less than the 28 grams required for a completed trafficking offense. Moreover, the evidence regarding the order and sale of purportedly one ounce (28.350 grams) of cocaine to Detective Hamby supports a reasonable jury finding that defendant was attempting to possess, transport, deliver, and sell at least 28 grams of cocaine.

Finally, defendant asserts that since the amount of cocaine was not proven to be at least 28 grams, and therefore it was impossible for defendant to have committed the trafficking offense, defendant could not have attempted to commit that offense. Defendant is incorrect. Had defendant procured the agreed upon quantity, then defendant would have completed the crime of trafficking. The sole reason defendant did not traffic in cocaine is that the quantity was less than the agreed upon one ounce. This Court has recently held that where a defendant attempts to possess, transport, sell or deliver a quantity of drugs sufficient for a trafficking offense but fails to do so because the drugs did not weigh the requisite amount and therefore the defendant did not have constructive possession of the necessary quantity, an appropriate charge is attempted trafficking of the controlled substance. *State v. Clark*, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000). Therefore attempted trafficking is the appropriate charge for this defendant who did not have possession of the requisite amount, but clearly intended and attempted to traffic cocaine.

II. Error in Jury Instructions

[3] Defendant asserts the trial court erred in its jury instructions. "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto . . . stating distinctly that to which he objects and the grounds of his objection." N.C. R. App. P 10(b)(2) (2001). Judge Freeman specifically asked the attoryneys, "Do you have any objections? Do either one of you want to put any objections on the record?" Defendant's attorney replied "No sir." In a criminal case, however, "a question not preserved by objection noted at trial . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to be plain error." N.C. R. App. P. 10(c)(4) (2001).

Though not properly asserted in the assignments of error, defendant, in her brief, contends the errors asserted constitute plain error.

Plain error is error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987). *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). "It is indeed the rare case when a criminal conviction will be reversed on the basis of an improper instruction where the defendant made no objection." *State v. Gainey*, 355 N.C. 73, 106-07, 558 S.E.2d 463, 484, *cert. denied*,—— U.S. ——, 123 S. Ct. 182, —— L. Ed. 2d —— (2002). "In order to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict." *State v. Hamilton*, 150 N.C. App. 558, 565, 563 S.E.2d 292, 296 (2002). This Court has reviewed defendant's assertions of error and finds there is no support for the conclusion that the jury would probably have reached a different verdict had the instructions been given differently, therefore we overrule these assignments of error.

No error.

Judges TIMMONS-GOODSON and HUDSON concur.

STEVEN M. FISHER, GUARDIAN AD LITEM FOR RHONDA CHILDS, A MINOR, PLAINTIFF v. THE HOUSING AUTHORITY OF THE CITY OF KINSTON, NORTH CAROLINA, DEFENDANT

No. COA01-1560

(Filed 31 December 2002)

Immunity— sovereign—housing authority—operation of low-income housing—proprietary function

The trial court erred in a breach of implied warranty of habitability, breach of express warranty, negligence, and unfair and deceptive trade practices case by granting summary judgment in favor of defendant housing authority on the basis of sovereign immunity because the operation of low-income housing is a pro-

prietary function rather than governmental, and thus, defendant cannot assert sovereign immunity as a defense.

Appeal by plaintiff from judgment entered 27 June 2001 by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 12 September 2002.

Donaldson & Black, P.A., by Phyllis Lile-King, for plaintiff-appellant.

White & Allen, P.A., by Matthew S. Sullivan and Thomas J. White, III, for defendant-appellee.

HUDSON, Judge.

Plaintiff Rhonda Childs ("Plaintiff"), a minor, brought suit through her guardian ad litem against the Housing Authority of the City of Kinston ("Housing Authority") in 2000. Plaintiff alleged that she has sustained injuries from exposure to lead paint, due to the Housing Authority's failure to properly maintain an apartment building that it owned. The Housing Authority moved for summary judgment on the basis of sovereign immunity. The trial court granted the motion. For the reasons set forth below, we reverse the judgment of the trial court.

Plaintiff is eleven years old. From either 1996 or 1997—the year is disputed—until 2000, Plaintiff lived with her mother in an apartment at 3 Mitchell Wooten Court in Kinston, North Carolina, property that is owned and maintained by the Housing Authority. Plaintiff alleges that during that period, she was exposed to peeling and chipping lead paint because the Housing Authority failed to properly maintain and repair the apartment. Plaintiff alleges that she now suffers from permanent brain damage due to the lead exposure.

Plaintiff filed this suit in November 2000, alleging that the Housing Authority violated the North Carolina Residential Rental Agreements Act, N.C. Gen. Stat. § 42-38 et seq.; that it breached the implied warranty of habitability; that it breached an express warranty; that it was negligent; and that it engaged in unfair and deceptive practices in contravention of N.C. Gen. Stat. § 75-1.1. Plaintiff sought actual, treble, and punitive damages. The Housing Authority moved for summary judgment in April 2001, arguing that sovereign immunity precluded Plaintiff from maintaining this action. The trial court granted the motion on June 27, 2001. Plaintiff now appeals.

Plaintiff argues that the trial court erroneously granted summary judgment in favor of the Housing Authority. She contends that operating low-income housing is a proprietary, not governmental, function and, therefore, that the Housing Authority cannot assert sovereign immunity as a defense in this action. We agree.

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2001). The burden to demonstrate the absence of a triable issue lies with the moving party, who must show either (1) that an essential element of the opposing party's claim is nonexistent or (2) that the opposing party cannot produce evidence sufficient to support an essential element of the claim or to overcome an affirmative defense that would bar its claim. *Pierson v. Cumberland County Civic Ctr. Comm'n*, 141 N.C. App. 628, 630, 540 S.E.2d 810, 812 (2000). The trial court must consider the evidence in the light most favorable to the nonmoving party and draw all inferences from the evidence against the moving party and in favor of the nonmovant. *Id.* at 631, 540 S.E.2d at 812.

In general, the doctrine of sovereign immunity shields municipalities from liability for torts committed by its agencies and organizations unless immunity has been waived by the General Assembly or otherwise. *Wood v. North Carolina State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002); *Herring ex rel. Marshall v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 685, 529 S.E.2d 458, 462, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). Application of the doctrine depends in part upon whether the activity out of which the tort arises is properly characterized as governmental or proprietary in nature. *Pierson*, 141 N.C. App. at 631, 540 S.E.2d at 813. The doctrine applies when the entity is being sued for the performance of a governmental function, but it does not apply when the entity is performing a proprietary function. *Herring*, 137 N.C. App. at 683, 529 S.E.2d at 461; *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).

As our Supreme Court has explained, governmental functions are those that are "discretionary, political, legislative, or public in nature and performed for the public good [on] behalf of the State." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). In

contrast, proprietary activities are those that are "commercial or chiefly for the private advantage of the compact community." *Id.* The test for distinguishing between the two is as follows: "If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing. . . ." *Id.* at 451, 73 S.E.2d at 293; see also *Herring*, 137 N.C. App. at 683, 529 S.E.2d at 461.

In applying this test, our courts have analyzed whether the act or function involves special corporate benefit or pecuniary profit that inures to the municipality. *Hickman v. Fuqua*, 108 N.C. App. 80, 83-84, 422 S.E.2d 449, 451 (1992), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993); see also *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 22, 213 S.E.2d 297, 302 (1975) (noting that an "analysis of the various activities that this Court has held to be proprietary in nature reveals that they involved *a monetary charge* of some type"). It is not necessary, however, that the public body actually make a profit. *Sides*, 287 N.C. at 23, 213 S.E.2d at 303; *Pierson*, 141 N.C. App. at 632, 540 S.E.2d at 813. The main issue remains, under the test set forth in *Britt*, whether an "undertaking is one traditionally provided by the local governmental units." *Hickman*, 108 N.C. App. at 84, 422 S.E.2d at 452 (citation and quotation marks omitted).

Using these tests, we conclude here that the Housing Authority's activities in owning, operating, and maintaining the low-income housing occupied by Plaintiff is a proprietary function. Managing low-income housing is not an enterprise in which only governmental entities can engage. Any individual or corporation can—and, in fact, often does—own and operate low-income housing. Providing rental housing does not traditionally fall within the government's purview.

In addition, the Housing Authority in most cases collects rents from its tenants. Although the Housing Authority may not make a profit, our cases require only that a "*monetary charge* of some type" be involved. *Sides*, 287 N.C. at 22, 213 S.E.2d at 302.

Two prior decisions further compel our conclusion that operating low-income housing is a proprietary function. In *Carter v. City of Greensboro*, 249 N.C. 328, 106 S.E.2d 564 (1959), the City of Greensboro entered into a contract with the federal government that required the city to manage and maintain public housing units. The plaintiff, who lived in one of the units, sued the city after a trash

fire was left unattended and caused severe injuries to the plaintiff. *Id.* at 329, 106 S.E.2d at 565-66.

The Supreme Court in *Carter* noted that the defendant made three arguments on appeal, the second of which was: "(2) the defendant is immune from liability for negligence in this case in that the injury occurred incident to the performance of a necessary governmental function." 249 N.C. at 330, 106 S.E.2d at 566. To resolve the issue, the Court directly addressed "whether the defendant acted in its governmental or in its proprietary capacity." *Id.* at 332-33, 106 S.E.2d at 568.

In the Court's view, the "duties the city assumed and the purposes it sought to accomplish, the special and limited class of tenants who could qualify for occupancy, and the substantial financial returns the city received under the contract placed the city's management of the project in the category of proprietary activity." *Id.* at 333, 106 S.E.2d at 568-69. The same holds true here.

The Housing Authority contends that *Carter* is not controlling. It argues that *Carter* is not a "housing authority" case because the public entity at issue was a city and not a housing authority acting pursuant to statute. The Housing Authority also submits that *Carter* is distinguishable because the city in *Carter* was acting pursuant to a contract with the federal government, while the Housing Authority in this case had no such contractual obligation.

We do not agree that these factual distinctions affect the analysis. That the Housing Authority was acting pursuant to statute does not automatically render its actions governmental and is not relevant to our analysis. Much activity by a housing authority is regulated by statute, as is much activity by a municipality. Similarly, the fact that the city in Carter was acting pursuant to a contract with the federal government did not affect the Supreme Court's decision on this issue and does not affect ours.

More recently, this Court addressed a very similar issue, in *Jackson v. Housing Authority of the City of High Point*, 73 N.C. App. 363, 326 S.E.2d 295, *disc. review denied*, 313 N.C. 603, 330 S.E.2d 610 (1985). There, the plaintiff's estate sued the defendant Housing Authority after the plaintiff, a resident of a housing project that the Housing Authority owned and operated, died from carbon monoxide poisoning. The estate alleged that the Housing Authority was negligent in failing to maintain the heater and flue in the plaintiff's unit,

which had become clogged and had caused the plaintiff's death. *Id.* at 364-66, 326 S.E.2d at 296-97.

The Housing Authority argues that Jackson is inapposite because the parties did not raise immunity as an issue. However, this Court did. It noted the following: "[T]he court did not specify what the perceived weakness in plaintiff's case was and we will briefly address the possibilities that the record suggests." *Jackson*, 73 N.C. App. at 367, 326 S.E.2d at 297-98. As the Court explained, "[c]ertainly the claim is not barred because of defendant's status as an arm of the City of High Point in operating a low income housing project; such activities are proprietary, rather than governmental, and municipalities are legally accountable therefor on the same basis as other defendants." *Id.* at 367, 326 S.E.2d at 298 (citing, inter alia, *Carter*). We find this analysis logical, and we hold accordingly. The parties also dispute whether the Housing Authority had purchased insurance for the unit in which Plaintiff resided and, if so, what that policy covered and excluded. Because we hold that the Housing Authority was engaging in a proprietary function, and that sovereign immunity did not apply, we need not reach these remaining questions.

We conclude that the Housing Authority, by owning and operating low-income housing, engaged in a proprietary function. Accordingly, it is not protected by the doctrine of sovereign immunity. We reverse the decision of the trial court and remand for further proceedings.

Reversed.

Judges TIMMONS-GOODSON and CAMPBELL concur.

ALAIMO FAMILY CHIROPRACTIC, PLAINTIFF v. ALLSTATE INSURANCE COMPANY, DEFENDANT

No. COA02-300

(Filed 31 December 2002)

Assignments— personal injury—proceeds of claim—medical services

The trial court did not err by granting summary judgment in favor of plaintiff who provided medical services to a patient who was injured in an automobile with a driver insured by defendant

insurance company when the patient executed an assignment in favor of plaintiff and defendant failed to heed the assignment and did not pay plaintiff out of the insurance proceeds, because: (1) the first sentence of the assignment directs any insurance carriers that may be obligated for the patient's bills to pay directly and exclusively in the name of plaintiff; (2) there is no evidence that defendant was misled or confused by the document, and defendant implicitly acknowledged the existence and validity of the assignment; (3) the patient did not assign to plaintiff his personal injury claim against defendant, but assigned the proceeds of that claim; and (4) N.C.G.S. §§ 44-49 and 44-50 which deal with liens recovered as damages in personal injury actions do not apply in this case.

Appeal by defendant from judgment entered 29 November 2001 by Judge James H. Faison, III in New Hanover County District Court. Heard in the Court of Appeals 30 October 2002.

Jennifer L. Umbaugh, for plaintiff-appellee.

Walker, Clark, Allen, Grice & Ammons, L.L.P., by Jerry A. Allen and Gay P. Stanley, for defendant-appellant.

HUDSON, Judge.

Alaimo Family Chiropractic ("Alaimo") provided medical services to a patient who was injured in an automobile crash with a driver insured by Allstate Insurance Company ("Allstate"). The patient executed an "Assignment of Proceeds, Lien and Authorization" ("assignment") in favor of Alaimo. When Allstate failed to heed the assignment and did not pay Alaimo for the treatment that Alaimo had provided, Alaimo sued. The district court granted Alaimo's motion for summary judgment, and Allstate now appeals. For the reasons set forth below, we affirm the decision of the district court.

I.

On March 14, 2000, Paul Tucker, insured by Allstate, was involved in an automobile collision with John MacEwan. Mr. MacEwan was injured in the wreck and sought treatment with Alaimo, who provided chiropractic care to Mr. MacEwan from March 20, 2000, to June 29, 2000. On March 20, 2000, Mr. MacEwan signed the assignment. Alaimo forwarded a copy of the document to Allstate's claims representative, Leigh Ann Ritter, on March 22, 2000, and again on April 19, 2000.

In addition to a copy of the assignment, Alaimo sent Allstate a bill for services rendered to Mr. MacEwan up to and including March 22, 2000, which amounted to $400. Ms. Ritter advised Alaimo that she would pay the $400 bill but that Allstate would not be willing to pay Alaimo for Mr. MacEwan's treatment beyond the initial two or three visits.

In May 2000, Alaimo informed Allstate that Mr. MacEwan's injuries were consistent with the type that result from automobile collisions and that Mr. MacEwan would require 20 to 24 treatments at an estimated cost of $1500 to $1800. The next month Ms. Ritter sent a letter to Mr. MacEwan, offering him $1500 to settle his claim, with $1100 going to Mr. MacEwan and $400 to Alaimo. Allstate did not send a copy of this letter to Alaimo.

Because it had heard nothing from Allstate, Alaimo sent a facsimile to Ms. Ritter on April 18, 2001, requesting information on the status of its claim. Ms. Ritter acknowledged that she had received the Assignment of Proceeds, Lien and Authorization but informed Alaimo that Allstate had settled with Mr. MacEwan directly and had sent the entire $1500 to him. On April 24, 2001, Alaimo notified Allstate that it had failed to honor the assignment and demanded full payment of its account. In a letter to Alaimo dated April 25, 2001, Ms. Ritter indicated that she had previously told Mr. MacEwan and Alaimo that Allstate would not pay for treatment beyond the two or three initial visits; that Alaimo and Mr. MacEwan chose to continue treatment knowing that Allstate would not cover it; that she had erred in sending $400 of the $1500 settlement to Mr. MacEwan rather than to Alaimo; and that Allstate was willing to pay Alaimo $400 if Alaimo would agree to collect the remaining balance directly from Mr. MacEwan.

Alaimo sued in the district court small claims division in May 2001. The magistrate entered judgment in favor of Alaimo, and Allstate appealed to the district court. Both parties filed motions for summary judgment. On November 29, 2001, the district court granted Alaimo's motion and denied Allstate's motion. Specifically, the court found that the assignment was valid and "obligated the Defendant to acknowledge the rights of the Plaintiff to receive payment out of the insurance proceeds for the medical treatment the Plaintiff provided." Allstate now appeals.

II.

Allstate argues that the trial court erred in granting summary judgment to Alaimo because the assignment did not create a valid

assignment under North Carolina law. Accordingly, Allstate contends that it, and not Alaimo, is entitled to judgment as a matter of law.

An assignment is a formal transfer of property or property rights from one person (the assignor) to another (the assignee). *Hinshaw v. Wright*, 105 N.C. App. 158, 164, 412 S.E.2d 138, 143 (1992). Principles of general contract law determine whether an assignment is valid. *Martin v. Ray Lackey Enterp., Inc.*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990). When the parties use clear and unambiguous terms, the contract should be given its plain meaning, and the court can determine the parties' intent as a matter of law. *Id.*

Here, the assignment provided, in pertinent part, as follows:

> I hereby authorize and direct any and all insurance carriers, attorneys, agencies, governmental departments, Companies, individuals, and/or other legal ("payers"), which may elect or be obligated to pay, provide, or distribute benefits to me for any medical conditions, accidents, injuries, or illnesses, past, present, or future ("condition") to pay directly and exclusively in the name of Alaimo Chiropractic such sums as may be owing to Alaimo Chiropractic for charges incurred by me at the office relating to my condition, with such payment to be made exclusively in the name of Alaimo Chiropractic. I further grant a lien to Alaimo Chiropractic with respect to my charges. This lien shall apply to all payers and to full extent permitted by law. For the purposes of this document (herein, "Assignment and Lien"), "benefits" shall include, but not be limited to, proceeds from any settlement, judgment or verdict, as well as, any proceeds relating to commercial health or group insurance, attorney retainer agreements, medical payments benefits, personal injury protection, no-fault coverage, uninsured and underinsured motorist coverage, third party liability distributions, disability benefits, and any other benefits or proceeds payable for me for the purposes stated herein.

The parties dispute whether the assignment is unambiguous and, correspondingly, whether it can be given its plain meaning.

In *Charlotte-Mecklenberg Hospital Authority v. First of Georgia Insurance Co.*, our Supreme Court upheld an assignment that provided:

> [T]he undersigned hereby assigns to the Hospital Authority and each of its facilities that provides services to the patient all right, title and interest in and to any compensation or payment in any

> form that the undersigned received or shall receive as a result of or arising out of the injuries sustained by the patient. . . ."
>
> . . .
>
> [T]he undersigned hereby authorizes and directs any person or corporation having notice of this assignment to pay to the Hospital Authority directly the amount of the indebtedness owed to the Hospital Authority in connection with services rendered to the patient.

340 N.C. 88, 91-92, 455 S.E.2d 655, 657, *reh'g denied*, 340 N.C. 364, 458 S.E.2d 186 (1995). These provisions, the Court explained, "should alleviate any doubt that the assignment required the defendants to pay the assigned money to the plaintiff." *Id.* at 92, 455 S.E.2d at 657. Thus, the liability carrier was required to pay the disputed amount to the assignee. *Id.*, 455 S.E.2d at 658.

Based on a careful reading of the document at issue, we conclude that in clear and unambiguous terms the language grants Alaimo an assignment of the insurance proceeds. The first sentence directs any insurance carriers that may be obligated for Mr. MacEwan's bills "to pay directly and exclusively in the name of Alaimo Chiropractic." We fail to see how this language is ambiguous. We see no meaningful distinction between this text and that in the assignment the Supreme Court upheld in *Charlotte Mecklenberg*, as the text here clearly assigns the benefits from Mr. MacEwan's personal injury claim to Alaimo.

Moreover, there is no evidence that Allstate was misled or confused by the document. In fact, Allstate implicitly acknowledged the existence and validity of the assignment when Ms. Ritter indicated to Alaimo that she had erroneously sent $400 to Mr. MacEwan rather than to Alaimo. As she indicated in her letter to Alaimo, "I did err in sending the full settlement to Mr. MacEwan rather than sending $400 to you. At this time I am willing to pay you that $400, with the understanding that you will pursue Mr. MacEwan for any remaining balance owed." Allstate's recognition of the assignment further persuades us that the assignment is unambiguous and that we can give it its plain meaning.

Allstate also argues that the assignment is invalid because, rather than assigning to Alaimo the proceeds of the claim, it assigns the claim itself. In North Carolina, a patient cannot assign his claim to

another, but he can assign the proceeds of that claim. *Charlotte Mecklenburg*, 340 N.C. at 91, 455 S.E.2d at 657. As that Court explained:

> There is a distinction between the assignment of a claim for personal injury and the assignment of the proceeds of such a claim. The assignment of a claim gives the assignee control of the claim and promotes champerty. Such a contract is against public policy and void. The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.

Id. (internal citations omitted).

Here, however, Mr. MacEwan did not assign to Alaimo his personal injury claim against Allstate. To the contrary, he assigned the proceeds of that claim, which, as we indicated above, is permitted. Pursuant to the assignment, Alaimo is entitled to receive "proceeds from any settlement, judgment, or verdict, as well as any proceeds relating to commercial health or group insurance, attorney retainer agreements, medical payments benefits, personal injury protection, no-fault coverage, uninsured and underinsured motorist coverage, third party liability distributions, disability benefits, and any other benefits or proceeds payable to me for the purposes stated herein" (emphasis added). This language clearly assigns to Alaimo the proceeds from Mr. MacEwan's claim against Allstate. We see no evidence that Alaimo also has received the right to litigate or otherwise control Mr. MacEwan's claim in general.

Finally, Allstate argues that the assignment is not valid and enforceable under N.C. Gen. Stat. §§ 44-49 and 44-50. In our view, those provisions, which deal with liens recovered as damages in personal injury actions, do not apply here. The dispute is over the validity of the assignment of the proceeds of Mr. MacEwan's claim. The language in the assignment providing for a lien is not at issue here.

For the reasons set forth above, we affirm the decision of the district court.

Affirmed.

Judges McGEE and THOMAS concur.

DOROTHY T. HOWARD, BY AND THROUGH THE ADMINISTRATRIX OF HER ESTATE, PLAINTIFF v. ROBERT D. VAUGHN, JR., M.D.; JAMES A. WATKINS, M.D.; LOUIS H. ZBINDEN, III, M.D.; DILWORTH SURGICAL GROUP, P.A. O/K/A DILWORTH SURGICAL SPECIALISTS, P.A.; MERCY HOSPITAL, INC.; CAROLINAS HEALTH CARE SYSTEM D/B/A MERCY HOSPITAL, INC., DEFENDANTS

No. COA02-28

(Filed 31 December 2002)

Medical Malpractice— wrongful death—extension of time under statute of limitations—resident superior court judge

The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's wrongful death action arising out of alleged medical malpractice based on its erroneous conclusion that an earlier extension of time by another trial judge who was not a resident of the pertinent county was in violation of N.C.G.S. § 1A-1, Rule 9(j) as it existed at the time of this action and did not meet the pertinent statute of limitations under N.C.G.S. § 1-53(4), because: (1) under N.C.G.S. § 7A-47, a regular superior court judge assigned to hold court in the pertinent county has the same powers as a superior court judge who was a resident of that county; and (2) the applicable statute of limitations would not have been violated through 21 August 2000, under Rule 9(j) a proper order extended the statute of limitations through 11 December 2000, and plaintiff filed her complaint on 8 December 2000.

Appeal by plaintiff from order entered 8 August 2001 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2002.

Pamela A. Hunter for plaintiff-appellant.

Cozen O'Conner, by Anna Daly and Paul Reichs for defendants-appellees Robert Vaughn, Jr., M.D.; James A. Watkins, M.D.; Dilworth Surgical Group, P.A., o/k/a Dilworth Surgical Specialists, P.A.; and Womble Carlyle Sandridge & Rice, PLLC, by Tricia Morvan Derr for defendants-appellees Mercy Hospital, Inc. and Carolinas Health Care System d/b/a Mercy Hospital, Inc.

THOMAS, Judge.

Plaintiff, Administratrix of Dorothy T. Howard's estate, appeals from an order dismissing this wrongful death action as violative of

the statute of limitations. Upon defendants' Rule 12(b)(6) motion, the trial court found an earlier extension of the statute of limitations by a different superior court judge to be ineffective.

Plaintiff appeals, contending the extension was proper and the complaint timely filed. For the reasons herein, we agree with plaintiff.

We initially note that when plaintiff filed her extension motion, the applicable statute, Rule 9(j), had not yet undergone extensive modifications. We therefore consider the parties' arguments under N.C. Gen. Stat. § 1A-1, Rule 9(j) (1999).

Dorothy T. Howard died on 20 August 1998. On Monday, 21 August 2000, plaintiff filed a "Motion and Order Extending Statute of Limitations in Medical Malpractice Action" pursuant to N.C. R. Civ. P. 9(j). The motion was presented to Judge Beverly T. Beal, a regular superior court judge living in Caldwell County, Judicial District 25A, who was holding court in Mecklenburg County, Judicial District 26. Judge Beal granted the motion, extending the statute of limitations through 11 December 2000.

Plaintiff filed her complaint on 8 December 2000, alleging that the death of decedent was proximately caused by the negligence of defendants Robert D. Vaughn Jr., M.D.; James A. Watkins, M.D.; Louis H. Zbinden, III, M.D.; Dilworth Surgical Group, P.A. o/k/a Dilworth Surgical Specialists, P.A., Mercy Hospital, Inc.; and Carolinas Health Care System d/b/a Mercy Hospital, Inc. Plaintiff subsequently took a voluntary dismissal with prejudice of her claim against Dr. Zbinden.

Defendants filed motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging that plaintiff's action was barred by the applicable two-year statute of limitations and her failure to abide by Rule 9(j). *See* N.C. Gen. Stat. § 1-53(4) (2001). Judge Robert P. Johnston, a regular superior court judge living in Mecklenburg County, granted the motion. Judge Johnston's order included the following findings:

> 3. On [the day Judge Beal signed plaintiff's Motion to Extend the Statute of Limitations pursuant to Rule 9(j),] he was sitting in Courtroom 307. The undersigned takes judicial notice that it is the custom and common practice in Mecklenburg County for non-scheduled motions to be heard in courtroom 307. . . .

> 6. The Honorable Beverly T. Beal is not and at the time in question was not a resident judge of Mecklenburg County, the 26th Judicial District. During the week of August 21, 2000, Judge Robert Bell and Judge Richard Boner, resident judges of the 26th Judicial District, were present and assigned to Mecklenburg County.

Judge Johnston further found that based on the plain language of Rule 9(j), only a judge who resides in the county where the suit is being appropriately brought may extend the statute of limitations. He concluded: "Because plaintiff failed to have the proper authority for the extension, the extension is null and void and the statute of limitations has expired as to Plaintiff's action."

By her sole assignment of error, plaintiff contends the trial court erred in dismissing her action.

For a motion based on Rule 12(b)(6), the question before this Court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Where a violation of the statute of limitations is alleged, the proper motion for requesting the court to address the issue is one based on Rule 12(b)(6). *Alford v. Catalytica Pharmaceuticals, Inc.*, 150 N.C. App. 489, 564 S.E.2d 267 (2002). Since whether the statute of limitations has been violated under these facts is a question of law, our review is *de novo*. *Falk Integrated Technologies, Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

Section 1-53(4) provides that within two years:

> Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought.

N.C. Gen. Stat. § 1-53(4). However, the two-year statute of limitations can be modified. Prior to an extensive amendment, effective after plaintiff filed her extension motion, Rule 9(j) provided:

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, *a resident judge of the superior*

> *court of the county in which the cause of action arose* may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (1999) (emphasis added).

In *Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 636, 556 S.E.2d 629, 634 (2001), this Court stated:

> [A] Rule 9(j) extension motion is to be heard by a resident judge when one is available, but *when the resident judge is unavailable or nonexistent, it is proper for the duly appointed presiding superior court judge to hear and sign the motion.*

(Emphasis added). In *Best*, counsel for the plaintiff searched the Wayne County Courthouse for the sole superior court judge living in that county only to learn he was on vacation. *Id.* at 629, 556 S.E.2d at 630. The *Best* Court concluded the resident judge was unavailable and thus the presiding superior court judge acted with the authority of the resident superior court judge. The Court stated:

> It is a reality in North Carolina that some counties have several resident superior court judges while other counties have but one. Some counties are included in a judicial district, but have no resident superior court judge at all. If we were to follow defendants' interpretation, the plaintiffs in counties without a resident superior court judge would not receive a benefit conferred by the Legislature upon the plaintiffs in other counties with resident superior court judges. By the same token, counties with only one resident superior court judge, such as the case here with Wayne County, could find plaintiffs potentially deprived of the benefit of the extension depending upon the schedule and/or health of that judge, or even the judge's willingness to hear such motions.

Id. at 634-35, 556 S.E.2d at 633.

The *Best* Court further held that, under section 7A-47 of the North Carolina General Statutes, the nonresident judge sitting in the court was "technically acting in a 'resident' capacity when he ruled on plaintiff's motion." *Id.* at 636, 556 S.E.2d at 634.

Section 7A-47 provides:

> A regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the *same powers* in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, in open court and in chambers *as the resident judge* or any judge regularly assigned to hold the courts of the district or set of districts as defined in G.S. 7A-41.1(a) has, and his jurisdiction in chambers shall extend until the session is adjourned or the session expires by operation of law, whichever is later.

N.C. Gen. Stat. § 7A-47 (2001) (emphasis added). Pursuant to Section 7A-47, Judge Beal, a regular superior court judge assigned to hold court in Mecklenburg County, had the same powers as a superior court judge who was a resident of that county. Obviously, not all North Carolina counties have superior court judges domiciled within their boundaries. Some citizens of our state, under the interpretation of Rule 9(j) proffered by defendants, would therefore be precluded from ever obtaining the extension, while citizens of other counties would have ample opportunities to avail themselves of the statute's benefits. Particularly in many of our small, rural and often economically deprived areas, the good citizens would be without recourse, thus implicating the equal protection clause of the North Carolina Constitution.

Further, in instances where one judge overrules another, the proper remedy would be for the defendant to come to this Court rather than seek to have the earlier judge overruled. *Madry v. Madry*, 106 N.C. App. 34, 38, 415 S.E.2d 74, 77 (1992). "[I]t is well established that 'no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge made in the same action.' " *Atkinson v. Atkinson*, 132 N.C. App. 82, 88, 510 S.E.2d 178, 181, *overruled on other grounds*, 350 N.C. 590, 516 S.E.2d 381 (1999).

Here, the applicable statute of limitations would not have been violated through Monday, 21 August 2000. N.C. Gen. Stat. § 1-53(4). Under Rule 9(j), a proper order extended the statute of limitations through 11 December 2000. Plaintiff filed her complaint on 8 December 2000. Accordingly, we reverse for proceedings consistent with the opinion and remand the order of the trial court.

REVERSED AND REMANDED.

Judges WALKER and BIGGS concur.

LEXIS-NEXIS, DIVISION OF REED ELSEVIER, INC., PLAINTIFF v. TRAVISHAN CORPORATION, DEFENDANT

No. COA01-1247

(Filed 31 December 2002)

Attorneys; Corporations— pro se representation through corporate agent—exceptions

The trial court erred by permitting defendant corporation to be represented pro se by its agent even though its agent is the CEO, president, chairman of the board, and sole shareholder of the corporation because in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed pro se unless doing so in accordance with the following exceptions: (1) a corporate employee who is not an attorney can prepare legal documents; (2) a corporation need not be represented by an attorney in the Small Claims Division; and (3) a corporation may make an appearance in court through its officer and thereby avoid default.

Appeal by plaintiff from an order entered 5 June 2000 by Judge Craig Croom in Wake County District Court. Appeal by defendant from an order entered 11 May 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 14 August 2002.

Smith, Debnam, Narron, Wyche, Story & Myers, by Gerald H. Groon, Jr., and Matthew E. Roehm, for plaintiff cross-appellant.

Florence Amelia Smith, CEO, President, Chairman of the Board of Travishan Corporation, for defendant cross-appellee.

CAMPBELL, Judge.

Plaintiff appeals from an order entered 5 June 2000 by Judge Craig Croom ("Judge Croom") in Wake County District Court permitting defendant, TRaviSHan Corporation, to be represented *pro se* by

its CEO, President, Chairman of the Board and sole shareholder, Ms. Florence Amelia Smith ("Ms. Smith"). Defendant appeals from an order entered 11 May 2001 by Judge Donald W. Stephens in Wake County Superior Court dismissing defendant's counterclaim.

Plaintiff filed a complaint against defendant on 13 October 1998 for breach of contract seeking damages in the amount of $2,922.26 plus interest. Ms. Smith filed an answer and counterclaim on behalf of defendant on 7 April 1999. Plaintiff filed a reply denying the allegations in the counterclaim on 7 June 1999. Thereafter, plaintiff filed an amended complaint and defendant filed an amended answer.

Plaintiff filed a motion to strike defendant's answer and counterclaim asserting that Ms. Smith's *pro se* representation of defendant violated N.C. Gen. Stat. § 84-5, which provides that a corporation may not practice law in North Carolina. Defendant answered this assertion with a motion to permit the appearance of Ms. Smith on behalf of defendant, citing the constitutions of both United States and North Carolina. Pursuant to Canon 3(A)(4) of the Code of Judicial Conduct, which provides that a judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before him," Judge Croom sought advice from the North Carolina State Bar. A deputy counsel, assigned to answer inquiries regarding the unauthorized practice of law, advised Judge Croom that, in the State Bar's opinion, Ms. Smith's appearance on behalf of defendant would not constitute unauthorized practice of law because an owner and officer of a corporation may represent her company to the same extent as an individual *pro se* party. Thereupon, Judge Croom issued an order denying plaintiff's motion to strike and permitting Ms. Smith's representation of defendant.

Plaintiff filed a reply to defendant's amended answer and counterclaim that included a request for a written statement of monetary relief and a motion to transfer to Superior Court. The motion to transfer to Superior Court was permitted on 5 September 2000. Plaintiff then filed a motion to dismiss defendant's counterclaim, which was granted on 14 February 2001, nunc pro tunc 15 December 2000. Plaintiff voluntarily dismissed its claim on 1 March 2001. Defendant filed multiple motions for rehearing. Judge Stephens entered, on 11 May 2001, an order reaffirming the prior dismissal.

Defendant appealed from the Superior Court order dismissing her counterclaim, and plaintiff cross-appealed the District Court order permitting Ms. Smith to represent defendant.

Appellate "[r]eview 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." N.C. R. App. P. 28(a) (2001). The Court may, however, in its discretion, suspend the rules of appellate procedure. N.C. R. App. P. 2 (2001). Defendant appealed from the Superior Court order dismissing her counterclaim, but failed to argue this issue or any other assignments of error in her brief. Therefore, pursuant to Rule 28(a), defendant's assignments of error are deemed abandoned. However, pursuant to Rule 2, we choose to address the merits of defendant's claim to the extent implicated in plaintiff's cross-appeal.

The issue presented to the Court on cross-appeal, and argued by both parties in their briefs, is whether or not the district court erred by permitting Ms. Smith to represent defendant TRaviSHan Corporation *pro se*.

Regarding legal representation, North Carolina law provides that "it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body . . . except in his own behalf as a party thereto." N.C. Gen. Stat. § 84-4 (2001). Moreover, "[a] corporation cannot lawfully practice law. It is a personal right of the individual." *Seawell, Attorney General v. Motor Club*, 209 N.C. 624, 631, 184 S.E. 540, 544 (1936). With these general rules in mind, we turn to the issue of whether or not a corporation may be represented *pro* se by its agent, even where its agent is the CEO, president, chairman of the board, and sole shareholder. Because this is an issue of first impression in our appellate courts, we find it helpful to consider the law from other jurisdictions.

"The prevailing rule is that a corporation cannot appear and represent itself either in proper person or by its officers, but can do so only by an attorney admitted to practice law." *Oahu Plumbing & Sheet Metal v. Kona Constr.*, 590 P.2d 570, 572 (Haw. 1979) (citing numerous cases from other jurisdictions throughout the United States). "Not only has this principle long been recognized, it has been almost universally accepted." *Eckles v. Atlanta Technology Group, Inc.*, 485 S.E.2d 22, 25 (Ga. 1997). The rule is often applied only in the context of litigation. For example, the Restatement of the Law Governing Lawyers, provides that "a nonlawyer officer of a corporation may permissibly draft legal documents, [and] negotiate complex

transactions." *Restatement (Third) of the Law Governing Lawyers* § 4 cmt. e (1998). The restatement further explains that "[w]ith respect to litigation, several jurisdictions except representation in certain tribunals, such as . . . small-claims courts and in certain administrative proceedings." *Id.*

North Carolina has never expressly adopted the general rule, but our appellate courts have recognized the most common exceptions to the rule. The North Carolina Supreme Court held that a corporate employee, who was not an attorney, could prepare legal documents. *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962). The North Carolina Court of Appeals recognized the exception, that a corporation need not be represented by an attorney in the Small Claims Division since "in enacting our small claims court system . . . the General Assembly apparently intended . . . to provide our citizens, corporate as well as individual, with an expedient, inexpensive, speedy forum in which they can process litigation involving small sums without obtaining a lawyer." *Duke Power Co. v. Daniels*, 86 N.C. App. 469, 472, 358 S.E.2d 87, 89 (1987). In addition to these exceptions, the North Carolina Court of Appeals also recognized that a corporation may make an appearance in court through its vice-president and thereby avoid default. *Roland v. Motor Lines*, 32 N.C. App. 288, 231 S.E.2d 685 (1977).

Ms. Smith asserts that since a North Carolina corporation may make an appearance through an officer, it may also represent itself in the ensuing litigation through an officer. This argument misapprehends the substantial difference between permitting a corporation to make an appearance and permitting a corporation to practice law.

As the Court explained in *Roland*, "an appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Id.*, 32 N.C. App at 289, 231 S.E.2d at 687. Moreover, "negotiations between parties after the institution of an action may constitute an appearance." *Webb v. James*, 46 N.C. App. 551, 557, 265 S.E.2d 642, 646 (1980) (holding that negotiations between the parties for a continuance constituted an appearance). Such negotiations would typically be made through an agent of the corporation, since "[a] corporation can only act through its agents." *Godwin v. Walls*, 118 N.C. App. 341, 348, 455 S.E.2d 473, 479 (1995). Though an agent may negotiate with an opposing party, and therefore may make an implied appearance on behalf of a corporation, it does not follow that the agent may also litigate for the corporation.

North Carolina has expressly adopted the most common exceptions to the general rule prohibiting non-attorney representation of corporations. We now expressly adopt the general rule, and hold that in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se* unless doing so in accordance with the exceptions set forth in this opinion.

Accordingly, we hold the District Court erred by permitting Ms. Smith to represent defendant TRaviSHan Corporation. The decision of the District Court is reversed. Defendant's appeal from the Superior Court is dismissed.

Dismissed in part, reversed in part.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA PLAINTIFF-APPELLANT v. JOHN WESLEY OLIVER AND GEORGE MOORE, DEFENDANT-APPELLEES

No. COA02-177

(Filed 31 December 2002)

Sentencing— first-degree murder—replacement of death sentences with consecutive life sentences

The trial court did not violate N.C.G.S. § 15A-1335 in a first-degree murder case by imposing consecutive life sentences as a replacement for one defendant's concurrent death sentences and the other defendant's death sentence with a second life sentence to run consecutively to the life sentence originally entered, because: (1) N.C.G.S. § 15A-1335 does not prohibit the trial court's replacement of concurrent sentences with consecutive sentences provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing; and (2) any number of life sentences, even if imposed consecutively, cannot be considered a greater sentence than even one death sentence since the penalty of death is qualitatively different from a sentence of imprisonment, however long.

Appeal by defendants from judgments entered 8 November 2001 by Judge Jack A. Thompson in Robeson County Superior Court. Heard in the Court of Appeals 16 October 2002.

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

Robert P. Mosteller, Duke University School of Law, for defendant-appellants.

BIGGS, Judge.

Defendants each appeal from the imposition of consecutive sentences of life imprisonment. The relevant facts may be summarized as follows: In 1979, following a joint trial, defendants were convicted of the first degree murder and armed robbery of Allen Watts and Dayton Hodge. Oliver received death sentences for each of the murders. Moore was sentenced to death for Watts' murder, and to life imprisonment for Hodge's murder. The trial court did not indicate in its judgment whether these sentences were to run concurrently or consecutively. On appeal, the North Carolina Supreme Court affirmed the defendants' convictions of all offenses, and the sentence of life imprisonment imposed on Moore. However, the Court vacated the death sentences imposed on both defendants, and remanded for a new sentencing hearing. *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981). On remand, the jury again recommended death sentences for both defendants, and the trial court sentenced Oliver to two death sentences, and sentenced Moore to death for Watts' murder. Defendants once again appealed these sentences. The North Carolina Supreme Court affirmed the death sentence imposed on Oliver for Hodge's murder, vacated the death sentences imposed on each defendant for the killing of Watts, and remanded for a third sentencing hearing. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). The State scheduled the new resentencing for November, 2001. In the interim, defendant Oliver pursued a motion for appropriate relief (MAR), and in 1994, following a hearing on his MAR, the trial court vacated the death sentence that Oliver received for killing Hodge.

At the November, 2001 resentencing, the State elected not to pursue the death penalty, leaving life imprisonment as the only permissible penalty for defendants' convictions of first degree murder. *See* N.C.G.S. § 14-17 (2001). The court sentenced defendant Oliver to two sentences of life imprisonment to run consecutively, and defendant Moore to a sentence of life imprisonment, to run consecutively to

the life sentence he was already serving. Thus, each defendant was sentenced to consecutive life sentences. Defendants again appeal.

The sole issue raised on appeal is whether the trial court erred by imposing consecutive, rather than concurrent, sentences of life imprisonment. Defendants contend that their original sentences were imposed concurrently, and that, therefore, the trial court's imposition of consecutive sentences on remand violated N.C.G.S. § 15A-1335 (2001). We conclude that, irrespective of whether their original death sentences were concurrent or consecutive, the court did not violate the statute by entering consecutive life sentences on remand.

N.C.G.S. § 15A-1335 provides that:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

See State v. Holt, 144 N.C. App. 112, 117, 547 S.E.2d 148, 152 (2001) ("life sentence on resentencing exceeds [defendant's] original sentence of 196 to 245 months, and thus violates § 15A-1335"). When multiple sentences are involved, N.C.G.S. § 15A-1335 bars the trial court from imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence. *State v. Nixon*, 119 N.C. App. 571, 459 S.E.2d 49 (1995) ("the prohibition against imposing more severe sentences after appeal . . . applies to offenses charged and convictions thereon, not to an aggregate term of years") (citing *State v. Hemby*, 333 N.C. 331, 426 S.E.2d 77 (1993)).

However, N.C.G.S. § 15A-1335 does not prohibit the trial court's replacement of concurrent sentences with consecutive sentences upon resentencing, provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing. *State v. Ransom*, 80 N.C. App. 711, 343 S.E.2d 232 (1986). In *Ransom*, the defendant initially received a consolidated sentence of twenty years for multiple offenses. On remand following appeal, the court sentenced him to six consecutive three year sentences, for a total of eighteen years. This Court found no violation of N.C.G.S. § 15A-1335 in the trial court's replacement of concurrent sentences with consecutive sentences:

> [T]he issue [is] whether the trial court is bound by its decision to consolidate convictions for sentencing when a case is reversed and remanded for resentencing. While G.S. 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, *nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand.*

Id. at 713-714, 343 S.E.2d at 234 (emphasis added). *See also State v. Harris*, 115 N.C. App. 42, 444 S.E.2d 226 (1994) (G.S. 15A-1335 does not restrict trial court on resentencing "from correcting the way in which it consolidated offenses" initially).

We find no violation of N.C.G.S. § 15A-1335 in the case *sub judice.* We reject defendants' argument, that by replacing Oliver's concurrent death sentences with consecutive life sentences, and Moore's death sentence with a second life sentence to run consecutively to the life sentence originally entered, the court violated the statute by entering a more severe sentence. Any number of life sentences, even if imposed consecutively, cannot be considered a greater sentence than even one death sentence, because "the penalty of death is qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976). The United States Supreme Court has stated:

> 'The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.'

Harmelin v. Michigan, 501 U.S. 957, 995, 115 L. Ed. 2d 836, 865 (1991) (quoting *Furman v. Georgia*, 408 U.S. 238, 306, 33 L. Ed. 2d 346, 388). Although our appellate courts have not previously addressed this issue, a Wyoming court, in *Turner v. State*, 624 P.2d 774 (Wyo. 2 March 1981), held that replacement of two death sentences with consecutive life sentences did not increase defendant's sentence:

> To prevail, [defendant] must establish . . . that two death sentences to run concurrently, or even one, is not as severe as two sentences of life imprisonment to run consecutively. He fails to do so. Life is precious.

We hold that the trial court did not violate N.C.G.S. § 15A-1335 by imposing consecutive life sentences. Accordingly, the sentences imposed by the trial court are

Affirmed.

Judges McGEE and HUDSON concur.

KENNETH H. MYERS, JR., PLAINTIFF v. THOMAS P. MUTTON, M.D.; FORSYTH MEMORIAL HOSPITAL, INC., NOVANT HEALTH, INC.; NOVANT HEALTH TRIAD REGION, LLC, DEFENDANT

No. COA01-1409

(Filed 31 December 2002)

Appeal and Error— appealability—interlocutory order—sanction for failure to comply with discovery order

Plaintiff's appeal in a medical malpractice action from an order sanctioning him for failure to comply with a discovery order is dismissed as an appeal from an interlocutory order, because: (1) the order for sanctions did not dispose of the case which has not yet come to trial; (2) the trial court did not certify the order for sanctions under N.C.G.S. § 1A-1, Rule 54(b); and (3) a substantial right will not be lost if the order is not immediately appealed.

Appeal by plaintiff from order entered 23 May 2001 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 17 September 2002.

Faison & Gillespie, by Reginald B. Gillespie, Jr., C. Michael Mallard, and Kristen L. Beightol, for plaintiff-appellant.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for defendant-appellees.

BIGGS, Judge.

Plaintiff appeals from an order sanctioning him for failure to comply with a discovery order. We dismiss plaintiff's appeal as interlocutory.

This appeal arises from a medical malpractice action filed by plaintiff February, 2000, in which he alleged that defendant (Dr. Mutton) was negligent in his treatment of plaintiff's appendicitis. Plaintiff, subsequent to filing suit, dismissed claims against all defendants except Dr. Mutton, the only defendant in the present appeal. In May, 2000, defendant filed his first set of interrogatories. He sought information regarding, *inter alia*, plaintiff's expert witnesses, medical records, medication history, employment and tax records, criminal record, the factual basis for certain allegations in the complaint, and an accounting of plaintiff's medical expenses, loss of income, and other alleged damages.

Plaintiff responded to defendant's interrogatories in July, 2000. He generally objected on the basis that the interrogatories were overly broad, unduly burdensome, sought privileged or confidential information, and "otherwise exceed[ed] the scope of permissible discovery." However, plaintiff did not file an objection to any specific request for information, or associate his general objections with any particular request, document, or item of information. Nor has plaintiff filed a motion for a protective order.

Between May and September, 2000, plaintiff produced some, but not all, of the requested documents. On 30 September 2000, defendant filed a Motion to Compel discovery, which was granted on 30 October 2000. The trial court ordered plaintiff to fully and completely answer each interrogatory, including subparts, and to produce each document requested by 18 November 2000. In response, plaintiff filed several supplemental answers to defendant's interrogatories. In each, plaintiff reiterated his general objections to defendant's interrogatories, while including some additional records.

In April, 2001, defendant filed a motion for sanctions under N.C.G.S. § 1A-1, Rule 37 (2001). On 23 May 2001, the trial court entered an order granting defendant's motion for sanctions. The court found that, even after the entry of an order compelling discovery, that plaintiff's supplemental responses had included "prior answers subject to continued objections which had already been overruled[,]" and that defendant had "failed to fully and completely respond to defendant's first set of interrogatories and request for production of documents[.]" The trial court also found that despite defendant's requests, plaintiff and plaintiff's counsel have chosen not to resubmit plaintiff's discovery without objections. The court concluded that plaintiff had failed to comply with the order compelling discovery, and failed to

"fully and completely answer each interrogatory, including subparts, and completely produce each document requested." The court ordered that plaintiff comply with the earlier discovery order on or before July 13, 2001, and imposed monetary sanctions on plaintiff's counsel. Plaintiff appeals from this order.

We conclude that plaintiff's appeal is not properly before us, notwithstanding the failure of either party to address the issue. "Although the interlocutory nature of the instant appeal[] has not been raised by the parties, . . . '[i]f there is no right of appeal, it is the duty of an appellate court to dismiss the appeal on its own motion.' " *Yang v. Three Springs, Inc.*, 142 N.C. App. 328, 330, 542 S.E.2d 666, 667 (2001) (quoting *Stafford v. Stafford*, 133 N.C. App. 163, 164, 515 S.E.2d 43, 44, *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999)).

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54 (2001). "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citations omitted). The order for sanctions entered in the case *sub judice* is interlocutory because it did not finally dispose of the case, which has not yet come to trial. *Yang*, 142 N.C. App. 328, 542 S.E.2d 666.

Although there is generally no right to appeal an interlocutory order, it is immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 526 S.E.2d 666 (2000). "Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]"[1] *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444

1. Plaintiff's notice of appeal includes the general statement that "[t]he order which is the subject of this appeal, is immediately appealable given the issues raised therein." However, that perfunctory allegation constitutes the entirety of plaintiff's attention to this issue. Plaintiff failed to include in his brief a statement of the grounds for appeal. He has not asserted a statutory privilege, has not argued that a substantial right is affected, and has never filed a motion for a protective order to prevent discovery of specific documents.

S.E.2d 252, 253 (1994). Moreover, under N.C.R. App. P. 28(b)(4), an appellant's brief must contain "a statement of the grounds for appellate review" and if the appeal is interlocutory, this statement "must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."

In the present case, the trial court did not certify the order for sanctions under Rule 54(b), nor do we conclude that a substantial right will be lost if the order is not immediately appealed. A 'substantial right' is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quoting *Oestreicher v. American Nat'l Stores*, 290 N.C. 118, 121-222, 225 S.E.2d 797, 800 (1976)). "Generally, appellate courts do not review discovery orders because of their interlocutory nature." *Stevenson v. Joyner*, 148 N.C. App. 261, 263, 558 S.E.2d 215, 217 (2002).

We hold that no substantial right of plaintiff's would be jeopardized by postponing appeal of the discovery order until after trial. Accordingly, plaintiff's appeal must be dismissed.

Dismissed.

Judges GREENE and WYNN concur.

MUNDEN v. COURSER

[155 N.C. App. 217 (2002)]

JOSH W. MUNDEN, III AND WIFE, ANN B. MUNDEN; RONALD LOCKE AND WIFE, GAYLE T. LOCKE; CHARLOTTE C. LOCKE; GENE WATSON AND WIFE, SARAH WATSON; MIRIAM M. QUICK; J. JERRY JOHNSON; FRED HOGGARD AND WIFE, SANDRA HOGGARD, PLAINTIFFS V. RICHARD COURSER AND WIFE, MARTHA COURSER; STONEHOUSE TIMBER LODGE, INC.; THE COUNTY OF WARREN, A BODY POLITIC AND CORPORATE; HARRY M. WILLIAMS, III, CHAIRMAN OF THE BOARD OF COMMISSIONERS OF WARREN COUNTY; CLINTON G. ALSTON, MICHAEL A. JONES, GLEN A. RICHARDSON AND ROGER L. WILLIAMS, MEMBERS OF THE BOARD OF COMMISSIONERS OF WARREN COUNTY, DEFENDANTS

No. COA01-1534

(Filed 31 December 2002)

Appeal and Error— appealability—interlocutory order—grant of partial summary judgment

Plaintiffs' appeal from the trial court's grant of partial summary judgment on some but not all issues in a case seeking to require defendants to remove improvements to their real property is dismissed as an appeal from an interlocutory order, and plaintiffs' brief contains no statement regarding a substantial right that would be affected by the dismissal of this appeal.

Appeal by plaintiffs from judgment entered 4 August 2001 by Judge Robert H. Hobgood in Warren County Superior Court. Heard in the Court of Appeals 12 September 2002.

Banzet, Banzet & Thompson, PLLC, by Lewis A. Thompson, III, for plaintiff-appellants.

Zollicoffer & Long, by Nicholas Long, Jr., for defendant-appellees, Richard Courser and Martha Courser and Stonehouse Timber Lodge, Inc.

Cranfill, Sumner & Hartzog, LLP, by Susan K. Burkhart, for defendant-appellees, Board of Commissioners of Warren County and Warren County.

CAMPBELL, Judge.

Plaintiffs are eleven landowners who own property adjacent to or close to property owned by Richard and Martha Courser and the Stonehouse Timber Lodge ("Stonehouse defendants"). Warren County and its Board of Commissioners ("Warren County defendants") are also parties to the suit. Plaintiffs appeal from the trial court's order granting partial summary judgment to both groups of

defendants on some but not all issues, these issues having been stipulated to by the parties and submitted to the trial court for partial summary judgment. Because we rule that this appeal is interlocutory and does not affect a substantial right, we dismiss the appeal.

The relevant procedural history of this case is as follows: Plaintiffs originally brought this action to require the Stonehouse defendants to remove improvements to their real property. On 25 May 2001, the parties filed a stipulation as to three issues to be heard by the trial court on motions for partial summary judgment. The issue submitted on appeal is whether a zoning classification exists for the area adjacent to the Stonehouse defendants' property depicted as Lake Gaston on the Warren County Zoning Map. The trial court ruled that no zoning classification exists below the mean high water mark of "Lake Gaston" and thus, the Stonehouse defendants do not have to comply with the Warren County Zoning Ordinance for any structure built on the lake or shoreline below the mean water mark. All of the parties agree that plaintiffs' appeal is interlocutory in that there are still issues remaining to be decided in the trial court. However, plaintiffs and the Stonehouse defendants argue that this Court, nonetheless, should decide the issue on appeal as it affects a substantial right. Warren County defendants argue that the appeal should be dismissed as interlocutory and not affecting a substantial right. We agree with the Warren County defendants.

A ruling on a motion for partial summary judgment that leaves issues remaining for trial is not a final judgment, but is interlocutory in nature, and therefore is not immediately appealable. N.C. Gen. Stat. § 1A-1, Rule 54(b) states in part:

> In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001); *see also Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Even if the lower court's ruling on the parties' motions for partial summary judgment was considered a final judgment as to the issue presented, no appeal of right will lie unless the decree is certified for appeal by the trial court pursuant to N.C. Gen.

Stat. § 1A-1, Rule 54(b) (2001). As that is not the case, here, plaintiffs' appeal is premature.

Plaintiffs and Stonehouse defendants, however, suggest that we may review the appeal under N.C. Gen. Stat. § 1-277(a) and 7A-27(d)(1), which allow interlocutory appeals if "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). For this Court to consider the appeal, "the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). This Court must consider these appeals by " 'the particular facts of [each] case and the procedural context in which the order from which appeal is sought was entered.' " *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (quoting *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). Although the Stonehouse defendants argue on behalf of plaintiffs that a substantial right will be lost if this appeal is not considered, this does not relieve appellants of their obligation under our rules.

N.C.R. App. P. 28 requires that the appellant's brief contain a statement of the grounds for appellate review containing "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2001). Plaintiffs failed to comply with this rule. Plaintiffs' brief contains no statement regarding a substantial right that would be affected by our dismissal of this interlocutory appeal. As this Court has said before, "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Accordingly, because no final judgment was entered, nor was any substantial right of the plaintiffs affected, we dismiss this appeal as interlocutory.

Appeal dismissed.

Judges TIMMONS-GOODSON and HUDSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 31 DECEMBER 2002

BURTON LUMBER CORP. v. TANERCAN No. 02-54	Beaufort (99CVD326)	No error
DAVIS v. LLOYD No. 02-45	Guilford (00CVS9625)	Dismissed
DRUMGOLD v. PERDUE FARMS, INC. No. 02-418	Ind. Comm. (I.C. 907057)	Appeal dismissed
GRADY v. HILLANDALE MED. CTR. No. 02-331	Ind. Comm. (I.C. 049720)	Affirmed
GREEN v. PICKERING & CO. No. 01-1331	Guilford (00CVD10371)	Affirmed
GURGANUS v. CARTWRIGHT No. 02-361	Camden (00CVS35)	Affirmed
HAYES v. ROGERS No. 01-1496	Wake (00CVS13289)	Affirmed
HAYES v. TORRENCE No. 01-1215	Davidson (00CVD1885)	Reversed and remanded
HOWELL v. WALL-MART STORES, INC. No. 02-369	Ind. Comm. (I.C. 567655)	Affirmed
IN RE BROWN No. 02-95	Cabarrus (97J07)	Affirmed
IN RE DOCKERY No. 02-365	Durham (99J157) (99J159) (99J160)	Affirmed
IN RE PLAYER No. 02-644	Randolph (01J78)	Affirmed
IN RE WOOD No. 01-1256	Johnston (93J33)	Affirmed
JOHNSON v. JOHNSON No. 02-444	Catawba (98CVD126)	Dismissed
McNEELY v. BOLLINGER No. 01-1059	Catawba (00CVS44)	No error
MOORE v. SHAIKH No. 01-1336	Wake (99CVD10613)	New trial

PAYNE v. DEPARTMENT OF TRANSP. No. 01-1547	Surry (98CVS62)	Reversed and remanded
PERKINS v. PERKINS No. 01-493-2	Alamance (00CVD1448)	Affirmed
RICHARDS v. VANSTORY No. 02-835	Guilford (01CVS7733)	Dismissed
ROYAL OAK APARTMENTS v. SOLT No. 01-1181	Cabarrus (01CVD107)	Affirmed
SEAGLE v. KENT-COFFEY MFG. CO. No. 99-1001	Ind. Comm. (I.C. 028828)	Affirmed
STATE v. ADAMS No. 01-1419	Cumberland (00CRS56201)	Reversed
STATE v. BARNES No. 01-1414	Alexander (00CRS1890)	No error
STATE v. BELCHER No. 02-243	Wake (00CRS68967)	No error
STATE v. BROWN No. 02-803	Durham (00CRS68631)	No error
STATE v. CONKLIN No. 02-239	Alleghany (99CRS759)	No error
STATE v. DADISMAN No. 02-68	Catawba (00CRS5037)	No error
STATE v. DAVIS No. 02-694	Forsyth (98CRS53251) (98CRS53253) (98CRS53254) (99CRS9615)	No error
STATE v. GARRETTE No. 02-626	Mecklenburg (00CRS30098)	Affirmed
STATE v. HAIRSTON No. 02-697	Rockingham (97CRS13322)	No error
STATE v. HARDING No. 02-313	Pitt (98CRS19149) (98CRS19150) (98CRS19151) (98CRS19154) (98CRS19155) (98CRS19157) (98CRS19158)	No error

STATE v. INGLE No. 02-709	Buncombe (01CRS55384)	No error-driving while license revoked. New trial-driving while impaired/habitual driving while impaired
STATE v. IRVING No. 02-230	New Hanover (99CRS53350)	No error
STATE v. JENKINS No. 02-69	Guilford (93CRS17788) (93CRS20004)	No error
STATE v. McARTHUR No. 02-581	Forsyth (98CRS53196) (98CRS53202) (98CRS53220) (99CRS3204) (99CRS57956)	Remanded for resentencing and correction of judgment
STATE v. McLEAN No. 01-1094	Robeson (98CRS13683)	No prejudicial error
STATE v. MESSER No. 01-1599	Cumberland (99CRS73157)	No error
STATE v. MONROE No. 02-535	Richmond (01CRS1680)	No error
STATE v. MOORE No. 02-783	Davidson (01CRS15763) (01CRS15764) (01CRS15765) (01CRS15766) (01CRS15767) (01CRS15768) (01CRS15769) (01CRS15770) (01CRS15771)	Reversed and remanded
STATE v. NORIEGA No. 02-422	Buncombe (00CRS8262) (00CRS8263) (00CRS8264) (00CRS8265) (00CRS8268) (00CRS8271)	No error
STATE v. RALEY No. 01-1004	Mecklenburg (00CRS13069) (00CRS13070) (00CRS13071) (00CRS13072)	Affirmed

STATE v. REYNOLDS No. 02-636	Forsyth (00CRS52951)	No error
STATE v. SCOTT No. 01-1353	Durham (00CRS16692) (00CRS56097)	No error
STATE v. SCOTT No. 02-367	Durham (00CRS51891)	No error
STATE v. SHELTON No. 01-1595	Alamance (00CRS50171) (00CRS50174) (00CRS57717)	No error
STATE v. STALLINGS No. 02-725	Wake (01CRS53590) (01CRS53591) (01CRS53592) (01CRS53593) (01CRS53594)	Affirmed
STATE v. STEWART No. 02-214	Forsyth (00CRS40347) (00CRS56712) (00CRS56714) (01CRS15634)	No error
STATE v. STOVAL No. 02-715	Durham (01CRS42225)	Vacated in part
STATE v. SWAIN No. 02-33	Buncombe (99CRS56852)	No error
STATE v. TERRY No. 02-561	Granville (01CRS2343) (01CRS50847)	No error
STATE v. THOMAS No. 01-1310	Forsyth (00CRS40403) (00CRS52318) (00CRS52319) (00CRS52322) (00CRS52668)	No error
STATE v. WEBSTER No. 02-259	Forsyth (00CRS58276)	No error
STATE v. WILLIS No. 02-366	Davidson (01CRS50009)	No error
STATE v. WILSON No. 02-179	Forsyth (99CRS49536) (99CRS49539)	No error

TOWN OF WARSAW v. RODRIGUEZ No. 01-1415	Duplin (00CVD979)	Affirmed
WHITE v. SCHWARTMAN No. 02-164	Carteret (99CVS696)	Affirmed
WILEY v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 02-169	Alamance (00CVS1829)	Affirmed in part; reversed in part
WRIGHT v. WRIGHT No. 02-286	Henderson (92CVD881)	Reversed and remanded
YOUNG v. YOUNG No. 02-320	Mecklenburg (99CVD17284)	Affirmed

COUNTY OF WAKE, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, AND JERRY FRANKS AND JOHN SCHIFANO, *ET AL.*, RESPONDENTS AND TOWN OF HOLLY SPRINGS, RESPONDENT-INTERVENOR

No. COA01-847

(Filed 31 December 2002)

1. Administrative Law—final agency decision—de novo review

The trial court properly exercised a de novo review in examining the substantive issues raised by respondent individuals' appeal concerning the reversal of a final administrative agency decision that ordered the withdrawal of a permit to construct a municipal solid waste landfill that had been issued to petitioner county.

2. Administrative Law—North Carolina Administrative Procedures Act—standing—persons aggrieved

Individual respondents who were adjacent property owners to a proposed landfill and respondent-intervenor town qualify as "persons aggrieved" under the North Carolina Administrative Procedures Acts and issues raised by respondents on appeal including the issue of whether respondent-intervenor town approved the location of the proposed landfill facility within its jurisdiction were properly before the trial court.

3. Public Health—solid waste management regulations—new and separate facility—lateral expansion

The trial court did not err by concluding that respondent-intervenor town's initial approval contained in its 1 September 1992 resolution included the construction of a new and separate sanitary landfill facility and was not only for a lateral expansion of the existing landfill.

4. Estoppel—equitable—municipal corporation—ratification

The trial court did not err by concluding that respondent-intervenor town could not withdraw its approval for petitioner county's landfill facility on 19 May 1998 even though respondent individuals contend the town at all times possessed the inherent power to withdraw its approval pursuant to its discretionary governmental authority because the town's multiple acts of ratification of its prior approval equitably estopped the town from withdrawing its approval.

5. Franchise—solid waste management regulations—sanitary landfill

The trial court did not err by concluding that petitioner county was not required to obtain a franchise under N.C.G.S. § 130A-294(b1)(3) or N.C.G.S. § 160A-319 from respondent-intervenor town for operation of a sanitary landfill prior to receiving Facility Permit 92-22.

6. Public Health—solid waste management regulations—sanitary landfill—applicability of administrative rule

The trial court did not err by concluding that 15A N.C.A.C. 13B.1618 did not apply to petitioner county's permit to construct a sanitary landfill.

7. Public Health—solid waste management regulations—sanitary landfill—applicability of statute

The trial court did not err by concluding that N.C.G.S. § 153A-136(c) was inapplicable to petitioner county's selection of the site for a proposed new sanitary landfill.

Judge WALKER concurring.

Appeal by respondents and respondent-intervenor from order entered 19 March 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 April 2002.

Wake County Attorney's Office, by Michael R. Ferrell, for petitioner-appellee County of Wake.

Land Loss Prevention Project, by Katherine Carpenter and Marcus Jimison; John Schifano; and John D. Runkle, for respondent-appellants Jerry Franks and John Schifano, et al.

The Sanford Holshouser Law Firm, by Anna K. Baird and Ernest C. Pearson, for respondent-intervenor-appellant Town of Holly Springs.

Attorney General Roy Cooper, by Assistant Attorneys General Nancy E. Scott and Lauren M. Clemmons, for North Carolina Department of Environment and Natural Resources, amicus curiae.

James B. Blackburn, General Counsel; and Jordan Price Wall Gray Jones & Carlton, by R. Frank Gray and Hope Derby Carmichael, for North Carolina Association of County Commissioners, amicus curiae.

CAMPBELL, Judge.

Jerry Franks, John Schifano, *et al.*, and the Town of Holly Springs (collectively, "respondents"), appeal the superior court's reversal of a judicially-imposed final agency decision of the North Carolina Department of Environment and Natural Resources ("DENR").[1] The judicially-imposed final agency decision had ordered the withdrawal of a permit to construct a municipal solid waste landfill ("Facility Permit 92-22") that had been issued to Wake County.

This appeal deals with numerous issues involving the interpretation and application of North Carolina statutory and regulatory law pertaining to solid waste management. This body of law impacts decisions on where solid waste landfills are to be located in this State and the relationships between counties and municipalities in making and implementing such decisions.

In 1990, Wake County began pursuing plans to expand its South Wake Sanitary Landfill, commonly referred to as the Feltonsville Landfill, in order to provide additional space for the disposal and storage of solid waste. The Feltonsville Landfill is located just outside the Town of Holly Springs ("Town").

In October 1990, the Wake County Board of Commissioners ("County Board") authorized the purchase of a 162.37-acre tract of land adjacent to the Feltonsville Landfill. In July 1991, an engineering consulting firm hired by Wake County informed the County Board that the 162.37-acre tract was insufficient to handle the long-term solid waste disposal needs of the County and recommended that several tracts near the 162.37-acre tract also be purchased for additional landfill space. On 5 August 1991, the County Board directed County staff to pursue the acquisition of additional property adjacent to the initial 162.37-acre expansion area for the Feltonsville Landfill. The County Board subsequently approved the purchase of four additional tracts of land, totaling approximately 311 acres, all located within the zoning jurisdiction of the Town.

In December 1991, Wake County officials met with the Town of Holly Springs Board of Commissioners ("Town Board") to explain the County's plans for expansion of the Feltonsville Landfill. County offi-

1. DENR did not file a brief as a party to this appeal due to the unique procedural posture created by the administrative law judge's recommended decision being adopted as the final agency decision by court order pursuant to N.C. Gen. Stat. § 150B-44. However, DENR did file an *amicus* brief in support of the superior court's reversal of the administrative law judge's judicially-imposed decision.

cials delivered a detailed explanation of the landfill expansion plans, provided maps showing the size and scope of the project, and made themselves available for questions from the Town Board. The minutes of the Town Board meeting recite that the expansion is to "include a total of 482 acres, 400 of which [are] to be located within Holly Springs." The minutes of the meeting indicate no objections from the Town Board to the landfill expansion plans as presented.

On 1 September 1992, County officials attended a second Town Board meeting and again provided a detailed explanation of the landfill expansion plans. The Town Board was informed that the project would cover approximately 471 acres, with approximately 189 acres used for municipal solid waste disposal, with the remaining acreage used for buffers, sedimentation basins, access roads, borrow areas, construction waste disposal, and ancillary facilities. At the meeting, the Town Board voted to approve a resolution granting "prior approval for the issuance of a sanitary landfill permit by the Division of Solid Waste Management to Wake County, said landfill to be established on approximately 380 acres shown on the attached map, part of which acreage is located within the extra-territorial zoning jurisdiction of the Town of Holly Springs, North Carolina." Approximately 320 acres of the proposed landfill was to be located within the Town's zoning jurisdiction.

On 4 December 1992, Wake County submitted a site plan application for the proposed landfill facility to DENR pursuant to the applicable solid waste management regulations. The cover letter accompanying the site plan application referred to its contents as an application for site approval for "the new South Wake Solid Waste Management Facility." The submission of the site plan application was accompanied by the required local government approval from the Town Board, but was not accompanied by the required approval from the County Board. The County Board's approval was subsequently submitted to DENR's Division of Solid Waste Management, Solid Waste Section.

In 1993, after Wake County had submitted its site plan application, the law governing the construction of municipal solid waste landfills changed to address the groundwater contamination problem caused by "leachate seepage." "Leachate" is "liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such waste." 15A NCAC 13B.1602(15) (2002). The new law and implementing regulations required that all landfills be lined; that is, have a system to capture

and collect leachate for treatment at a local wastewater treatment plant. In addition, all existing unlined landfills, such as the Feltonsville Landfill, were required to cease operations by 1 January 1998. As a result, the County's proposed landfill facility could no longer accurately be referred to as an "expansion" of the Feltonsville Landfill. Thereafter, the proposed facility began to properly be referred to as a "new" landfill. However, neither the size, location, anticipated years of operation, location of roads, location of buffer areas, nor any other factor related to the operation of the proposed facility changed in any material respect from the plans presented to and approved by the Town Board on 1 September 1992 and subsequently submitted in the County's site plan application. The only thing that changed was the law, which now mandated that the County's proposed facility be considered a "new" landfill instead of an "expansion" of the existing Feltonsville Landfill, which was now set for closure in 1998.

On 15 December 1994, the County and the Town entered into an Interlocal Agreement under which the Town agreed to provide the County 50,000 gallons per day of wastewater treatment capacity in the Town's wastewater treatment plant for the treatment of leachate generated by the new landfill. In return, the County agreed to forgive $298,291.00 in debt owed by the Town and pay $228,800.00 to the Town for construction of a wastewater collection system and pumping station to service the landfill site. The Interlocal Agreement reiterated the Town's approval of the construction and operation of the proposed landfill facility within the Town's zoning jurisdiction.

On 14 March 1995, DENR approved the County's site plan application and authorized the County to prepare an application for a permit to construct the proposed landfill. The County then authorized its engineering consultants to prepare the documents required to obtain the permit to construct. Those documents were filed with DENR on 31 December 1996.

In the interim, on 17 April 1995, the Town and the County amended their Interlocal Agreement to require the County to forthwith pay the $228,800.00 to the Town for construction of the wastewater collection system and pumping station instead of waiting for approval of its permit to construct. The County paid the Town accordingly.

On 20 May 1997, the Town Board adopted Resolution 97-23, approving the Wake County Ten Year Comprehensive Solid Waste

Management Plan ("Plan"). The Plan stated that all municipal solid waste generated in Wake County between the years 2003 and 2023 would be disposed of and stored at the proposed new facility partially located in the Town of Holly Springs.

On 19 May 1998, the Town Board passed a resolution revoking its prior approval of the issuance of a sanitary landfill permit for the County's proposed landfill facility. The reasons given for the Town Board's decision to revoke its approval included the following: (1) the Town had only approved an "expansion" of the Feltonsville Landfill, not a "new" landfill facility; (2) conditions within the Town had changed dramatically since the Town Board's grant of approval and the proposed landfill site was now unsuitable; and (3) numerous procedural requirements related to the permitting of the landfill had not been followed by the County.

On 18 February 1999, DENR issued Facility Permit 92-22, allowing the County to begin construction of the landfill facility. This permit, which is the focus of this case, grants specific approval for the actual construction of Phase I of the municipal solid waste disposal area ("MSW Phase I"), which is to be constructed in five phases. MSW Phase I covers approximately 47 acres plus infrastructure such as a sediment pond and access roads. MSW Phase I will be permitted to accept household, industrial, and commercial solid waste, and has a projected life of approximately four years. Facility Permit 92-22 also grants general approval of the overall facility concept and layout. However, no other phase of the landfill may be constructed without additional approval from DENR. To construct any phase beyond MSW Phase I, Wake County must receive an amendment to Facility Permit 92-22.

On 19 March 1999, respondent Jerry Franks filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH"), alleging DENR had issued Facility Permit 92-22 (1) without approval from the Town and County as required under 15A NCAC 13B.1618(c)(5)(A); (2) without the Town and County holding the required public meetings under 15A NCAC 13B.1618(c)(5)(A)(i); (3) based on inaccurate and incomplete application data; (4) in violation of N.C. Gen. Stat. § 130A-294(b1)(2); and (5) in violation of N.C. Gen. Stat. § 153A-136(c).

On 23 March 1999, John Schifano, *et al.* also filed a contested case petition with OAH, alleging DENR had issued the permit (1) in

violation of N.C. Gen. Stat. §§ 160A-325 and 153A-292; and (2) without the Town's required approval.

DENR and Wake County were both named as respondents in the petition filed by Franks. However, Wake County was not named as a respondent in the petition filed by Schifano *et al.* Wake County was allowed to intervene in the Schifano, *et al.* contested case and the OAH consolidated the contested cases for hearing. Thereafter, all parties moved for summary disposition.

On 28 September 1999, the administrative law judge ("ALJ") issued a recommended decision granting summary judgment in favor of respondents Franks and Schifano *et al.* and ordering withdrawal of Facility Permit 92-22 until all applicable procedural requirements were met. The ALJ concluded: (1) respondents Franks and Schifano, *et al.* were "persons aggrieved" under the North Carolina Administrative Procedure Act ("NCAPA") with standing to bring a contested case petition challenging DENR's issuance of Facility Permit 92-22; (2) respondents Franks and Schifano, *et al.* also had taxpayer standing; (3) the Town's 1 September 1992 resolution only granted approval for a "lateral expansion" to the Feltonsville Landfill and not a "new" landfill facility; (4) the Town's approval on 1 September 1992, however classified, was properly and legally withdrawn prior to DENR's issuance of the permit; (5) the County failed to obtain a franchise for operation of a solid waste landfill pursuant to N.C. Gen. Stat. § 160A-319; (6) issuance of the permit violated 15A NCAC 13B.1618; (7) issuance of the permit violated N.C. Gen. Stat. § 130A-294; and (8) issuance of the permit violated N.C. Gen. Stat. § 153A-136(c).

On 3 November 1999, the sealed record in this matter was transmitted from OAH to DENR for a final agency decision. DENR had 90 days from that date to render its final agency decision under N.C. Gen. Stat. § 150B-44.[2] On 1 February 2000, a few days before the final agency decision was due, DENR unilaterally declared "good cause" shown for an extension of time to render its final agency decision up to and including 2 March 2000. On 1 March 2000, DENR again unilaterally declared "good cause" for an extension of time up to and including 31 March 2000. On 30 March 2000, DENR for a third time extended the time for rendering its final agency decision up to and including 7 April 2000.

2. N.C.G.S. § 150B-44 has since been amended to provide that a final agency decision is due 60 days after the record is transmitted from OAH to the agency. N.C. Gen. Stat. § 150B-44 (2001).

On 6 April 2000, the individual respondents filed a petition for judicial intervention alleging DENR had violated N.C. Gen. Stat. § 150B-44 by taking multiple extensions of time in which to render its final agency decision. On 7 April 2000, DENR issued a final agency decision modifying the ALJ's recommended decision, withdrawing Facility Permit 92-22, and remanding the matter to the Division of Waste Management, Solid Waste Section, to await Wake County's compliance with N.C. Gen. Stat. § 153A-136(c). However, on 4 October 2000, the individual respondents' petition for judicial intervention was granted and the superior court ordered that the recommended decision of the ALJ be treated as DENR's final agency decision. *See Holland Group v. N.C. Dept. of Administration*, 130 N.C. App. 721, 504 S.E.2d 300 (1998) (holding an administrative agency is only entitled to one extension of time in which to render its final decision under N.C.G.S. § 150B-44).

On 11 October 2000, Wake County filed a petition for judicial review of the final agency decision pursuant to N.C. Gen. Stat. § 150B-45. Wake County asserted the final agency decision was "1) in excess of the statutory authority or jurisdiction of the Agency, 2) made upon unlawful procedure, 3) affected by error of law, 4) unsupported by substantial evidence in view of the entire record and/or 5) arbitrary and capricious."

On 28 November 2000, the parties entered into a consent order allowing the Town of Holly Springs to intervene in the matter.

On 19 March 2001, the superior court entered an order reversing the final agency decision and ordering Facility Permit 92-22 be reissued. The superior court concluded: (1) respondents Franks and Schifano, *et al.* lacked standing under the NCAPA to raise the issue of whether the Town approved the location of the proposed landfill; (2) by its 1 September 1992 resolution, the Town approved the location of a "new" landfill within its jurisdiction as required by N.C.G.S. § 130A-294 and 15A NCAC 13B.0504(1)(e) as they existed at the time; (3) once DENR issued site plan approval to Wake County on 14 March 1995, the Town was prevented from "withdraw[ing] [its] approval absent a showing that the approval was obtained by fraud or material misrepresentation, or that construction plan documents subsequently filed demonstrate[d] that the facility being submitted for a permit [was] substantially different from that which was presented to the [Town] for its approval[;]" (4) the Interlocal Agreement between the County and Town was an enforceable contract by which the Town released its right to withdraw approval for the proposed landfill;

(5) Wake County was not required to obtain a franchise from the Town under N.C.G.S. § 160A-319; (6) the provisions of 15A NCAC 13B.1618 did not apply to Wake County's application; (7) N.C.G.S. § 130A-294(b1)(1)-(3) did not apply to Wake County's application; and (8) N.C.G.S. § 153A-136(c) did not apply to Wake County's application. Respondents Franks, Schifano *et al.*, and the Town of Holly Springs appeal to this Court.

[1] Under the NCAPA, a final administrative agency decision may be reversed or modified by the superior court if the agency's findings, inferences, conclusions or decisions are:

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

N.C. Gen. Stat. § 150B-51(b) (2001). The standard of review to be employed by the superior court is dictated by the nature of the error asserted by the party seeking review. *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). If the petitioner contends the agency's decision was affected by errors of law, N.C.G.S. § 150B-51(1)(2)(3) & (4), *de novo* review is required; if the petitioner contends the agency decision was not supported by the evidence, N.C.G.S. § 150B-51(5), or was arbitrary, capricious, or an abuse of discretion, N.C.G.S. § 150B-51(6), the whole record test is utilized. *Id.* "*De novo* review requires a court to consider the question anew, as if the agency has not addressed it." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001). Under the whole record test, the reviewing court must examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)). In reviewing a superior court order entered upon

review of an administrative agency decision, this Court has a two-fold task: "(1) determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) decide whether the court did so properly." *Deep River Citizen's Coalition v. N.C. Dep't of Env't & Natural Res.*, 149 N.C. App. 211, 213, 560 S.E.2d 814, 816 (2002). In performing this task, this Court need only consider " 'those grounds for reversal or modification argued by the petitioner before the superior court and properly assigned as error on appeal to this Court.' " *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994) (quoting *Professional Food Services Mgmt. v. N.C. Dept. of Admin.*, 109 N.C. App. 265, 268, 426 S.E.2d 447, 449 (1993).

Having reviewed the superior court's order, we conclude it properly exercised *de novo* review in examining the substantive issues raised by respondents' appeal. We now determine whether it did so properly.

[2] As an initial matter, respondents contend the superior court erred in concluding the individual respondents lacked standing to raise the issue of whether the Town approved the location of the County's proposed solid waste landfill within its jurisdiction. The superior court concluded the right of approval belonged exclusively to the Town Board and, since the Town Board had expressly refused to file an administrative appeal of DENR's issuance of Facility Permit 92-22, the individual respondents lacked standing. In contrast, DENR, through the judicially-imposed decision of the ALJ, concluded the individual respondents were "persons aggrieved" under the NCAPA with standing to file a contested case petition.

In its petition for judicial review, Wake County failed to assert as error the agency's conclusion that the individual respondents were "persons aggrieved" under the NCAPA with a right to challenge DENR's issuance of the permit. Nevertheless, "[w]hether one has standing to obtain judicial review of an administrative decision is a question of subject matter jurisdiction[,]" *Carter v. N.C. State Bd. for Professional Engineers*, 86 N.C. App. 308, 313, 357 S.E.2d 705, 708 (1987), which "can be raised at any time, even for the first time on appeal and even by a court *sua sponte*." *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 341, 543 S.E.2d 169, 171 (2001).

"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." *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994) (citing N.C. Gen. Stat. §§ 150B-23(a) (2001)). " '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." N.C. Gen. Stat. § 150B-2(6) (2001). Under the predecessor judicial review statute, which did not define the term, the Supreme Court gave it an expansive interpretation:

> 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; damnified, 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."

In re Assessment of Sales Tax, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) (quoting 3 C.J.S. *Aggrieved*, at 509 (1973)); *accord Empire Power*, 337 N.C. at 588, 447 S.E.2d at 779; *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 360, 265 S.E.2d 890, 898-99 (1980). For the following reasons, we conclude the individual respondents are "persons aggrieved" within the meaning of the NCAPA.

Respondents Franks and Schifano *et al.* allege DENR issued Facility Permit 92-22 in violation of statutory and regulatory requirements; specifically, without the approval of the Town and County, without the Town and County holding public hearings, and without the Town and County considering alternative sites and socioeconomic and demographic data.

The individual respondents further allege that, as owners of property located adjacent to the site of the proposed landfill—the construction of which will result in noise, pollution, inalterable landscape changes, and other negative environmental consequences—they will suffer interference with the use and enjoyment of their property and diminution in the value of their property.

In the solid waste management provisions of the North Carolina General Statutes, the General Assembly mandated the Department of Environment and Natural Resources maintain a Division of Waste Management "to promote sanitary processing, treatment, disposal,

and statewide management of solid waste," "[f]or the purpose of promoting and preserving an environment that is conducive to *public health and welfare*, and preventing the creation of nuisances and the depletion of our natural resources." N.C. Gen. Stat. § 130A-291(a) (2001) (emphasis added). The General Assembly further required the Environmental Management Commission to adopt, and the Department of Environment and Natural Resources to enforce, rules to implement a comprehensive statewide solid waste management program. N.C. Gen. Stat. § 130A-294(b).

> The rules shall be consistent with applicable State and federal law; and shall be designed to protect the *public health, safety, and welfare*; preserve the environment; and provide for the greatest possible conservation of cultural and natural resources.

Id. (emphasis added). In concluding that a comprehensive statewide solid waste management program was desirable, the General Assembly found that:

> (1) Inefficient and improper methods of managing solid waste create hazards to public health, cause pollution of air and water resources, constitute a waste of natural resources, have an adverse effect on *land values*, and create public nuisances.

N.C. Gen. Stat. § 130A-309.03(a)(1) (2001) (emphasis added).

Clearly, the individual respondents alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the solid waste management statutes, and rules and regulations promulgated pursuant thereto, the procedural requirements of which they assert the agency violated when it issued Facility Permit 92-22. As adjacent property owners, the individual respondents may be expected to suffer whatever adverse environmental consequences arise from construction of the landfill. The individual respondents may also experience a decrease in the value of their property caused by construction and eventual operation of the landfill. The individual respondents therefore are "persons aggrieved" within the meaning and intent of the solid waste management statutes, with standing to assert that the permit was issued in violation of statutory and regulatory requirements, including the requirement that the Town grant prior approval for location of a landfill in its jurisdiction. *See Empire Power*, 337 N.C. at 589-90, 447 S.E.2d at 780-81 (individual petitioner was "person aggrieved," within the meaning of the NCAPA, by

DENR's issuance of a permit allowing the construction and operation of sixteen combustion turbine electric generating units where the petitioner owned property immediately adjacent to and downwind of the site of the proposed units); *Orange County*, 46 N.C. App. at 360-62, 265 S.E.2d 899 (plaintiffs were all "persons aggrieved" by a decision of the State Board of Transportation on the location of an interstate highway where the individual plaintiffs were property owners within the proposed corridor of the highway, the members of plaintiff non-profit corporation were citizens and taxpayers who lived in or near the proposed highway corridor, and plaintiff county's tax base and planning jurisdiction would be affected; further, the "procedural injury" implicit in the failure of an agency to prepare an environmental impact statement was itself a sufficient "injury in fact" to support standing as an "aggrieved party" under former N.C. Gen. Stat. § 150A-43, as long as such injury was alleged by a plaintiff having *sufficient geographical nexus* to the site of the challenged project that he might be expected to suffer whatever environmental consequences the project might have).

In addition, we conclude the Town, which was added to the case by consent of the parties following Wake County's filing of its petition for judicial review, also qualifies as a "person aggrieved" under the NCAPA because its tax base and planning jurisdiction will be affected by the proposed landfill. *See Orange County*, 46 N.C. App. at 361, 265 S.E.2d at 899; *see also* N.C. Gen. Stat. § 150B-2(7) (2001) (defining "person" under the NCAPA as any "natural person, partnership, corporation, *body politic* and any unincorporated association, organization, or society which may sue or be sued under a common name") (emphasis added)).[3] Therefore, the issue of whether the Town of Holly Springs approved the location of the proposed landfill facility within its jurisdiction, along with all other issues raised by respondents on appeal, was properly before the OAH and the superior court, and is properly presented for review by this Court.

[3] Respondents argue the Town's initial approval, contained in its 1 September 1992 resolution, was only for an "expansion" of the existing Feltonsville Landfill and not the construction of a "new" and separate facility. In the judicially-imposed final agency decision, the ALJ agreed, relying on the distinction between a "lateral expansion" of an "existing municipal solid waste landfill unit," and a "new municipal

3. Having concluded that all respondents here are "persons aggrieved" within the meaning of the NCAPA, we do not address whether the individual respondents also have taxpayer standing to contest DENR's issuance of Facility Permit 92-22.

solid waste landfill unit," *see* 15A NCAC 13B.1602 (7), (14), (18) (2002), to support its conclusion that the Town had not granted approval for a "new" landfill facility. However, the superior court concluded the Town gave Wake County approval to site the proposed landfill within the Town's jurisdiction as required by N.C. Gen. Stat. § 130A-294 and 15A NCAC 13B.0504(1)(e) as they existed at the time the Town passed the approval resolution. For the reasons discussed herein, we agree with the superior court's reasoning.

On 1 September 1992, the Town Board passed a resolution granting "prior approval for the issuance of a sanitary landfill permit by the Division of Solid Waste Management to Wake County, said landfill to be *established* on approximately 380 acres," part of which was located in the Town's zoning jurisdiction. At the time, there was no legal distinction between a "new" landfill and a "lateral expansion" of a landfill under the applicable solid waste management statutes and regulations governing landfill permit applications. *See* 15A NCAC 13B.0101 through .0204 (effective 1 April 1982); 15A NCAC 13B.0501 through .0510 (effective 1 April 1982); N.C. Gen. Stat. § 130A-290 through 310.23 (1992).

The distinction between a "lateral expansion" of an existing landfill and a "new" landfill did not appear in the solid waste management regulations until the passage of Title 15A, Subchapter 13B, Section .1600, which became effective 9 October 1993. Under these new regulations, the term " 'lateral expansion' means a horizontal expansion of the waste boundaries of an existing MSWLF [municipal solid waste landfill] unit." 15A NCAC 13B.1602(14). An " 'existing MSWLF unit' means any municipal solid waste landfill unit that is receiving solid waste as of October 9, 1993 and is not a new MSWLF unit." 15A NCAC 13B.1602(7). A " 'new MSWLF unit' means any solid waste landfill unit that has not received waste prior to October 9, 1993." 15A NCAC 13B.1602(18).

Because the Town granted approval for the proposed landfill on 1 September 1992, prior to the effective date of the new solid waste management regulations, we agree with the superior court that the ALJ erred in concluding the Town only approved a "lateral expansion" to the existing Feltonsville Landfill. The term "lateral expansion" was not a legal term of art with a definite meaning at that time. Further, the record on appeal does not indicate Wake County ever used the term "lateral expansion" when referring to the proposed landfill facility.

We also agree with the superior court that the County's references to the proposed landfill as an "expansion" of the Feltonsville Landfill, which became inaccurate in 1993 when it was mandated that the Feltonsville Landfill be closed by 1 January 1998, were simply a method of identifying the location of the proposed landfill adjacent to the Feltonsville Landfill. The term "expansion" was not a legal term of art with any particular legal significance under the solid waste management statutes and regulations applicable at the time the Town granted its approval in September 1992.

The record shows the County proceeded with its landfill plans in accordance with the applicable regulations in existence at the time. The County sought and was granted local government approval from the Town as required by N.C. Gen. Stat. § 130A-294(a)(4), as it existed at the time, and 15A NCAC 13B.0504(1)(e). The County then filed its site plan application with DENR on 4 December 1992, beginning the permitting process. *See* 15A NCAC 13B.0202 (stating permit applications must contain both site and construction plans); 15A NCAC 13B.0504 (enumerating the requirements for a site plan application for a proposed sanitary landfill before the requirements for a construction plan application).

In addition, there is no evidence in the record that the County misled or deceived the Town in any way in securing the Town's approval. In fact, the plans for the proposed landfill contained in the construction permit application approved by DENR do not differ in any material respect from the plans presented to and approved by the Town Board on 1 September 1992. In short, the landfill facility approved by the Town in September 1992 is the same landfill facility permitted to be constructed under Facility Permit 92-22. Accordingly, the superior court did not err in concluding the Town gave approval for the proposed landfill facility at issue here.

[4] Respondents next contend that, even if the Town granted approval for a "new" landfill facility on 1 September 1992, the Town at all times possessed the inherent power to withdraw its approval pursuant to its discretionary governmental authority. Thus, the Town maintains its withdrawal of approval for the landfill on 19 May 1998 was valid and effective.

However, subsequent to 1 September 1992, the Town Board took several actions which explicitly ratified its previous approval of the County's proposed landfill. We conclude that these multiple acts of ratification equitably estopped the Town from withdrawing its

approval for the proposed landfill following DENR's acceptance of the County's site plan application on 14 March 1995.

As a general rule, the doctrine of equitable estoppel is not applicable to municipal corporations in matters pertaining to governmental functions. 12 McQuillan *Municipal Corporations* § 34.85 (3d ed. 1995). However, courts in many jurisdictions have applied "the doctrine in exceptional cases, where, upon all the circumstances of the case, right and justice require it." *Id.* at 251. In *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), this Court addressed the application of the doctrine of equitable estoppel to a municipal corporation as follows:

> We recognize that counties [and municipalities] are not subject to an estoppel to the same extent as a private individual or a private corporation. *See Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E.2d 754 (1948). Otherwise a county [or municipality] could be estopped from exercising a governmental right. *Id.* However, a governmental entity may be estopped if it is necessary to prevent loss to another and the estoppel will not impair the exercise of governmental powers. *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 406 (1953).
>
> Estoppel is a means whereby a party may be prevented from asserting a legal defense contrary to or inconsistent with previous conduct. *Godley v. County of Pitt*, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982). In *Godley*, the court determined that detrimental reliance need not be established to invoke the remedial doctrine of quasi estoppel. *Id.* at 361, 293 S.E.2d at 170. Quasi estoppel "is directly grounded upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Id.* One who has the right to accept or reject the benefits flowing from a transaction or instrument and does not do so but instead accepts these benefits has ratified that transaction. *Redevelopment Comm. of City of Greenville v. Hannaford*, 29 N.C. App. 1, 4, 222, S.E.2d 752, 754 (1976)

Id. at 91-92, 336 S.E.2d at 657.

Applying the equitable principles stated in *Land-of-Sky*, we conclude the Town repeatedly ratified its initial approval of the County's proposed landfill. On 15 December 1994, the Town agreed to provide Wake County 50,000 gallons of wastewater treatment capacity in the Town's treatment plant in exchange for forgiveness of $298,291.00 in

debt and payment of $228,800.00 for construction of a wastewater collection system and pumping station to service the landfill site. This agreement reiterated the Town's approval of the construction, as well as operation, of the County's proposed landfill.

On 17 April 1995, the agreement between the Town and Wake County was amended to require Wake County to forthwith pay the Town $228,800.00 for construction of the wastewater collection system and pumping station instead of waiting until Wake County received a permit to construct. Wake County subsequently paid the Town. In sum, counting debt forgiveness and payment, the Town received a financial benefit of approximately $527,000.00 as a result of its approval of the proposed landfill site.

Finally, on 20 May 1997, over four-and-a-half years after giving its approval for the new landfill, the Town approved Wake County's Ten Year Solid Waste Management Plan which stated that all municipal solid waste generated in Wake County between 2003 and 2023 would be disposed of at the proposed new facility.

Wake County relied upon the Town's ratification of its 1 September 1992 approval of the proposed landfill. Not only did Wake County provide the Town a large financial benefit following its grant of approval, but Wake County proceeded with the steps required to make the proposed landfill a reality. Wake County filed and received approval of a site plan application and a permit to construct. These steps required large financial investments on Wake County's part. To allow the Town to withdraw its approval and take a position inconsistent with its actions running over a period of nearly six years would be inequitable under the circumstances. It would create needless instability in the permitting process for the siting and construction of solid waste management facilities within this State, a process which is necessarily time consuming due to the significant public interest and highly-technical complexities involved, by allowing local governments to grant prior approval for a landfill site then withdraw that approval prior to the completion of the permitting process. The superior court refused to countenance such a result, as do we. We conclude, under the circumstances here, that the Town was equitably estopped from withdrawing its prior approval for the County's proposed landfill facility.[4]

4. As a result of this conclusion, we do not consider the vested rights argument presented by DENR and the North Carolina Association of County Commissioners in their *amicus* briefs. We also do not consider Wake County's argument that the Town contractually waived its right to withdraw its approval by entering into the Interlocal Agreement.

[5] Respondents next contend the superior court erred in concluding Wake County was not required to obtain a franchise from the Town for operation of the landfill prior to receiving Facility Permit 92-22. Respondents argue a franchise was required under both Chapter 160A, Article 16 of the General Statutes, entitled "Public Enterprises," and N.C. Gen. Stat. § 130A-294(b1)(3). It is undisputed that Wake County did not obtain a franchise from the Town. Thus, respondents maintain the Town's approval was a mere license which was revocable at any time. Wake County counters by arguing that the statutes relied upon by respondents did not require the County to obtain a franchise prior to starting construction of the landfill pursuant to Facility Permit 92-22.

We first address respondents' argument as to N.C.G.S. § 130A-294(b1)(3), which reads in pertinent part:

> (3) An applicant for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill shall obtain, prior to applying for a permit, a franchise for the operation of the sanitary landfill from each local government having jurisdiction over any part of the land on which the sanitary landfill and its appurtenances are located or to be located. A local government shall adopt a franchise ordinance under G.S. 153A-136 or G.S. 160A-319 prior to the submittal by an applicant of an application for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill. A franchise granted for a sanitary landfill shall include:
>
> a. A statement of the population to be served, including a description of the geographic area.
>
> b. A description of the volume and characteristics of the waste stream.
>
> c. A projection on the useful life of the landfill.

N.C. Gen. Stat. § 130A-294(b1)(3) (2001).

If Wake County was to begin today the permitting process for a new landfill to be located in the Town, N.C.G.S. § 130A-294(b1)(3) would require it to secure a franchise from the Town to operate the new landfill facility prior to applying for a permit from DENR. However, N.C.G.S. § 130A-294 (b1)(3) was added to the General Statutes by Session Laws 1993 (Reg. Sess. 1994), c. 722, and became effective on 7 July 1994. Section 3 of this Act states that it is "effec-

tive upon ratification and applies to applications submitted on or after the effective date." Here, Wake County began the permitting process for the proposed landfill by submitting its site plan application on 4 December 1992, prior to the effective date of N.C.G.S. § 130A-294(b1)(3). Accordingly, Wake County was not required to secure a franchise for operation of the landfill pursuant to N.C.G.S. § 130A-294(b1)(3).

Respondents also contend Wake County was required to obtain a franchise from the Town pursuant to the Public Enterprise Statutes set forth in Chapter 160A, Article 16. N.C. Gen. Stat. § 160A-319, entitled "Utility Franchises," reads in pertinent part:

> (a) A city *shall have authority* to grant upon reasonable terms franchises for the operation within the city of any of the enterprises listed in G.S. 160A-311 and for the operation of telephone systems . . . Except as otherwise provided by law, when a city operates an enterprise, or upon granting a franchise, a city *may* by ordinance make it unlawful to operate an enterprise without a franchise.

N.C. Gen. Stat. § 160A-319(a) (2001) (emphasis added). Included among the list of "public enterprises" is "[s]olid waste collection and disposal systems and facilities." N.C. Gen. Stat. § 160A-311(6) (2001). Pursuant to N.C.G.S. § 160A-76, any such ordinance granting a "public enterprise" franchise must be passed at two regular meetings of the city or town council. N.C. Gen. Stat. § 160A-76(a) ("No ordinance making a grant, renewal, extension, or amendment of any franchise shall be finally adopted until it has been passed at two regular meetings of the council, and no such grant, renewal, extension, or amendment shall be made otherwise than by ordinance.").

Respondents contend that these statutes, when read *in pari materia*, required Wake County to obtain a franchise from the Town of Holly Springs prior to receiving Facility Permit 92-22.

We first note that the language used in the statutes is not mandatory in nature. N.C.G.S. § 160A-319 states that cities and towns shall have the *authority* to grant franchises for public enterprises and, when they *choose* to do so, they *may* pass an ordinance making it unlawful to operate a public enterprise within the city or town without a franchise. The statute does not by its language require the grant of a franchise from a city or town prior to the operation of a public utility not owned and operated by the city or town.

However, case law interpreting Chapter 160A, and its predecessor, indicates that a franchise is mandatory for the operation of a "public enterprise." *See Madison Cablevision v. City of Morganton*, 325 N.C. 634, 654, 386 S.E.2d 200, 212 (1989) ("A city needs no grant from itself to own and operate public enterprises, including operating a CATV [cable television] system; it does so in its own right pursuant to the authority granted to it by the legislature under General Statutes chapter 160A, article 16, part 1. It needs no franchise or other grant of authority from itself as do non-municipal suppliers of the same enterprise."); *Shaw v. Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967); *Power Co. v. Membership Co.*, 253 N.C. 596, 604, 117 S.E.2d 812, 817 (1961) ("Every town has by statute, G.S. 160-2(6) [now N.C.G.S. § 160A-311], the power to grant franchises to public utilities, that is, the right to engage within the corporate boundaries in business of a public nature. Businesses requiring sovereign permission to operate are multitudinous: transportation of goods and persons by railroad or by motor carrier, transmission of telegrams, transmission and distribution of electric power, water and sewerage systems, telephone systems . . . and street railways are but illustrative of the many kinds of businesses which may require sovereign approval."). Based on this case law, we are constrained to conclude that a city or town is required to pass an ordinance granting a franchise any time a third party, be it a private individual or corporation, another municipality, or a county, seeks to operate a public utility such as a solid waste disposal facility.

Nonetheless, we conclude the Town of Holly Springs is equitably estopped from arguing that Wake County has failed to receive a franchise from the Town for operation of the proposed landfill. When the Town granted its approval of the County's proposed landfill, on 1 September 1992, the Town had no ordinance requiring a franchise for the operation of a public utility within its jurisdiction. Over the ensuing period of nearly six years, the Town took several steps to ratify this approval, including: (1) entering into an Interlocal Agreement, and subsequent amendment thereto, reiterating its approval of the construction and operation of the landfill and receiving a significant financial benefit, and (2) approving Wake County's Ten Year Solid Waste Management Plan calling for the disposal of all solid waste generated in Wake County between 2003 and 2023 at the proposed landfill.

Wake County relied on the Town's conduct in proceeding with its plans to construct the landfill. In so doing, Wake County made large

financial investments. To allow the Town to now, or in the future, pass an ordinance requiring a franchise for the operation of a public utility within its jurisdiction, and subsequently attempt to prevent Wake County from operating the proposed landfill on the grounds that a franchise has not been secured, would be grossly inequitable under the circumstances of the instant case. Accordingly, we hold the Town is equitably estopped from contending that a franchise is currently, or in the future, required for operation of the proposed landfill.

[6] Respondents next contend the superior court erred in concluding 15A NCAC 13B.1618 did not apply to Wake County's permit to construct the landfill. Respondents further maintain the County failed to adhere to the public notice and public hearing requirements set forth in 15A NCAC 13B.1618(c)(5)(A)(i-iv).

While respondents correctly contend that 15A NCAC 13B.1618(c)(5)(A)(i-iv) require a public hearing with sufficient public notice prior to the granting of local government approval for a site plan application for a new landfill, these provisions do not apply to the permitting process in the instant case due to the grandfather provision found in 15A NCAC 13B.1618(e), which states:

> (e) New facility applications in transition. Site plan applications for a new facility submitted in accordance with Rule .0504 (1) of this Section after January 15, 1992 and prior to April 9, 1993 and approved by the Division consistent with Subparagraph (a)(1) of this Rule are not subject to the requirements of this Rule.

15A NCAC 13B.1618(e) (2002).

Here, the County filed its site plan application with DENR on 4 December 1992. The site plan application was submitted in accordance with the requirements of Rule .0504(1), including the approval of the Town Board. The County's site plan application was subsequently approved, on 14 March 1995, by the Division of Solid Waste Management and the County was authorized to prepare an application for a permit to construct. *See* 15A NCAC 13B.1618(a)(1). Accordingly, the County's site plan application was not subject to 15A NCAC 13B.1618(c)(5)(A).

[7] Respondents next contend the superior court erred in concluding N.C. Gen. Stat. § 153A-136(c) was inapplicable to Wake County's selection of the site for the proposed new landfill. We disagree.

N.C.G.S. § 153A-136(c), effective 22 July 1992, sets forth requirements that must be satisfied by a county prior to the selection or approval of certain landfill sites.

> **§ 153A-136 Regulation of solid wastes.**
>
> . . .
>
> (c) The board of commissioners of a county shall consider alternative sites and socioeconomic and demographic data and shall hold a public hearing prior to selecting or approving a site for a new sanitary landfill that receives residential solid waste that is located within one mile of an existing sanitary landfill within the State. The distance between an existing and a proposed site shall be determined by measurement between the closest points on the outer boundary of each site. The definitions set out in G.S. 130A-290 apply to this subsection. As used in this subsection:
>
> (1) "Approving a site" refers to prior approval of a site under G.S. 130A-294(a)(4).
>
> (2) "Existing sanitary landfill" means a sanitary landfill that is in operation or that has been in operation within the five-year period immediately prior to the date on which an application for a permit is submitted.
>
> (3) "New sanitary landfill" means a sanitary landfill that includes areas not within the legal description of an existing sanitary landfill as set out in the permit for the existing sanitary landfill.
>
> (4) "Socioeconomic and demographic data" means the most recent socioeconomic and demographic date compiled by the United States Bureau of the Census and any additional socioeconomic and demographic data submitted at the public hearing.
>
> . . . .

N.C. Gen. Stat. § 153A-136(c) (2001).

Here, it is undisputed that the proposed landfill facility constitutes a "new sanitary landfill" under N.C.G.S. § 153A-136(c), since the area of the proposed landfill is not within the legal description of an existing sanitary landfill. It is likewise undisputed that the proposed landfill is located within one mile of the Feltonsville Landfill, which was in operation when the County's site plan application was submitted. It is further uncontested that Wake County did not meet the requirements of N.C.G.S. § 153A-136(c) in selecting or approv-

ing the site for the proposed landfill. Wake County argues that it is excused from compliance with N.C.G.S. § 153A-136(c) by the exemption enacted contemporaneously therewith, which provides in pertinent part:

> G.S. 153A-136(c) . . . shall not apply to the selection **or** approval of a site for a new sanitary landfill if, prior to the effective date of this act [22 July 1992]:
>
> (1) The site was selected **or** approved by the board of commissioners of a county or the governing board of a city;
>
> (2) A public hearing on the selection **or** approval of the site has been held;
>
> (3) A long-term contract was approved by the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] under Part 4 of Article 15 of Chapter 153A of the General Statutes; **or**
>
> (4) An application for a permit for a sanitary landfill to be located on the site has been submitted to the Department of Environment, Health and Natural Resources [now the Department of Environment and Natural Resources].

Session Laws 1991 (Reg. Sess., 1992), c. 1013, s. 9 (emphasis added).

Wake County contends the actions of the County Board constituted selection or approval of the proposed landfill site prior to 22 July 1992, the effective date of N.C.G.S. § 153A-136(c). Respondents however contend Wake County had not selected or approved a site for a "new" landfill prior to 22 July 1992. According to respondents, all Wake County had done at that time was authorize the "lateral expansion" of the existing Feltonsville Landfill. Since a "new" landfill had not been authorized prior to 22 July 1992, respondents insist N.C.G.S. § 153A-136(c) applies to the selection of the proposed landfill site. Respondents further contend the County could not have selected or approved the proposed landfill site prior to 22 July 1992, whether it be considered a "new" landfill or a "lateral expansion," because the Town's approval of the site was a condition precedent to the County's approval and the Town did not grant its approval until 1 September 1992, after the effective date of N.C.G.S. § 153A-136(c).

As earlier noted, the distinction between a "new" municipal solid waste landfill and a "lateral expansion" of an existing landfill did not appear in the solid waste management rules and regulations until 9

October 1993, after both the Town and the County had clearly selected and approved the proposed landfill site. Further, the record shows that the County's plans for the landfill did not change in any material respect following the Town's approval on 1 September 1992. Because the County initially referred to its proposed plans as an "expansion" of the Feltonsville Landfill does not change the fact that the plans approved by the County and Town were at all times for the construction of a "new sanitary landfill" facility, as defined under N.C.G.S. § 153A-136(c). Accordingly, we must determine whether the County selected or approved the site prior to the effective date of N.C.G.S. 153A-136(c).

In *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 542 S.E.2d 296 (2001), this Court faced a similar question. In *Grassy Creek*, the plaintiffs argued that the City of Winston-Salem Board of Alderman had not selected or approved the site for a landfill prior to 22 July 1992, the effective date of N.C.G.S. § 160A-325, which sets forth the same requirements for cities and towns as does N.C.G.S. § 153A-136(c) for counties.

The Court noted that, prior to 22 July 1992, the City had entered into an interlocal agreement with Forsyth County creating a Utility Commission with responsibility over, *inter alia*, solid waste management and disposal. On 12 August 1991, the Utility Commission approved a resolution to proceed with the landfill. The resolution created access restrictions and buffer requirements for the landfill site and identified the site by tax lots and block numbers. The resolution also stated the approximate price of the property for the landfill site and resolved that the City undertake to acquire the property.

On 9 September 1991, the Finance Committee of the Board of Alderman approved a resolution entitled "RESOLUTION OF THE CITY OF WINSTON-SALEM, NORTH CAROLINA APPROVING THE LEASE AGREEMENT WITH NORTH CAROLINA MUNICIPAL LEASING CORPORATION AND RELATED MATTERS." Under the terms of the lease, North Carolina Municipal Leasing Corporation would purchase the property for the landfill and lease it to the City. The Finance Committee attached a "Board of Alderman-Action Request Form" to the resolution stating that the lease was, in part, for the acquisition of "land for future solid waste disposal."

On 16 September 1991, the Finance Committee resolution and the Action-Request Form were brought before the Board of Alderman. The Board approved the following resolution:

> the Mayor, the City Manager, the City Secretary, and the Director of Finance of the City are hereby authorized, empowered and directed to do any and all other acts and to execute any and all other documents, which they in their discretion, deem necessary and appropriate in order to consummate the transactions contemplated by (I) this Resolution, (ii) the Lease, and (iii) the documents presented to this meeting . . .

This Court concluded the actions of the Board of Alderman—approving the lease agreement for the property that had previously been identified as "land for solid waste disposal"—were sufficient to constitute a selection or approval of the landfill expansion site on 16 September 1991, prior to the effective date of N.C.G.S. § 160A-325.

Here, the County Board, on 29 October 1990, authorized the purchase of the 162.37-acre tract of land for the landfill. On 5 August 1991, the County Board directed staff to pursue acquisition of additional property for the landfill. Finally, on 6 April 1992, the County Board authorized the purchase of the four additional tracts of land to be used for the landfill.

We hold these actions of the County Board to be sufficient to constitute selection of the landfill site as of 6 April 1992, prior to the effective date of N.C.G.S. § 153A-136(c). Accordingly, the exemption found in Session Laws 1991 (Reg. Sess., 1992), c. 1013, s. 9 applies and the County was not required to consider alternative sites and socioeconomic and demographic data, or to hold a public hearing prior to selecting the site.

Respondents correctly point out that the Town, under N.C. Gen. Stat. § 160A-325(a), has a separate and independent duty to consider alternative sites and socioeconomic and demographic data prior to granting its approval of the location of a "new sanitary landfill." Because the Town's approval was not granted until 1 September 1992, after the effective date of N.C.G.S. § 160A-325, and the Town did not meet the requirements of the statute, respondents maintain Facility Permit 92-22 was issued in violation of N.C.G.S. § 160A-325 and must be set aside.

However, consideration of the requirements found in N.C.G.S. §§ 153A-136(c) and 160A-325(a) are not part of the permitting process for a solid waste management landfill. DENR is authorized to issue permits "governing the establishment and operation of solid waste management facilities." N.C. Gen. Stat. § 130A-294(4)a (2001).

DENR's authority to promulgate rules and regulations and to develop a permitting system for landfills is therefore derived from N.C.G.S. § 130A-294(a)(4)a. The administrative rules promulgated pursuant to N.C.G.S. § 130A-294 specify detail requirements that applicants must meet and state specifically that applications for permits shall be reviewed "to assure that all provisions of these Rules, the Solid Waste Management Act [N.C. Gen. Stat. § 130A, Article 9], and the Federal Act [the Resource Conservation and Recovery Act of 1976], will be met." 15A NCAC 13B.0203 (2002). Neither the Rules, the Solid Waste Management Act, nor the Federal Act incorporates N.C.G.S. § 153A-136(c), or N.C.G.S. § 160A-325(a), as a requirement which must be met by landfill permit applicants.

Generally, an administrative agency may exercise its authority only as specifically delegated by the legislature. North Carolina has embraced this principle in N.C. Gen. Stat. § 150B-19 (2001), which reads in pertinent part:

> An agency may not adopt a rule that does one or more of the following:
>
> (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.

Because neither N.C.G.S. § 160A-325(a) nor any other statute specifically authorizes DENR to implement or interpret Section 160A-325(a), it is not part of DENR's regulatory permitting scheme for solid waste management landfills, and assuming, *arguendo*, the Town was required to adhere to its requirements, failure to do so does not require withdrawal of Facility Permit 92-22.

Finally, even if a municipality's failure to comply with N.C.G.S. § 160A-325(a) could warrant withdrawal of a landfill permit issued by DENR, we would still conclude, based on the facts of the instant case, that here the Town of Holly Springs and the individual respondents are equitably estopped from raising such a failure in contesting Facility Permit 92-22.

For the reasons discussed herein, we agree with the able and learned superior court judge, and affirm his reissuance of Facility Permit 92-22 to Wake County.

Affirmed.

Judge McGEE concurs.

Judge WALKER concurs in a separate opinion.

WALKER, Judge, concurring.

I concur in this well-reasoned opinion and I further agree with the following conclusion of the trial court:

> 24. Additionally this Court concludes as a matter of law that the Interlocal Agreements between Wake County and the Town of Holly Springs entered into on December 12, 1994, and April 17, 1995, are valid, enforceable contracts between the parties. In those agreements the Town specifically approved Wake County's "construction and operation" of the MSW landfill within the Town's jurisdiction. By those agreements the Town contractually released any right it might have had to withdraw its approval for Wake County to locate the MSW landfill within the Town's jurisdiction. Because the Town had contractually surrendered any such right of withdrawal it might have had, the Decision's conclusion that DENR was required not to issue the MSW landfill construction permit to Wake County because of the Town's withdrawal of approval is erroneous as a matter of law.

STATE OF NORTH CAROLINA v. DONALD FREDERICK TAYLOR

No. COA01-942

(Filed 31 December 2002)

1. Constitutional Law—right to counsel—disqualification of retained counsel—conflict of interest

The trial court did not violate defendant's Sixth Amendment right to counsel in a second-degree murder case by disqualifying defendant's retained counsel based on a conflict of interest, because: (1) defendant's retained counsel was previously retained by the victim as her attorney for a domestic action against her husband; (2) defendant's retained counsel gave notice of his intent to use a power of attorney, prepared by the attorney giving defendant power of attorney over the victim's interests while the attorney was counsel of record for the victim in a domestic case, for the benefit of defendant; (3) the attorney's representation of defendant would inescapably be adverse to the

victim within the meaning of Revised Rule of Professional Conduct 1.7 since defendant was on trial for the victim's murder and the attorney, in defense of defendant for that murder, could be called upon to impeach statements made by the victim during his dual representation; (4) although the attorney was representing defendant in a matter unrelated to his representation of the victim, the attorney had a duty of loyalty and care to the victim which could have been compromised by this dual representation; (5) the attorney was privy to some information regarding the victim's personal life and habits and her state of mind after having represented her for some fifteen months in her divorce proceedings, and this information would be helpful in defending the person accused of her murder; (6) although the attorney was not actually called as a witness to testify, the possibility certainly existed and would have violated Revised Rule of Professional Conduct 3.7; and (7) defendant was not prejudiced when his newly appointed attorney had five months to prepare for trial.

2. Homicide—second-degree murder—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder even though defendant contends the victim shot herself, because the evidence taken in the light most favorable to the State revealed that: (1) the victim and defendant were the only two persons in the house at the time of the shooting; (2) prior to the shooting, one of the victim's friends overheard defendant threatening to kill the victim if she ever left him; (3) defendant and the victim had an argument just before the victim was shot; and (4) the victim was shot in the back of the neck, and medical analysis indicated it was from a distance that could not have been self-inflicted.

3. Sentencing—presumptive range—failure to find mitigating factors

The trial court did not abuse its discretion in a second-degree murder case by sentencing defendant within the statutory presumptive range without making findings in mitigation.

Appeal by defendant from judgment entered 28 March 2000 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 21 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General A. Danielle Marquis, for the State.

James R. Parish, for defendant.

BIGGS, Judge.

Donald Frederick Taylor (defendant) appeals his conviction of second-degree murder. For the reasons herein, we find no error.

At trial, the State's evidence tended to show that on 15 July 1998, defendant called a 911 operator to report that his live-in girlfriend, Dorothy Taylor (victim, no relation to defendant), had shot herself. When a paramedic arrived, he observed the victim lying on her back in the kitchen with an apparent gun shot wound to the back of the neck and a substantial amount of blood coming from the wound. A semi-automatic pistol was discovered on the floor beside the victim. Defendant told the paramedic that he and the victim were arguing, that she received a phone call, and, shortly thereafter, shot herself.

When Deputy Marvin Sapp of the Cumberland County Sheriff's Department arrived at the scene, he observed defendant, who seemed extremely calm, coming out of the bathroom drying his hands. Defendant told the deputy that the victim came home from work and laid across the bed while defendant was talking on the phone. Defendant ended the telephone conversation, took a shower, and then left the bedroom to make another phone call. According to defendant, after he finished the second call, the victim dialed *69 on the phone and discovered that defendant had been talking to another woman. The couple then argued. Defendant went back to the bedroom, took his gun from his holster and laid it on the bed as he got ready for work as a security officer. When he turned around, the gun was missing. Shortly thereafter, defendant heard a gun shot and saw the victim fall to the kitchen floor.

The victim was transported by ambulance to Cape Fear Valley Hospital, where it was determined that she had suffered a gunshot wound, with the bullet entering from the left and exiting on the right of her posterior neck. As a result, the victim's spinal cord was bruised beyond recovery, leaving her a quadriplegic. Noting the absence of any markings of burning, stippling, or tattooing, which are typical for close contact gunshot wounds, the treating physician determined that the victim's wound was not a contact wound. The doctor further determined that the victim could not have inflicted this injury on her-

self since she could not possibly have held the gun at a distance to prevent any burning, stippling, or tattooing of any kind.

On 8 August 1998, defendant was charged with felonious assault with a deadly weapon with intent to kill inflicting serious injury. As a result of complications from the gunshot wound, the victim died on 2 February 1999; on the same day defendant was charged with second-degree murder.

Prior to trial, the State moved to disqualify defendant's attorney, James Walen, from representing defendant contending that a conflict of interest existed since Walen had previously represented the victim in a divorce action. Hearings were conducted based on the State's motion on 24 and 26 October 2000. The court order, entered 19 January 2001, concluded that there was an "actual and substantial" conflict of interest and disqualified Walen and all members of his firm from representing defendant. The court appointed another attorney to represent defendant.

On 28 March 2001, defendant was convicted of second-degree murder and sentenced to a minimum term of 141 months and a maximum term of 179 months in prison. From this conviction, defendant appeals.

I.

[1] By his first assignment of error, defendant argues that the trial court violated his constitutional right to counsel by disqualifying his retained counsel. We disagree.

The Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment and §§ 19 and 23 of the North Carolina Constitution guarantees a defendant's right to counsel in a criminal prosecution. *State v. Shores*, 102 N.C. App. 473, 402 S.E.2d 162 (1991). This right includes the right to retain an attorney of the defendant's choice. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987). However, this right is not absolute. "The essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to insure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159, 100 L. Ed. 2d 140 (1987). As noted by this Court in *State v. Shores*, 102 N.C. App. at 475, 402 S.E.2d at 163 (quoting *Id.* at 160, 100 L. Ed. 2d 140), "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards. . . ." In this

regard, the right of a defendant to have an attorney of his own choosing must be balanced against the court's interest of conducting a fair and unbiased legal proceeding. *State v. Bruton*, 344 N.C. 381, 474 S.E.2d 336 (1996).

When a party challenges an attorney's representation contending that a conflict of interest exists, "a hearing should be conducted, 'to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment.' " *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d S.E.2d 755, 758 (1993) (quoting *U.S. v. Cataldo*, 625 F. Supp. 1255, 1257 (S.D.N.Y. 1985) (citation omitted)). If it is shown that "an actual conflict or the potential for conflict exists, the presumption in favor of an accused's counsel of choice will be overcome." *Shores*, 102 N.C. App. at 475, 402 S.E.2d at 163.

It is well settled that "[t]he trial court must be given substantial latitude in granting or denying a motion for attorney disqualification." *Id.* To that end, the findings of the trial court are binding upon appeal if they are supported by any competent evidence, and the court's ruling may be disturbed only where there is a manifest abuse of discretion or if it is based on an error of law. *State v. Hardison*, 143 N.C. App. 114, 545 S.E.2d 233 (2001).

In the case *sub judice*, hearings were conducted on the State's motion that Walen be disqualified due to conflict of interest. After extensive discussion with and questioning of counsel for defendant and the State, as well as briefing the issue by both parties, the trial court made the following pertinent findings:

> 4. Dorothy Taylor, [the victim], retained James M. Walen as her attorney for a domestic action against her husband, Jeffrey Taylor [Taylor]. Pursuant to that representation, Mr. Walen filed a Complaint for divorce in 97 CVD 5481 on July 25, 1997. According to Donald Taylor, [defendant], he and the victim were involved in a relationship and had been living together for about one year as of the date of the shooting, July 15, 1998.
>
> 5. Mr. Walen filed a Motion for Summary Judgment on September 8, 1997. On September 16, 1997, Mr. Walen filed an Amended Complaint for divorce and sought to have a separation agreement incorporated into the divorce judgment. On September 29, 1997, Mr. Walen obtained a Judgment of Divorce by Order of Summary

Judgment in which the court incorporated the separation agreement into the judgment.

6. On October 14, 1997, Mr. Walen filed a Motion in the Cause for the court to determine why Taylor should not be held in contempt for failing to comply with the terms of the Judgment of Divorce. The matter was heard on November 20, 1997, and the court granted the victim relief by Order filed on December 4, 1997.

7. On April 23, 1998, Mr. Walen filed another Motion in the Cause to again determine why Taylor should not be held in contempt for failing to comply with the terms of the Judgment of Divorce. The matter was heard on June 29, 1998, and the court granted the victim relief by Order filed on July 13, 1998.

8. On July 15, 1998, the State's evidence tends to show that the Defendant shot the victim in the neck resulting initially with high cervical quadriplegia but ultimately resulting in her death on February 2, 1999.

9. The victim made statements regarding the events of the shooting. The State has given Notice of its intent to use certain statements in the trial of this matter under the residual hearsay exception to the hearsay rule. Further, on July 15, 1998, Detectives Ed Brincefield and Jo Autry spoke with the victim as she was in the initial stages of treatment at Cape Fear Valley Medical Center. This was the victim's first known statement following the shooting. According to one of the victim's treating physicians, Dr. Mark Hnilica, her injury was certainly life threatening. She communicated to Detectives Brincefield and Autry that she had not shot herself but rather her husband, the man at the house had shot her. She has made other statements, some of which indicate that the defendant did not shoot her, some of which indicate that he did, and some of which reveal that she could not remember what had happened. She has consistently stated, however, that she did not shoot herself. Only two people were present at the time of the shooting, the victim and the defendant.

10. The defendant was arrested on August 8, 1998. On or about August 18, 1998, as the victim lay immobile in her hospital bed, Mr. Walen prepared a Power of Attorney for the victim to give power of attorney to the defendant. A member of Mr. Walen's staff proceeded to the hospital whereupon the victim executed the document. Mr. Walen has given Notice to the State that he intends

to use at trial certain hearsay statements of the victim. His Notice includes the August 18, 1998 Power of Attorney given to the Defendant by the victim. This evidence is relevant to show that the Defendant did not shoot the victim for if he had, the victim would not have given her power of attorney to him. According to a statement made by the victim to her sister on August 19, 1998, however, she (the victim) was "so drugged up" when the document was executed that she did not know what she had done. This information was provided to Detective O'Briant on August 25, 1998.

11. On September 9, 1998, Mr. Walen filed a Motion to Withdraw as the victim's attorney in 97 CVD 5481. On October 9, 1998, the court allowed Mr. Walen's motion to withdraw. The domestic case continued as Taylor through counsel filed a Motion and Amended Motion to set aside the divorce judgment and for a preliminary injunction on the grounds that he and the victim were never married.

. . . .

13. There is a substantial likelihood that the following will occur at the trial of this case: The State [] will introduce into evidence statements made by the victim which implicate the Defendant as the perpetrator of the charged offense. The Defendant must attempt to impeach the victim's statements. The Defendant will also attempt to use statements made by the victim which tend to exculpate the Defendant. The Defendant will also attempt to use the above-described power of attorney in his defense. The State will then attempt to negate the meaning of the power of attorney with subsequent statements of the victim concerning the execution of the document, which in turn bolsters the victim's statements tending to implicate the Defendant. This in turn tends to make Mr. Walen's contact with the victim relevant in the case thus making him a potential witness for the Defendant.

14. An actual and substantial conflict of interest on a material issue exists in the representation of the Defendant by Mr. Walen and all members of his law firm.

15. Although the Defendant waived the conflict of interest upon extensive questioning by this court, the deceased victim is obviously unable to waive the conflict of interest in the Defendant's continued representation by Mr. Walen.

Based upon its findings, the trial court concluded, "[a]n actual and substantial conflict of interest on material issues" existed in Walen's representation of defendant.

While defendant failed to assign error to any of the court's findings of fact in the record, he does argue in his brief that findings #13 and #14 are not supported by the evidence of record. Our appellate courts have long held that an appellant's failure to assign error to each finding of fact and to identify in his brief which findings are challenged, will result in the presumption that the findings are supported by competent evidence. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999); *see also Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60 (finding that the failure of appellant to "except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence . . . will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact"), *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

Since defendant presents arguments in his brief as to the sufficiency of the evidence to support the trial court's Findings of Fact 13 and 14, we will review the propriety of those findings alone. The trial court's remaining findings are presumed correct, and are binding on this Court.

Defendant argues that there is no evidence in the record to support the scenario outlined by the court in Finding of Fact 13. We disagree.

The record demonstrates that both the State and Walen, as defense counsel, gave notice of their intent to use various statements of the victim, and that a number of the statements were conflicting. Further, Walen gave notice of his intent to use the power of attorney signed by him for the benefit of defendant. The following exchange occurred between the court and Walen at the disqualification hearing:

> THE COURT: Do you intend to offer that power of attorney as evidence?
>
> MR. WALEN: I don't know yet. I don't know if it's admissible. I don't—First of all, I contend that the dying declarations or not dying declarations are not admissible. And if in fact it is, there's two dying declarations.
>
> THE COURT: Well—

MR. WALEN: Not one.

THE COURT: Mr. Walen, would you follow me here as I walk—

MR. WALEN: Okay.

THE COURT: —briefly, gradually through this case. I'm representing a defendant charged with murder.

MR. WALEN: Okay.

THE COURT: I've got some inkling of evidentiary matters that I can offer that the victim said my guy didn't do it.

MR. WALEN: Okay.

THE COURT: Okay. Are you telling me that I wouldn't offer that evidence?

MR. WALEN: Well, of course I would.

THE COURT: All right.

MR. WALEN: But there's—

THE COURT: And—

MR. WALEN: Okay.

THE COURT: Consistent with that contention that I have that the victim said my guy didn't do it—

MR. WALEN: Um-hum.

THE COURT: I've got evidence that after the shooting, before death, the victim gave my client a power of attorney, which tends to support the position the victim said my guy didn't do it. You tell me I wouldn't attempt to get that power of attorney in?

MR. WALEN: Of course you would. And I would. But that's not a conflict. How can that be a conflict, unless she said—

THE COURT: All right. Once you do offer that—

MR. WALEN: Okay.

THE COURT: —are you telling me they can't rebut that?

MR. WALEN: Absolutely, they can rebut that. But I'm not going to go into how or why that won't work. Because that's trial strategy. If we want to address that in camera, I'll be happy to address that.

THE COURT: Okay.

MR. WALEN: But I'm not going to sit here and tell Mr. Hicks how we're going to try this case, if we ever get to court.

THE COURT: Well, I suspect if I deny—if I rule at this point that the trial goes forward with you as counsel of record, I'll be honest with you, folks, it's impossible to tell how a case is going to come out, but I will not be surprised if in the middle of the trial I will hear one or both lawyers stand up and say, oops, I now see it. We've got a conflict. We've got a mistrial.

MR. HICKS: I see it now. I mean, I don't expect—

We believe that there was a substantial likelihood that the scenario outlined in Finding of Fact 13 would occur as found by the court; thus, we conclude that the finding is supported by competent evidence in the record, as well as, reasonable inferences to be drawn from that evidence, and is therefore binding on appeal.

Next defendant argues that there is no evidence to support Finding of Fact 14 in which the trial court concludes that "an actual and substantial conflict of interest on a material issue exist in the representation of defendant by Walen."

We first observe that the court labels its conclusion as both a finding of fact and conclusion of law; however, because it states no factual basis, it is in fact a conclusion of law and should be reviewed as such. *Wilder v. Wilder*, 146 N.C. App. 574, 553 S.E.2d 425 (2001); *State v. Rogers*, 52 N.C. App. 676, 681-82, 279 S.E.2d 881, 885 (1981) ("[f]indings of fact that are essentially conclusions of law will be treated as such upon review," and will be "upheld where there are other findings upon which they are based.") Thus, we will review the court's conclusion *de novo*; irrespective of the label applied. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000) (conclusion of law, even if erroneously labeled as findings of fact, are reviewable *de novo* on appeal; court "not bound by the label used by the trial court.")

Defendant argues that there are no findings to support the conclusion of law that an actual and substantial conflict of interest existed which would prohibit . . . Walen from representing . . . [him]" in this case. Defendant makes much of the fact that neither the statements made by the victim inculpating defendant as her attacker, nor the power of attorney prepared by Walen giving defendant power of

attorney over the victim's interests while Walen was counsel of record for the victim in a domestic case, were actually introduced into evidence at trial, thereby necessitating any compromise in Walen's level of representation. However, the failure of these situations to materialize in defendant's trial are not dispositive.

In this case, at an unusually early stage in the proceedings, the trial court was called upon to balance defendant's right to be represented by retained counsel of choice against standards of the profession, and the court's interest in assuring that a defendant have a fair trial. *See State v. Yelton*, 87 N.C. App. at 556, 361 S.E.2d at 755 (noting that issues of potential problems with representation are usually presented in post-conviction motions alleging ineffective assistance of counsel).

The United States Supreme Court has recognized the unique challenge of the trial court when a party presents the issue of a possible conflict of interest prior to trial. In *Wheat*, the Supreme Court stated,

> Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

486 U.S. at 162, 100 L. Ed. 2d at 151. In light of this "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a

potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.*; *see also Shores*, 102 N.C. App. at 475, 402 S.E.2d at 163 ("The trial court must be given substantial latitude in granting or denying a motion for attorney disqualification").

In the instant case, the trial court considered, in addition to the relevant case law, Rules 1.6, 1.7, and 3.7 of the Revised Rules of Professional Conduct of the North Carolina State Bar in making its determination of whether an actual conflict of interest existed. Revised Rule 1.6(c) prohibits an attorney from (1) revealing confidential information of a client; (2) using confidential information of a client to the disadvantage of the client, or (3) using confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation. The rule defines "confidential[ity] of information" as: "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." R.P.C. 1.6(a). Revised Rule 1.6(a) specifically provides that " 'client' refers to present and former clients." *Id.* In its 1998 Ethics Opinion 20, the State Bar noted, "Although this definition may appear on its face to limit confidential information to information either received from the client or received during the course of the representation, the comment to the rule clarifies that '[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' " 1998 N.C. Eth. Op. 20 (quoting Rule 1.6, cmt. 5). Revised Rule of Professional Conduct 1.7, which is the "General Rule" regarding a conflict of interest provides:

> A lawyer shall not represent a client if the representation of that client will be, or is likely to be, directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and
>
> (2) each client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.

R.P.C. 1.7(a); *see also* Comment 3 to R.P.C. 1.7 ("As a general proposition, loyalty to a client prohibits undertaking representation directly

adverse to that client without the client's consent. . . . Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated). Finally, Revised Rule of Conduct 3.7 provides, pertinently:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case;
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

R.P.C. 3.7(a).

In *State v. James*, 111 N.C. App. 785, 790, 433 S.E.2d 755, 758 (1993), this Court examined the issue of a conflict of interest where the same attorney represented both the defendant and a prosecution witness, but in unrelated matters. *Id.* The Court noted that such a situation "creates several avenues of possible conflict for an attorney." *Id.* at 790, 433 S.E.2d at 758. The Court explained,

> We believe representation of the defendant . . . as well as the prosecution witness (albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

Id. The Court, therefore, held that an actual conflict of interest existed, which adversely affected counsel's representation of defendant. *Id.*

In the case *sub judice*, Walen was first employed to represent the victim in a domestic matter in July 1997 and continued to represent her in the matter until 9 October 1998, when counsel was allowed by order of the district court to withdraw as counsel of record for the victim. Defendant was arrested on charges that he feloniously assaulted the victim on 8 August 1998, and retained Walen to repre-

sent him also. Ten days later, Walen prepared a power of attorney giving defendant power of attorney over the victim's affairs while she lay immobile in the hospital. Prior to trial, Walen gave notice that he would present the evidence of the victim's execution of the power of attorney in defendant's favor to refute evidence that defendant shot the victim. In addition, both the State and Walen gave notice that they would be using conflicting statements made by the victim that defendant did or did not shoot her.

Walen's representation of defendant would inescapably be adverse to the victim, within the meaning of Revised Rule of Professional Conduct 1.7, since defendant was on trial for her murder, and Walen, in defense of defendant for that murder, could have been called upon to impeach statements made by the victim during his dual representation. In addition, although Walen was representing defendant in a matter unrelated to his representation of the victim, Walen had a duty of loyalty and care to the victim which could have been compromised by this dual representation. Similar to the Court's concern in *James*, the representation of defendant by Walen in the criminal matter, may have been hampered by his duty of loyalty and care to two competing interests. *See id.*, 111 N.C. App. at 790, 433 S.E.2d at 758. To this end, defendant would have been precluded " 'from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment.' " *Id.* at 791, 433 S.E.2d at 758 (quoting *Cataldo*, 625 F. Supp. at 1257).

Additionally, Walen was undoubtedly privy to some information regarding the victim's personal life and habits, her state of mind, etc., after having represented her for some fifteen months in the divorce proceedings. Such information would be most helpful in defending the person accused of her murder, especially if the defendant submits that the victim was distressed and shot herself or if the defendant intends to attack the victim's credibility. Such a scenario presents the potential that a defense of the charges in this case could compromise (or could be hampered by) Walen's duty of confidentiality under Revised Rule 1.6, as well as the duty of loyalty and care under Revised Rule 1.7.

Finally, although Walen was not actually called as a witness to testify, had certain other evidence been proffered by the State or defendant at trial, the possibility certainly existed. Walen's testimony while he represented defendant would be in clear derogation of Revised Rule of Professional Conduct 3.7.

We conclude that the trial court properly determined that there was an actual conflict of interest in this case. In light of this conflict, the presumption in favor of defendant's choice of counsel must give way. *Shores*, 102 N.C. App. at 475, 402 S.E.2d at 163 (citing *Wheat*, 486 U.S. at 164, 100 L. Ed. 2d at 152). Further, in such circumstances, the United States Supreme Court has provided that the trial court may justifiably "decline a proffer of waiver," and such a decision should be accorded wide latitude. *Wheat*, 486 U.S. at 162, 100 L. Ed. 2d at 150. In balancing defendant's right to retained counsel of choice against the court's interests in the proper administration of justice, we conclude that the trial court did not abuse its discretion in determining that an actual conflict of interest existed here, so as to justify disqualifying Walen and all of the members of his firm from representing defendant in this matter.

We do find it of concern that the State did not address its opposition about Walen's representation for nearly two years. However, we believe that defendant did not suffer prejudice since the newly appointed attorney had five months to prepare for trial. *Cf. State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977) (holding that defendant was denied effective assistance of counsel when an attorney withdrew from the case because of a possible conflict of interest, the judge denied defendant's motion for a continuance, and the court-appointed attorney had only ninety minutes to confer with the defendant prior to the trial). This assignment of error is, therefore, overruled.

II.

[2] By his second assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the charge of second degree murder. Specifically, defendant contends that there was insufficient evidence to show that he committed the crime as charged. We disagree.

A motion to dismiss is properly denied if the State offers substantial evidence—direct or circumstantial, or both—that the offense charged was committed, and that the defendant was the perpetrator. *State v. Montgomery*, 341 N.C. 553, 561, 461 S.E.2d 732, 735 (1995). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). In ruling on a motion to dismiss, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to

be drawn therefrom. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Contradictions or discrepancies in the evidence are matters for the jury to resolve, and do not warrant dismissal of the case. *Id.* at 379, 526 S.E.2d at 455.

" 'Second-degree murder is the unlawful killing of a human being, with malice, but without premeditation and deliberation.' " *State v. Welch*, 135 N.C. App. 499, 502-03, 521 S.E.2d 266, 268 (1999) (quoting *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983)). "The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984); *see also State v. Hodges*, 296 N.C. 66, 72, 249 S.E.2d 371, 374 (1978) (providing that evidence showing defendant intentionally inflicted a wound with a deadly weapon which caused death "raises inferences of an unlawful killing with malice which are sufficient [to establish] murder in the second degree"); *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997) (providing that malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death). Such a presumption is sufficient to withstand a motion to dismiss for insufficient evidence. *State v. Barrett*, 20 N.C. App. 419, 422, 201 S.E.2d 553, 555, *cert. denied*, 285 N.C. 86, 203 S.E.2d 58 (1974). The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question. *Id.*

In the instant case, the evidence, taken in the light most favorable to the State, tended to show that the victim and defendant were the only two persons in the house at the time of the shooting; that prior to the shooting, one of the victim's friends overheard defendant threatening to kill the victim if she ever left him; that defendant and victim had an argument just before the victim was shot; that victim was shot in the back of the neck from approximately three feet away or from a distance greater than thirty inches; that subsequent medical analysis indicated that the victim's wound was not self-inflicted; and that the victim subsequently died as a result of complications from the gunshot wound to her neck.

The North Carolina Supreme Court was presented with a similar set of facts in *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). In *Childress*, the Supreme Court held that the trial court did not err in denying the defendant's motion to dismiss the charge of second degree murder for insufficiency of the evidence where the evidence

in the light most favorable to the State showed that (1) the defendant and the victim were the only two people in the residence when the victim was shot to death, and (2) the physical evidence showed that the victim was shot from behind at a distance of at least two feet away, and therefore, could not have shot himself. *Id.* at 229-32, 362 S.E.2d at 265-67. The Supreme Court noted that the defendant's contention that the victim's injuries were self-inflicted was inconsistent with the State's physical evidence, and that the evidence was therefore sufficient for the jury to reasonably infer that the defendant shot the victim. *Id.* at 231, 362 S.E.2d at 266.

Like the Supreme Court in *Childress*, we conclude here that there was indeed substantial evidence to show that defendant shot the victim. In light of the absence of any physical evidence to support defendant's allegation that the victim shot herself, we hold that the trial court did not err in submitting this matter to the jury. This assignment of error is also overruled.

III.

[3] By his third and final assignment of error, defendant argues that the trial court abused its discretion in sentencing him within the statutory presumptive range since there was evidence to support the finding of various mitigating factors. Though defendant concedes that under existing statutory and case law, a trial court is not required to consider evidence of aggravation or mitigation unless it deviates from the presumptive range, *see* N.C.G.S. § 15A-1340.16(c) (2001); *State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739 (1999), he invites the Court to revisit this issue. We decline defendant's invitation. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that when "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"). As defendant was sentenced within the presumptive range of sentences, the trial court did not abuse its discretion in failing to make findings in mitigation. G.S. § 15A-1340.16(c); *Campbell*, 133 N.C. App. at 542, 515 S.E.2d at 739. This last assignment of error is, therefore, summarily overruled.

In light of the above, we hold that defendant has failed to demonstrate that the trial court erred in either the conviction or sentencing and, thus, the judgment is affirmed.

No error.

Judges GREENE and HUDSON concur.

DONNA PITTMAN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA01-1285

(Filed 31 December 2002)

1. Administrative Law—standard of review—constitutional question—de novo

The trial court correctly applied the de novo standard of review to the constitutional sufficiency of a dismissal letter received by a health care technician employed by respondent.

2. Public Officers and Employees—state employee—dismissal letter—not unconstitutionally vague

A letter dismissing a state employee was not unconstitutionally vague where it comprised more than two pages, gave petitioner sufficient reasons for her dismissal to enable preparation for a contested case hearing, and advised petitioner of her appeal rights.

3. Administrative Law—state employee dismissal letter—alleged inaccuracies—no constitutional deficiency

A letter dismissing a state employee was not constitutionally deficient where the employee alleged that it contained inaccuracies and falsehoods. The agency decides the credibility of witnesses and conflicts in the evidence.

4. Public Officers and Employees—state employee—dismissal letter—received at time of dismissal

A letter dismissing a state employee was neither constitutionally deficient nor in violation of statutory requirements where petitioner received it at the same time she was dismissed. The purpose of the statute is to notify employees of the reasons for disciplinary actions and to advise them of their rights of appeal; in this case, petitioner had a pre-termination conference before receiving the letter and a post-termination conference after receiving it.

5. Administrative Law—standard of review—not stated—no remand

Remand of the dismissal of a state employee was unnecessary where the trial court did not state that it was applying the whole record standard of review to the question of whether there was substantial evidence to support the State Personnel Commission's decision, but the court did state that its order was based upon a review of the papers, pleadings, briefs, and other matters filed and submitted in the action.

6. Administrative Law—whole record test—conflicting evidence

There was substantial evidence to support the State Personnel Commission's findings that a heath care technician had committed the acts for which she was terminated. The whole record test does not allow the reviewing court to replace the agency's judgment between two reasonably conflicting views.

7. Public Officers and Employees—dismissal of state employee—violation of work rules—knowledge of rules

There was sufficient evidence that a dismissed state health care technician violated known or written work rules where she pointed to a change in respondent's feeding policy, but there is no reasonable possibility that she would be unaware that acts such as throwing out food without offering it to residents violated the rules.

8. Public Officers and Employees—termination of state employee—sufficiency of evidence

There was substantial evidence to support the State Personnel Commission's conclusion that there was just cause to terminate a health care technician at a long-term care nursing facility for unacceptable personal conduct where there were multiple instances of petitioner throwing out nourishments intended for residents in her care. This was a willful failure to carry out one of the basic functions of her position rather than a technical violation of an administrative regulation, and her intentional indifference to the effect on the residents' health and quality of life constitutes conduct for which no reasonable person should expect to receive a prior warning.

Judge WALKER dissenting.

Appeal by petitioner from order entered 13 July 2001 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 10 June 2002.

Mast, Schulz, Mast, Mills & Stem, P.A., by David F. Mills, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward, for the State.

BIGGS, Judge.

Petitioner (Donna Pittman) appeals from an order of the trial court affirming the State Personnel Commission's decision to uphold her termination by respondent, North Carolina Department of Health and Human Services (hereinafter referred to as NCDHHS). We affirm the trial court.

Petitioner was employed by the North Carolina Special Care Center (NCSCC) from 1994 to 1998, as a Health Care Technician (HCT). The NCSCC, operated by respondent, is a 208 bed long-term care nursing facility for residents suffering from mental illness, Alzheimer's disease, senile dementia, and other psychological disorders, as well as unrelated medical or physical problems. NCSCC accepts patients who cannot be cared for elsewhere; their residents typically are unable to bathe, feed, or dress themselves, and cannot make decisions on their own. As an HCT, petitioner was responsible for the feeding, bathing, and general care of these residents.

In September, 1998, a new HCT expressed concerns about "short-cuts" taken by some of the other HCT's on the sixth floor, where petitioner worked. Respondent's supervisory staff observed that the sixth floor distribution of meals took far less time than on other halls, and undertook an investigation. They interviewed HCTs, observed the care and feeding of residents on the sixth floor, and inspected the charts and records kept for sixth floor residents. During this investigation, several HCTs reported having seen petitioner discard the residents' evening snacks without offering them to the residents, while other reports indicated that petitioner had put a resident to bed without completing his bathing and shaving; had given another resident both his meal and also the meal intended for his roommate; and had allowed *difficult* residents to eat only sweets for supper. In early November, 1998, the assistant director of nursing met with petitioner to discuss respondent's concerns. Petitioner denied

throwing out residents' food, distributing meals improperly, or failing to bathe patients in her care. She offered explanations for some of the alleged incidents, but the residents' charts were inconsistent with petitioner's explanations.

On 4 December 1998, NCSCC held a pre-dismissal conference with petitioner, and discussed with her the allegations of the other HCTs. Petitioner admitted substituting foods on occasion, but denied ever throwing out food or drink, except on rare occasions when an item had spoiled. She was dismissed the same day.

Petitioner appealed her dismissal, and was granted a hearing before a NCDHHS officer in February, 1999. The hearing officer concurred with the decision to terminate her. Petitioner was then granted a contested case hearing, held before an Administrative Law Judge (ALJ) on 10 August 1999. Although the record suggests that the ALJ filed a decision favorable to petitioner on 15 August 1999, the decision was not made a part of the record. Respondent appealed, and the matter was heard by the State Personnel Commission (SPC) on 27 April 1999. The SPC issued a decision on 16 May 2000, reversing the ALJ's recommendation, and reinstating petitioner's dismissal. Petitioner sought judicial review in superior court, and on 13 July 2001, the court issued an order affirming the SPC's decision. Petitioner appeals from this order.

Standard of Review

Petitioner's appeal from the final decision of the SPC to the trial court is governed by N.C.G.S. § 150B-51(b) (2001). The statute authorizes the court to reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

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

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

On appeal, this Court must determine (1) whether the trial court applied the appropriate standard of review and, if so, (2) whether the court did so properly. *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994). The issues presented dictate the appropriate standard of review to be applied. "Where the petitioner alleges that the agency decision was either unsupported by the evidence, or arbitrary and capricious, the superior court applies the whole record test to determine whether the agency decision was supported by substantial evidence contained in the entire record. Where the petitioner alleges that the agency decision was based on an error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Id.*

In applying the whole record test, "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "If substantial evidence supports an agency's decision after the entire record has been reviewed, the decision must be upheld." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 473-74, 546 S.E.2d 177, 181 (2001).

I.

[1] Petitioner argues first that the trial court erred by concluding that the dismissal letter of 8 December 1998 (1) sufficiently provided petitioner with notice of the reasons for her dismissal, and (2) did not violate either petitioner's right to due process guaranteed by the U.S. Constitution, or the requirements of N.C.G.S. § 126-35. We disagree with both contentions.

Petitioner contends that the dismissal letter she received, informing her of the NCSCC's decision to terminate petitioner for "violation of our Abuse, Neglect, and Exploitation Policy," was constitutionally deficient. The trial court applied *de novo* review to this question, which we conclude is the correct standard of review. *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 686, 468 S.E.2d 813, 816 (1996) ("When reviewing an agency decision for constitutional or procedural errors, this Court applies de novo review.").

[2] We next consider whether the trial court correctly applied *de novo* review to the issues concerning the dismissal letter. Petitioner is a career State employee. "The North Carolina General Assembly

created, by enactment of the State Personnel Act, a constitutionally protected property interest in the continued employment of career State employees." *Peace v. Employment Sec. Com'n of North Carolina*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). Petitioner's right to due process of law, "guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § § 19, 23, and 27 of the North Carolina Constitution[,]" *State v. Parker*, 350 N.C. 411, 516 S.E.2d 106 (1999), applies to employment termination procedures. *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 348-49, 342 S.E.2d 914, 921, *cert. denied*, 349 S.E.2d 862, 318 N.C. 507 (1986).

Although "the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy," "[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment Sec. Com'n of North Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 547-48, 84 L. Ed. 2d 494, 506-07 (1985)). An employee's property interest in his or her employment "is sufficiently protected by 'a pretermination opportunity to respond, coupled with post-termination administrative procedures[,]' and 'the minimal protection of fundamental fairness established by federal due process' " is satisfied "if the employee receives 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.' " *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 686, 468 S.E.2d 813, 816 (1996) (quoting *Loudermill*, *id.*).

The dismissal letter which petitioner received is just one feature of a statutory scheme, outlined in N.C.G.S. § Chapter 126, which provides an employee with notice and opportunity to be heard prior to termination, as well as the opportunity to appeal a termination decision. The North Carolina Supreme Court previously has held that the statutory procedure "fully comports with the constitutional procedural due process requirements mandated by the Fourteenth Amendment, and no additional safeguards are needed to avoid erroneous deprivation." *Peace* at 327, 507 S.E.2d at 280.

Nonetheless, petitioner contends that this letter is "unconstitutionally vague" because it "contains no details as to time, place, events, or people involved." We disagree. The letter included the following:

> . . . [HCTs] have witnessed you pouring nourishments out prior to offering them to the Residents. Irene Moore, Julian Mack and Geishala Norfleet . . . have seen you pour [bedtime] nourishments down the sink in the kitchen and the Resident's room. Ms. Norfleet . . . [saw] you open nourishments and pour half of it out and then throw the remainder in the trash without offering them to the Resident. Ms. Moore has seen you pour nourishments down the kitchen sink and down sinks in the Resident's rooms prior to offering them[, and] indicated that . . . the self-feeders were the [only] ones that received the snack. Julian Mack has seen you pour nourishments down the sink without offering them to the Resident. . . . Mr. Mack . . . [saw] you feeding only dessert to some [Residents] that are "difficult" to feed. Ms. Moore observed you on one occasion feeding Resident # 11-58-87 a supper tray that belonged to Resident # 95-66-94. Ms. Moore has also observed Resident # 14-60-63 returned to bed by 3:30 p.m. - 3:35 p.m. in his gown with an unshaven face on his shower day when you were assigned to him.

The letter, comprising more than two pages, informs petitioner that the primary "act or omission" that led to her termination was petitioner's failure to provide residents the food and drink ordered for them, by (1) pouring bedtime snacks down the drain, rather than distributing them to residents, (2) switching dinner plates between residents with specific dietary needs, (3) feeding certain residents only dessert, and (4) substituting snacks without authorization. The dismissal letter specified individual co-workers who had observed this behavior, and identified the residents involved. The letter informed petitioner that her record keeping was inaccurate; that she had been observed to neglect hygiene care of at least one resident, identified in the letter; and listed specific NCSCC nursing and training classes petitioner had attended. The letter also summarized petitioner's prior responses to respondent's concerns, consisting of denials, claims that she was unaware of policies, and an assertion that witnesses to her actions were motivated by racial bias. We conclude that the letter sufficiently informed petitioner of the reasons for her dismissal to enable her to prepare for the contested case hearing. The letter also advised petitioner of her appeal rights, steering her to the statutory procedures that guard against erroneous termination of an employee:

> The above practices can no longer be tolerated. As a permanent employee, you have the right to appeal this decision. Such an

> appeal must be submitted to Personnel, in writing on the enclosed Department of Human Resources form # 0660 within (15) calendar days of your receipt of this letter. A copy of the DHR directive #33 is also enclosed. Should you have any questions concerning appeal rights, please contact Ms. Shirley Howard, Human Resources Manager at [phone number].

It would appear that petitioner understood her right to appeal the decision; she requested and received a contested case hearing, a hearing before the SPC, a superior court review, and the present appeal.

[3] Petitioner also argues that the dismissal letter was constitutionally deficient because it allegedly contained inaccuracies and falsehoods. However, where "petitioner asserts that testimony by the agency's witnesses was inconsistent, [and that] the agency's witnesses were biased and delayed reporting the alleged misconduct, . . . it is for the agency to decide the credibility of witnesses and conflicts in the evidence." *Blalock v. Department of Health and Human Services*, 143 N.C. App. 470, 546 S.E.2d 177, 181-82 (2001).

[4] Finally, petitioner argues that the dismissal letter violated N.C.G.S. § 126-35, because she received it at the same time that she was dismissed. Under the statute, "the employee shall, before the [disciplinary] 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 purpose of the statute is to notify the employee of the reasons for the disciplinary action and to advise him of his rights to appeal the disciplinary action." *Employment Sec. Commission of North Carolina v. Wells*, 50 N.C. App. 389, 392, 274 S.E.2d 256, 258 (1981). This is intended to "prevent an employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal." *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 351, 342 S.E.2d 914, 922-23 (1986). *See Kea v. Department of Health and Human Services*, 153 N.C. App. 595, 604, 570 S.E.2d 919, 925, (2002) ("The fact that [the] notice was given simultaneously with the disciplinary action in this case is not a violation of N.C. G. S. § 126-35.").

In the instant case, petitioner had both a pretermination conference before receiving the dismissal letter, and a post-termination contested case hearing after receipt of the letter. We conclude that the dismissal letter was neither constitutionally deficient, nor in violation

of N.C.G.S. § 126-35, because of being given to petitioner simultaneously with her dismissal. Accordingly, this assignment of error is overruled.

II.

Petitioner argues next that the trial court erred in affirming the SPC's determination that there was just cause to terminate petitioner's employment for unacceptable personal conduct. She contends that: (1) the Commission's findings, that petitioner committed the acts for which she was terminated, were not supported by substantial evidence; (2) there was insufficient evidence that petitioner violated known or written work rules, and; (3) the acts for which petitioner was terminated, even if proven, constituted unsatisfactory job performance rather than unacceptable personal conduct. We disagree.

Termination of career State employees is governed by N.C.G.S. § 126-35 (2001), which provides in part that a career State employee may not be "discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126- 35(a). The statute also provides that "[t]he State Personnel Commission may adopt, subject to approval of the Governor, rules that define just cause." Accordingly, SPC has drafted a regulation stating that:

> There are two bases for the discipline or dismissal of employees under the statutory standard of 'just cause' as set out in G.S. 126-35. These two bases are:
>
> (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.
>
> (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct.

25 NCAC 1J.0604 JUST CAUSE FOR DISCIPLINARY ACTION. In the present case, petitioner was dismissed for 'unacceptable personal conduct,' defined in the N.C. Administrative Code in relevant part as follows:

> (i) Unacceptable Personal Conduct is:
>
> (1) conduct for which no reasonable person should expect to receive prior warning; or
>
> . . . .
>
> (4) the willful violation of known or written work rules[.]

25 NCAC 1J.0614(i)(1) and (4). "An employee challenging his or her termination for just cause has the burden of proving that the agency's decision was improper." *Peace v. Employment Sec. Comm'n of North Carolina*, 349 N.C. 315, 328, 507 S.E.2d 272, 281-82 (1998). *See also Best v. Department of Health and Human Services*, 149 N.C. App. 882, 563 S.E.2d 573 (2002) ("SPC properly required the petitioners to prove the absence of substantial evidence of just cause for their termination").

[5] A trial court's conclusion that just cause existed to dismiss petitioner is "an issue of law, which we review de novo." *Steeves v. Scotland County Bd. of Health*, 152 N.C. App. 400, 406, 567 S.E.2d 817, 821 (2002). Thus, in the case *sub judice*, the trial court properly concluded "the issue[] raised by the Petitioner, that . . . Respondent did not have just cause to dismiss her for improper personal conduct, . . . require[s] a *de novo* review by this Court." However, the SPC's findings supporting its conclusion must be based upon substantial evidence, *N.C. Dept. of Correction v. McNeely*, 135 N.C. App. 587, 521 S.E.2d 730 (1999), and petitioner's contention that the Commission's decision was not supported by sufficient evidence required the trial court to apply the "whole record" test. *Homoly v. North Carolina State Bd. of Dental Examiners*, 125 N.C. App. 127, 479 S.E.2d 215 (1997).

Although the trial court did not expressly state that it applied the whole record standard of review in the present case, it stated that its order was based upon "a review of the papers, pleadings and other matters filed in this action, and upon review of the briefs submitted by each party." Even assuming that the trial court failed to apply whole record review to the issue of whether substantial evidence supported the Commission's order, on the facts of this case "we conclude [that] remand in the case sub judice is unnecessary." *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 274, 533 S.E.2d 525, 528-29 (2000) (agency failed to delineate whether it applied *de novo* or whole record review to particular issue).

[6] In her assignments of error, petitioner alleged that the trial court's findings of fact numbers 5, 8, and 12-17 were not supported by substantial evidence. The challenged findings of fact essentially summarize witness testimony from the hearing and, we conclude, do so accurately. However, in her brief, petitioner argues more generally that the evidence was insufficient to allow the SPC

to conclude that she had committed the acts for which she was terminated. We disagree.

Petitioner was terminated for neglect of residents, in violation of respondent's 'Abuse, Neglect, and Exploitation' policy, and specifically for throwing out food instead of feeding it to the residents. The record evidence includes the following:

> 1. Testimony by HCT Moore, that she had personally observed petitioner feeding a clinically overweight resident both his supper and also that intended for his roommate, a clinically underweight resident; opening fresh nourishments and then pouring them out in the kitchen sink, without ever offering them to the residents; and discarding other evening nourishments in resident Allen's room, without offering them to the residents.
>
> 2. Testimony by HCT Mack, that he had heard petitioner 'pop open' fresh cans of the evening drink, and then saw her pouring them down the sink in resident Lindsey's room.
>
> 3. Testimony by nursing director Batts that respondent had interviewed petitioner's co-workers and reviewed patient charts, and other records during their investigation; that petitioner's statements to her supervisor were inconsistent with her deposition testimony; and that intentionally withholding nourishment from residents was considered 'neglect' by respondent.
>
> 4. Testimony by dietician Leake that for certain residents, it was medically important that they receive food as prescribed for them.
>
> 5. Testimony of assistant nursing director Register, that when the HCTs were interviewed, petitioner was the only HCT identified as discarding residents' food; that petitioner had admitted substituting food on occasion; and that petitioner had been counseled on previous occasions for inappropriate or suggestive behavior with residents, and for falsifying her time sheet.

Petitioner challenges the witnesses' testimony. She argues that the HCT witnesses were biased against her; that their testimony lacked details such as the exact date on which petitioner poured out food; that their observations were subject to innocent interpretations; and that the HCTs had an insufficient opportunity to make the observations to which they testified. However, the "whole record test does

not allow the reviewing court to replace the [agency's] judgment as between two reasonable conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). "Further, the court may not 'disturb an agency's assessment of the credibility of the witnesses and the weight and sufficiency' to be given the evidence." *Beauchesne v. University of North Carolina at Chapel Hill*, 125 N.C. App. 457, 465-66, 481 S.E.2d 685, 691 (1997) (quoting *Teague v. Western Carolina University*, 108 N.C. App. 689, 692, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993)). We conclude that the testimony amply supported the SPC's findings that petitioner had committed the acts for which she was terminated. This assignment of error is overruled.

[7] We next consider petitioner's contention that there was insufficient evidence that she violated known or written work rules. This argument is meritless. Petitioner was dismissed for violation of respondent's policies on neglect of residents. The dismissal letter states that:

> According to our Residents Right[s] Policy # 12-10 (Abuse, Neglect and Exploitation) located in the Administrative Manual: The . . . neglect . . . of Residents will subject the employee to disciplinary action. Neglect is defined as the failure to provide care or services, necessary to maintain the mental health, physical health and well being of the Resident. Any committed or omitted act resulting in inadequate or improper care or treatment of a Resident.

Petitioner belabors the issue of whether she was notified when respondent's feeding policy changed from requiring HCTs to offer residents nourishments two times versus three times before discarding the food as refused by the resident. However, petitioner was not fired for technical violation of respondent's policies, such as offering residents food twice instead of three times. Rather, witnesses testified that they personally observed petitioner discarding fresh snacks or nourishments by throwing them out or pouring them down the sink, without ever offering them to the residents. Petitioner does not argue, and we discern no reasonable possibility, that she could be unaware that simply throwing out food was a violation of known work rules. This assignment of error is overruled.

[8] Finally, we address petitioner's argument that the acts for which she was terminated, if proven, constitute unsatisfactory job performance, rather than unacceptable personal conduct.

N.C.G.S. § 126-4, "Powers and duties of State Personnel Commission," directs that "[s]ubject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following: . . . (7a) The separation of employees." Accordingly, the SPC has drafted 25 NCAC 1I .2301(b) (2002), which provides that "[t]he basis for any disciplinary action taken in accordance with this policy falls into one of the two following categories: (1) Discipline imposed on the basis of job performance; [or] (2) Discipline imposed on the basis of personal conduct." Personal misconduct includes, *inter alia*, "conduct for which no reasonable person should expect to receive prior warning" and the "willful violation of known or written work rules." 25 NCAC 1I .2301(b) explains: "The Job Performance category is intended to be used in addressing performance-related inadequacies for which a *reasonable person would expect to be notified of and allowed an opportunity to improve.* Personal Conduct discipline is intended to be imposed for those actions for which *no reasonable person could, or should, expect to receive prior warnings.*" *Fuqua v. Rockingham County Bd. of Social Services*, 125 N.C. App. 66, 71, 479 S.E.2d 273, 276 (1997) (emphasis added).

We have previously concluded that substantial evidence supported the SPC's conclusion that "petitioner had willfully violated known or written work rules" by discarding nourishments that she was directed to feed residents. However, our determination of whether petitioner's conduct constitutes unacceptable personal conduct requires more than a mechanical application of 25 NCAC 1J.0614(i)(4) ("Unacceptable Personal Conduct is . . . (4) the willful violation of known or written work rules"). This Court previously has held that a mere "technical" violation of a work rule will not necessarily bring an employee's conduct within the statutory definition of unacceptable personal conduct. *Steeves*, 152 N.C. App. 400, 567 S.E.2d 817 (inadvertent violation of administrative requirement did not rise to the level of unacceptable personal conduct). Several considerations have been identified by this Court as relevant to our determination of this issue, including: (1) whether the violation was willful or unintentional, (2) whether the conduct pertained to the primary function of the agency, or to an ancillary administrative rule, (3) whether the 'disruption of work or safety of persons or property' was implicated by the conduct, and (4) whether the petitioner's conduct

would likely cause any detriment to the agency. Thus, while the unwitting violation of a pre-audit requirement by the director of a county agency is not unacceptable personal conduct, *see Steeves*, *id.*, a county agency director's intentional evasion of state laws governing purchasing and contract bids is sufficient to uphold the SPC's termination of petitioner for unacceptable personal conduct. *Fuqua*, 125 N.C. App. at 74, 479 S.E.2d at 278 (this Court "must affirm the trial court's determination" if the "Board's dismissal of petitioner was supported by substantial evidence in the record and not arbitrary or capricious, or erroneous as a matter of law."). Similarly, where evidence showed that a prison guard left his post to smoke, read a novel, or sleep, the possibility of danger to persons or property renders his conduct unacceptable, and is sufficient to uphold the SPC's finding of just cause for termination. *McNeely*, 135 N.C. App. at 593, 521 S.E.2d at 734 ("respondent's behavior in leaving his post without authorization and failing to remain alert while on duty falls squarely within the category of unacceptable personal conduct").

In the present case, petitioner was terminated primarily for multiple instances of throwing out nourishments intended for the residents in her care. We conclude that such behavior "falls squarely within the category of unacceptable personal conduct." *Id.* Her conduct was not a technical violation of an administrative regulation, but the willful failure to carry out one of the basic functions of her position. Further, evidence was presented that withholding or exchanging food could be detrimental to the health of certain residents. Most residents of NCSCC were completely dependent upon the HCTs—unable to leave the facility, incapable of obtaining other food, and in most cases unable even to articulate their needs to another HCT. Petitioner's conduct in intentionally discarding bedtime snacks to complete the evening rounds more quickly meets respondent's definition of neglect, and her intentional indifference to the effect of this on residents' health and quality of life constitutes both "conduct for which no reasonable person should expect to receive prior warning," as well as "willful violation of known or written work rules."

We conclude that the SPC's conclusion, that there was just cause to terminate petitioner based on evidence that petitioner engaged in unacceptable personal conduct, was supported by substantial evidence in the record. For the reasons discussed above, we hold that the trial court did not err in affirming the SPC's order which upheld respondent's termination of petitioner's employment. The trial court's order is Affirmed.

Chief Judge EAGLES concurs.

Judge WALKER dissents.

WALKER, Judge, dissenting.

I respectfully dissent from the majority opinion affirming the order of the trial court.

This matter was heard by an able and experienced administrative law judge (ALJ), who made extensive findings and conclusions and recommended that petitioner not be terminated for unacceptable personal conduct pursuant to N.C. Gen. Stat. § 126-35 (2001), but instead be given a written warning for unsatisfactory performance. The State Personnel Commission rejected the ALJ's recommended decision with two members dissenting.

After careful review of the record, I agree with the findings and conclusions of the ALJ. The evidence raises no more than a permissible inference that petitioner engaged in the conduct for which she was dismissed.

DAVID TEASLEY, PLAINTIFF v. THEODIS BECK, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, IN HIS OFFICIAL CAPACITY, AND JUANITA BAKER, CHAIRMAN OF THE NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION, IN HER OFFICIAL CAPACITY; AND ELBERT BUCK, AND CHARLES L. MANN, SR., MEMBERS OF THE NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

ODELL CLINTON BATES, PLAINTIFF v. THEODIS BECK, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, IN HIS OFFICIAL CAPACITY, AND JUANITA BAKER, CHAIRMAN OF THE NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION, IN HER OFFICIAL CAPACITY; AND ELBERT BUCK, AND JEWYL DUNN, MEMBERS OF THE NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. COA02-212

(Filed 31 December 2002)

1. Appeal and Error—mootness-issue evading review and capable of repetition

A case concerning the calculation of parole eligibility was reviewed even though a plaintiff had become eligible for parole because it was capable of repetition, yet evaded review.

2. Probation and Parole—eligibility dates—life sentences—gain and merit time

Plaintiffs' parole eligibility dates for life sentences under the Fair Sentencing Act were calculated correctly, and the trial court erred by concluding otherwise, where defendants applied good behavior time reductions ("good time") to plaintiff's life sentences but not gain and merit time (awarded for work and program participation). Some aspects of the statutory parole scheme are ambiguous and deference must be given to reasonable agency interpretation.

3. Probation and Parole—eligibility date—time credits—consecutive sentences

The Department of Correction's application of time credits to a Fair Sentencing Act burglary sentence served consecutively with a life term did not violate statutory and case law prohibitions on "paper parole" (whereby inmates serving consecutive sentences are required to be paroled from the first sentence before beginning the second for purposes of determining parole eligibility).

Appeal by defendants from order entered 18 September 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 29 October 2002.

George B. Currin, for plaintiffs-appellees.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

BRYANT, Judge.

Theodis Beck, Secretary of the North Carolina Department of Corrections (the Department); Juanita Baker, Chairman of the North Carolina Post-Release Supervision and Parole Commission (Parole Commission or Commission); and other members of the Commission so designated (collectively defendants) appeal the trial court's order granting declaratory judgment in favor of David Teasley and Odell Clinton Bates (collectively plaintiffs).

Plaintiff Teasley pled guilty to two Class H felonies. On 14 September 1992, Teasley was sentenced pursuant to the "Fair Sentencing Act (the FSA or the Act)," N.C.G.S. §§ 15A-1340.1 to -1340.7

(1988) (repealed effective 1 October 1994), as a habitual felon, and received a Class C felony life sentence.

On 16 October 1989, plaintiff Bates pled guilty to one count each of second-degree murder, a Class C felony, and first-degree burglary. Bates was sentenced, also under the FSA, to life imprisonment for the second-degree murder conviction and a fifteen-year consecutive sentence for his first-degree burglary conviction.

For the purpose of determining plaintiffs' parole eligibility dates, the minimum term of imprisonment for their life sentences was twenty years. Plaintiffs' life sentences were then reduced to ten years, based upon credits for good behavior at a rate of one credit per day of incarceration without a major infraction.

The Parole Commission further reduced Bates' parole eligibility date by only those gain and/or meritorious time credits earned during the pendency of his burglary term. In so doing, the Commission first reduced Bates' burglary sentence to seven and one-half years based upon accumulated good-time credits, then subtracted from the burglary sentence only those gain and/or meritorious time credits earned while serving the last seven and one-half years of his total sentence. In other words, to determine his parole eligibility date, Bates would serve the first ten years of his sentence and then the seven-and-one-half years, minus any gain and/or merit time earned during the burglary sentence. As to both Teasley and Bates, no gain and/or merit time was applied to reduce their life terms.

Teasley and Bates filed separate actions for declaratory relief requesting that the court determine whether, based upon certain Department regulations, gain and/or meritorious time credits should apply to alter the parole eligibility date of their life sentence terms. In the alternative, Bates requested that the court declare him eligible for a reduction in his sentence for good time, gain time and meritorious time earned during his entire incarceration. Plaintiffs' actions were subsequently consolidated for a bench trial.

On 18 September 2001, the trial court concluded that pursuant to the Department's regulations governing "sentence reduction credits," inmates serving life sentences for Class C felonies were eligible to reduce their imprisonment terms by good, gain and meritorious time credits earned during their incarcerations. The trial court further concluded that for purposes of determining Bates' parole eligibility date,

Bates was entitled to a reduction in his sentence by all gain and/or meritorious time credits earned during the pendency of his entire incarceration. Defendants now appeal.

The dispositive issues on appeal are: I) whether the Department's "sentence reduction credit" regulations apply to inmates serving Class C life sentences for the purpose of determining their parole eligibility dates; and, if not, II) whether the Commission erred in its practice of applying gain and meritorious time credits to sentences running consecutively to a life term.

[1] Preliminarily we note that plaintiff Teasley obtained eligibility for parole on 26 August 2002, and therefore, any issues of parole eligibility with regard to Teasley are moot. *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989). Nonetheless, we find the present action " 'capable of repetition, yet evading review,' " *id.* (citation omitted), and therefore, must review it even though the action is moot.

Background

We begin our discussion with an overview of the Department's structure and the statutes and rules giving rise to this appeal. As noted *supra*, plaintiffs were sentenced pursuant to the FSA, which has subsequently been superseded by the Structured Sentencing Act, effective on or after 1 October 1994.[1] Accordingly, our discussion in the case *sub judice* is limited to those statutes and regulations that are part of and parcel to the FSA.

The Parole Commission, as its name indicates, is the independent agency within the Department that is responsible for releasing offenders eligible for parole. The Commission consists of one Chairman and two other members, all appointed by the Governor. The Secretary of the Department is also appointed by the Governor, but, unlike the Commission, has no authority over parole eligibility. Rather, the Secretary has the sole authority over the unconditional release of offenders.

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1. Incident to the passage of the Structured Sentencing Act, several of the North Carolina General Statutes at issue in the present action were repealed or amended. The following statutes applicable to plaintiffs were repealed, effective 1 January 1995: N.C.G.S. §§ 14-1.1 (1986) (defining classes of felonies) and 148-13(c), (d) (1987) (governing gain time credits). The following relevant statutes have since been amended: N.C.G.S. §§ 14-52 (1986) (defining punishment for burglary) and 15A-1355(c) (1988) (calculating terms of imprisonment). N.C.G.S. § 15A-1340.7(a) (1988) (governing credits for good behavior) was repealed effective 1 October 1994.

Class C felonies may be punishable by life imprisonment. N.C.G.S. § 14-1.1(a)(3). Prisoners sentenced under the FSA are "eligible for release on parole only upon completion of the service of th[e] minimum term *or one fifth of the maximum penalty* allowed by law . . . whichever is less, *less any credit allowed under G.S. 15A-1355(c).*" N.C.G.S. § 15A-1371(a) (2001) (emphasis added). One fifth of a life term is twenty years. *Id.*

The statutes at issue in the present appeal are provided below in relevant part. N.C.G.S. § 15A-1355(c), entitled "Credit for Good Behavior," states:

> The Department of Correction and jailers . . . *must* give credit for good behavior toward service of a prison or jail term imposed for a felony that occurred on or after the effective date of Article 81A, as required by G.S. 15A-1340.7. The provisions of this subsection do not apply to persons convicted of Class A or Class B felonies . . . . The Department of Correction and jailers *may* give time credit toward service of other prison or jail terms imposed for a felony or misdemeanor, according to regulations issued by the Secretary of Correction as provided by G.S. 148-13. The Department of Correction *may* give credit toward service of the maximum term and any minimum term of imprisonment and toward eligibility for parole for allowances of time as provided in rules and regulations made under G.S. 148-11 and 148-13.

N.C.G.S. § 15A-1355(c) (emphasis added).

Section 15A-1340.7 provides:

> (a) . . . Credit toward the service of the term *shall* be given for time already served . . . , and good behavior in prison or jail as provided by subsection (b) of this section, *except that a life term imposed for a Class C felony shall not be subject to subsection (b) of this section but shall be subject to G.S. 148-13(b) for the purposes of good time and gain time deductions. . . .*
>
> (b) A prisoner committed to the Department of Correction or a jail to serve a sentence for a felony shall receive credit for good behavior at the rate of one day deducted from his prison or jail term for each day he spends in custody without a major infraction of prisoner conduct rules.

N.C.G.S. § 15A-1340.7 (emphasis added).

Section 148-13 states:

> (b) With respect to prisoners who are serving prison or jail terms for offenses not subject to Article 81A of Chapter 15A of the General Statutes and prisoners serving a life term for a Class C felony, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.
>
> (c) With respect to all prisoners serving prison or jail terms for felonies that occurred on or after the effective date of Article 81A of Chapter 15A of the General Statutes, the Secretary of Correction and local jail administrators must grant credit toward their terms for good behavior as required by G.S. 15A-1340.7. The provisions of this subsection shall not apply to persons convicted of Class A or Class B felonies or persons sentenced to a life term for a Class C felony.
>
> (d) With respect to prisoners serving prison or jail terms for felonies that occurred on or after the effective date of Article 81A of Chapter 15A, the Secretary of Correction shall issue regulations authorizing gain time credit to be deducted from the terms of such prisoners, in addition to the good behavior credit authorized by G.S. 15A-1340.7. Gain time credit may be granted for meritorious conduct and shall be granted for performance of regular work and regular participation in study, training, work release, and other rehabilitative programs inside or outside the prison or jail. . . .

N.C.G.S. § 148-13(b)-(d).

In conjunction with the FSA, the Secretary promulgated regulations concerning the grant of "sentence reduction credits." 5 NCAC 2B .0110, *et seq.* (Supp. Jan. and Sept. 1995) (effective date 1 February 1995). According to these regulations, "sentence reduction credits" are "[t]ime credits applied to an inmate's sentence that reduce the amount of time to be served," including good, gain, and meritorious time. 5 NCAC 2B .0110(6). Good time is "credit for good behavior at the rate of one day deducted from an eligible inmate's sentence for each day he spends in custody without a major infraction of prisoner conduct rules." 5 NCAC 2B .0110(1). Gain time is "credit for participation in work and program activities," 5 NCAC 2B .0110(2), and meritorious time is credit awarded "for acts of exemplary conduct or work under extraordinary conditions," 5 NCAC 2B .0110(5).

In summary, the FSA provided that a prisoner sentenced to a life sentence for a Class C felony becomes parole eligible after a statutorily-mandated twenty-year period. N.C.G.S. § 15A-1371(a). The Department must give credit for good behavior pursuant to N.C.G.S. § 15A-1355(c) and as required by N.C.G.S. § 15A-1340.7. N.C.G.S. §§ 15A-1340.7, -1355(c). Section 15A-1340.7 directs that life terms for Class C felonies are subject to § 148-13(b), for purposes of determining whether, if at all, good and gain time credits may be applied such that the statutorily-mandated twenty-year period may be reduced.

Section 148-13(b) provides that the Secretary may issue regulations governing deductions for good, gain or meritorious time for those convicted pursuant to the FSA but not to Class A and B life sentences. N.C.G.S. § 148-13(b). The paramount question remains: what, if any, is the effect of the "sentence reduction credit" regulations on plaintiffs' parole eligibility dates.

Standard of Review

"The standard of review of a judgment rendered under the declaratory judgment act is the same as in other cases." *Miesch v. Ocean Dunes Homeowners Assn.*, 120 N.C. App. 559, 562, 464 S.E.2d 64, 67 (1995) (citing N.C. Gen. Stat. § 1- 258). Thus, in a bench trial, the court's findings of fact are conclusive, while its conclusions of law are reviewable *de novo*. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000).

I.

[2] We must first determine whether defendants erred in calculating the parole eligibility date on plaintiffs' life sentences. Resolution of this issue depends upon the accuracy with which defendants interpreted the relevant statutory scheme and related regulations. In examining whether an agency erred in interpreting a statute it administers, "an appellate court employs a *de novo* review." *County of Durham v. North Carolina Dep't of Env. & Natural Resources*, 131 N.C. App. 395, 396, 507 S.E.2d 310, 311 (1998) (citation omitted). Legislative intent controls the meaning of statutes. *Francine Delany New School for Children, Inc., v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 345, 563 S.E.2d 92, 97 (2002) (citing *Brown v. Flowe*, 349 N.C. 520, 507 S.E.2d 894 (1998)). "To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown*, 349 N.C. at 522, 507 S.E.2d at 895 (citation omitted). "Statutes on the same subject matter must be con-

strued together and harmonized to give effect to each." *Delany*, 150 N.C. App. at 345, 563 S.E.2d at 97 (citation omitted). Where statutes are "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 703 (1984).

Accordingly, while the trial court's conclusions of law do not bind us here, where a statute at issue is silent or ambiguous, we must give deference to the agency " 'so [ ] long as the agency's interpretation is reasonable and based on a permissible construction of the statute.' " *Durham*, 131 N.C. App. at 397, 507 S.E.2d at 311 (alteration in original) (quoting *Carpenter v. N.C. Dept. of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992)).

In reviewing the relevant statutes, we first find certain aspects of the statutory scheme unclear or ambiguous. Section 1533(c) states that those inmates serving Class C life sentences *must receive* credit for "good behavior" toward their parole eligibility date as required by section 1340.7. However, section 1340.7(a) states that section 1340.7(b), the subsection citing the method for calculating credits for "good behavior," does not apply to those inmates serving Class C life sentences for the purpose of "good time and gain time" deductions. Rather, section 1340.7(a) directs that credits for "good time" are to be granted to inmates based upon section 148-13(b). Section 148-13(b), however, does not mandate that the Secretary pass regulations for deducting time for "good behavior . . . and the like."

In resolving this ambiguity, Parole Commission Chairperson, Juanita Baker, stated in an affidavit that the Commission believed section 15A-1355(c) allowed the twenty-year service requirement for those inmates serving Class C life sentences "to be reduced by day-for-day good time to ten years." According to Baker, at the time of her affidavit, the Commission had reduced the sentences of approximately 963 inmates based upon credits for good behavior.

We conclude that the Commission's own interpretation of the relevant yet ambiguous statutes is reasonable. Under section 1355(c), granting deductions in Class C life sentences for good behavior was mandatory, and it was within the Commission's authority to carry out this statutory mandate. This is true, whether or not the Secretary had in his (or her) discretion granted by section 148-13(b) promulgated rules dictating the method by which the Commission was to apply those credits. As such, both Teasley and Bates were granted good-time credits to reduce parole eligibility on their

Class C life sentences by day-for-day credits to within ten years of their conviction dates.

Next, we examine what appears to be unambiguous within the relevant statutory scheme. Unlike good time credits, the application of gain and meritorious time credits (time for "meritorious conduct, work or study, participation in rehabilitation programs, and the like") in determining the parole eligibility date of those serving Class C life terms was not statutorily mandated by section 1355(c) or, for that matter, any other statute. The Commission could not apply gain and meritorious time credits unless the Secretary issued regulations dictating such action pursuant to his or her discretionary authority per subsection 148-13(b).

Furthermore, subsection 148-13(b) stands in stark contrast to subsections 148-13(c), (d). Subsections (c) and (d) *require* the Secretary to issue regulations for the deduction of both good and gain time credits from the sentences of those prisoners serving "term of year" sentences, while expressly excluding those serving life sentences. There is a clear disjunctive between subsections (b) and (c), (d) under section 148-13: section 148-13 binds the Secretary as to subsections (c), (d) but gives discretion as to subsection (b).

This leads us to the crucial question: under which of the above stated statutes were the Secretary's "sentence reduction credit" regulations promulgated. If they were passed pursuant to § 148-13(c), (d), as defendants contend, then the regulations apply to the reduction of eligible inmates' sentences for the purpose of determining unconditional release dates. Thus, given the present situation, because those inmates serving life sentences are not entitled to unconditional release, plaintiffs' parole eligibility date could not be further reduced based upon gain or meritorious time earned while incarcerated. However, if the regulations were passed under § 148-13(b), as plaintiffs contend, then they apply to parole eligibility dates, such that plaintiffs' sentences would be further reduced by the gain and meritorious time earned while incarcerated.

We believe that this question is best answered by giving deference to the Department's interpretation of its own regulations. For it is well established that an agency's interpretation of its own regulations are to be afforded "due deference by the courts unless it is plainly erroneous or inconsistent with the regulation[s]." *Pamlico Marine Co., Inc. v. N.C. Dept. of Natural Resources*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986) (citation omitted).

Theodis Beck, the Secretary at the time of this appeal, stated in an affidavit that he did not possess the authority to consider inmates for parole, and that 5 N.C. Admin. Code 2B .0112 [Policy and Procedures for computing gain time] governs only unconditional release from prison, something within his statutory authority. According to Beck, he never instructed the Commission to apply gain time to reduce the parole eligibility service requirements of inmates serving Class C life sentences. Chairperson Baker also noted that in her regular consultations with past and present Secretaries, they never informed her that the Commission erred in failing to apply gain or merit time to the sentences of those prisoners serving Class C life sentences.

Furthermore, Andrew Terrell, a thirty-year Commission employee holding positions as the Commission's parole analyst, chief of staff, and statistician, testified in the action below that the Secretary had not issued any regulations directing the Commission to grant inmates serving Class C life sentences gain time credits. According to Terrell, the Commission had never followed Subchapter 2B in calculating parole eligibility, and did not have the authority to apply gain time credits.

Plaintiffs argue that the "sentence reduction credit" regulations apply to inmates serving Class C life sentences because while the regulations expressly exclude Class A and Class B felons, *see* 5 NCAC 2B .0111(4), .0112(4), they do not exclude those serving Class C life sentences. This is admittedly plaintiff's strongest argument. However, we find that the failure to exclude inmates serving Class C life sentences simply creates another ambiguity in the regulation for which we must defer to the agency. The Department insists that the regulations were promulgated under subsections 148-13(c), (d) and not (b). These subsections are clear: 148-13(c), (d) does not apply to any inmate serving a life sentence, whether it is Class A, B, or C life sentence. Furthermore, unlike all "Class A and Class B felons," not all Class C felons are subject to life sentences. *See* N.C.G.S. § 14-1.1(a)(3) (stating that sentences for Class C felonies may be punishable by life imprisonment, a term of up to fifty years, a fine, or both a term and a fine). If the regulation excluded Class A, B, and C felons, it would certainly contradict N.C.G.S. § 148-13(c), (d), by which inmates serving "term of years" sentences *must* receive gain and/or meritorious time credits.

Plaintiffs also argue that the regulations apply because Subchapter 2B defines the term "parole eligibility date." *See* 5 NCAC

2B .0110(10). We disagree. The regulations define "parole eligibility date" as "[t]he date, if any, provided to the Department of Correction by the Parole Commission as the date an inmate becomes eligible for parole." *Id.* This is the only mention of parole eligibility in the regulations. The regulations specify that they are to be applied to the "parole eligibility date." If anything, the above-noted definition affirms the distinction between "parole eligibility dates," which is provided by the Commission, and "sentence reduction," which is regulated by the Secretary.

Finally, plaintiffs contend that if gain and meritorious time do not apply to Class C life sentences, there would be no need for the Department to allow those prisoners serving such sentences to accumulate gain and merit time, or for the Department to keep records of that accumulation, as is its practice. However, Terrell explained that these records are kept because prisoners sentenced to life can have their sentences commuted to a term of years, at which point gain and meritorious time must be applied, per section 148-13(d). We are persuaded that Terrell's reasoning concerning the regulations, the other above-noted explanations, and defendants' interpretation of the regulations in their entirety are not erroneous or inconsistent with the letter of the regulations. In so finding, we conclude that the Secretary promulgated the "sentence reduction credit" regulations under section 148-13(c), (d) to apply to the unconditional release date of those inmates serving "term of years" sentences. The Secretary has not, however, exercised its authority under section 148-13(b) to pass regulations for the application of good, gain, and meritorious time credits for those serving life sentences. *See Price v. Beck*, 153 N.C. App. 763, 768, 571 S.E.2d 247, 250 (stating, in dicta, that "[t]he Secretary has not issued regulations regarding deductions of time for Class A, B, and C felons"), *disc. review denied*, 356 N.C. 615, 575 S.E.2d 26 (2002). The trial court, therefore, erred in concluding otherwise.

II.

[3] We next address whether the Department's practice of applying gain and merit time to a sentence served consecutive to a life term is a permissible practice. Bates argued and the trial court concluded that this practice contravenes N.C.G.S. § 15A-1354(b) (2001) and our holding in *Robbins v. Freeman*, 127 N.C. App. 162, 487 S.E.2d 771 (1997), prohibiting the practice of "paper parole." We disagree.

In *Robbins*, the plaintiff was incarcerated for, *inter alia*, three counts of robbery with a deadly weapon, in which one sentence ran

consecutive to the other two. In calculating the plaintiff's parole eligibility date, the Department employed a practice known as " 'paper parole,' whereby an inmate serving consecutive sentences for armed robbery is required to be paroled from the first sentence to a second consecutive sentence before being treated as having begun service of the second sentence for purposes of determining parole eligibility." *Id.* at 163, 487 S.E.2d at 772.

Our Court held that the practice of "paper parole" was impermissible because according to N.C.G.S. § 15A-1354(b) (1985) the Department must treat defendants as if they have been committed for single terms. *Id.* at 164-65, 487 S.E.2d at 773. Accordingly, the *Robbins* Court concluded that the plaintiff's sentences should be aggregated before determining his parole eligibility date. *Id.* at 165, 487 S.E.2d at 773.

Robbins is distinguishable from the present action, in that *Robbins* concerned an inmate serving three sentencing terms, each for the same offense, and to each the same calculations of time credits applied. In contrast, Bates' consecutive term followed a life sentence, for which the accumulation of time credits differed dramatically. Also, in calculating Bates' parole eligibility date, defendants treated the accumulation of time for each sentence differently, but not the sentences themselves. Unlike the defendants in *Robbins*, here, defendants properly aggregated the sentencing terms after the proper amounts of accumulated time credits were applied to both. The practice employed in the case *sub judice* simply does not run afoul of the practice prohibited by *Robbins*.

Furthermore, this Court recently affirmed the validity of this practice to a similar situation in *Price v. Beck*, 153 N.C. App. 763, 571 S.E.2d 247. In *Price*, the plaintiff was sentenced to life imprisonment for a Class B felony and to a consecutive term for second-degree kidnapping. *Id.* at 765, 571 S.E.2d at 249. The *Price* plaintiff brought suit to challenge the defendants' calculation of his parole eligibility, arguing, *inter alia*, that the Commission erred in failing to apply time credits to his life sentence and in retroactively applying *Robbins* to determine his parole eligibility.

The *Price* defendants applied *Robbins* to determine the plaintiff's parole eligibility by first determining the minimum time allowable on the plaintiff's life sentence, which was twenty years. The defendants took the good, gain, and meritorious time credits gained by plaintiff and applied those to the minimum time allowable on his consecutive

sentence, but not the life sentence. The defendants then added the resulting two sentences together to determine the plaintiff's parole eligibility date. *Id.* In reviewing the above-noted practice, our Court concluded that because no time credits applied to the *Price* plaintiff's life sentence, the Commission did not err in applying time credits to the consecutive sentence but not the life sentence. *Id.* at 767-68, 571 S.E.2d at 250-51.

Although neither the issues raised in, nor the facts presented by *Price* are completely analogous, *Price* indicates our Court's approval of the process employed by the Commission in the present case. Similar to its practice in *Price*, the Commission applied all time credits available to plaintiff Bates' life sentence and all time credits available to his burglary sentence and then aggregated those sentences to determine his parole eligibility date. Under *Price*, such practice does not run afoul of and is even in accordance with the *Robbins* holding that sentences must be treated in the aggregate. Thus, the trial court erroneously concluded that the practice employed by defendants *sub judice* was impermissible and erred in granting Bates' declaratory relief on that basis.

Conclusion

For the reasoning stated herein, we reverse the trial court's order granting declaratory judgment in plaintiffs' favor.

Reversed.

Judges GREENE and MARTIN concur.

STATE OF NORTH CAROLINA v. EMMETT BERNARD SHIPP

No. COA02-67

(Filed 31 December 2002)

1. Drugs—trafficking in heroin by possession—possession of heroin with intent to sell or deliver—selling heroin—disjunctive jury instruction

The trial court did not commit plain error in a trafficking in heroin by possession, possession of heroin with intent to sell or deliver, and selling heroin case by instructing the jury in the dis-

junctive that defendant could be convicted if the jury found that he sold heroin to either of two individuals or both even though defendant contends the indictment alleged that defendant sold heroin to one individual, because: (1) the trial court's instruction did not present the jury with theories of conviction not charged in the bill of indictment; (2) the indictment 00 CrS 124301 charges that defendant sold heroin to the two undercover officers and a conviction would be permitted upon a showing that defendant sold heroin to either or both officers; (3) although the indictments in 00 CrS 124295 and 00 CrS 124298 charged that defendant sold heroin only to one undercover officer, it cannot be said that the instruction allowed for conviction on any theory other than those alleged in the respective indictments; (4) the trial court instructed the jury as to all three indictments in one single charge and the trial court followed the disjunctive charge with the words "as the case may be"; and (5) the verdict sheets for 00 CrS 124295 and 00 CrS 124298 also indicate that conviction was expressly limited to the theory charged in the indictments.

2. Drugs—trafficking in heroin by possession—possession of heroin with intent to sell or deliver—selling heroin—sufficiency of evidence

The trial court did not err in a trafficking in heroin by possession, possession of heroin with intent to sell or deliver, and selling heroin case by denying defendant's motion to dismiss case numbers 00 CrS 124298 and 00 Crs 124300, because there was ample evidence in the record to reasonably support the conclusions that: (1) defendant sold State's Exhibit Number 8 to two undercover officers on 4 February 2000; and (2) the substance sold was heroin.

3. Criminal Law—prosecutor's argument—personal opinion—uncomplimentary conduct—defendant as car with faulty brakes—hit of heroin—no plain error

The trial court did not commit plain error in a trafficking in heroin by possession, possession of heroin with intent to sell or deliver, and selling heroin case by failing to correct alleged improper statements made by the prosecutor during closing arguments concerning her personal opinion as to the credibility of a witness, uncomplimentary conduct toward defense counsel, the prosecutor's portrayal of defendant as a car with faulty brakes, and what constituted a "hit" of heroin, because: (1) the prosecutor's argument was not so grossly improper as to require

the trial court to intervene ex mero motu; and (2) defendant has not established that the jury probably would have reached a different result.

4. Joinder—crimes—motion to sever trial—single scheme or plan

The trial court did not abuse its discretion in a trafficking in heroin by possession, possession of heroin with intent to sell or deliver, and selling heroin case by denying defendant's motion to sever the trial of the 12 January 2000 offenses, because: (1) defendant was charged with seven drug offenses involving both the possession and sale of heroin, and the offenses occurred on three separate dates over the course of less than two months; (2) the acts or transactions were either connected together or constituted parts of a single scheme or plan to distribute heroin; and (3) a defendant fails to show abuse of discretion on the part of the trial judge in joining two offenses for trial where defendant's only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others.

Appeal by defendant from judgment entered 14 June 2001 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly P. Hunt, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

EAGLES, Chief Judge.

Defendant, Emmett Bernard Shipp, appeals from judgment entered in Mecklenburg County Superior Court upon a jury verdict finding him guilty of one count of trafficking in heroin by possession; three counts of possession of heroin with the intent to sell or deliver; and three counts of selling heroin.

The State's evidence tended to establish that on 12 January 2000, the Charlotte-Mecklenburg Police Department was involved in a 2-3 month long undercover drug investigation in the area surrounding the intersection of Kohler Avenue and Statesville Avenue in Charlotte, North Carolina. Officer Patrick Mulhall ("Mulhall") and Officer Michael Marlow ("Marlow") of the Charlotte-Mecklenburg Police

Department's vice and narcotics division were assigned to drive through the area and attempt to make undercover purchases of heroin from street dealers who "flagged" them down.

On 12 January 2000, Mulhall drove with Marlow to the area of Kohler Avenue and Statesville Avenue. While the officers were stopped at an intersection, defendant, who was walking up the street with another man, called out to the officers. Defendant walked up to the driver's side of the car and asked Mulhall what they wanted. Mulhall replied "two bags," meaning heroin. Defendant told Mulhall to meet him at "the top of the hill" and disappeared from the officers' sight. After driving to the top of the hill, the officers were met by several people in a green minivan. The officers followed the van to a duplex on Olando Avenue where defendant was standing in the front yard.

Once the officers stopped in front of the duplex, defendant walked up to the driver's side of the car. Mulhall told defendant they wanted "two bags" of heroin. Defendant walked over to a parked gray Ford Tempo, retrieved something from the trunk and then placed two "cellophane baggies" on the passenger door's armrest of the officers' car. Mulhall and Marlow gave defendant fifty dollars: Mulhall put twenty-five dollars on the car's dash while Marlow handed twenty-five dollars to defendant directly. Defendant took the money and told the officers to come back to the house and beep the horn if they wanted "anything else." Mulhall and Marlow then left.

Mulhall placed the two cellophane baggies into a larger evidence envelope and sealed it with tape. Mulhall then obtained a complaint number for the incident and wrote this number on the envelope, along with his initials and the letters "B/M." Mulhall turned the evidence over to the Charlotte-Mecklenburg Police Department's ("CMPD") property control facility with a request for chemical analysis of the substance contained in the cellophane baggies. Mulhall and Marlow then looked through books of police photographs until they identified defendant as the person who sold them the cellophane baggies.

At approximately 9:15 a.m. on 4 February 2000, Mulhall and Marlow again drove through the area of Statesville Avenue and Kohler Avenue seeking to make undercover purchases of heroin. This time defendant was driving what appeared to be the same gray Ford Tempo from which the officers had seen defendant retrieve the drugs on 12 January 2000. Defendant came up behind the officers' car in the

Tempo and flashed his headlights. The officers stopped and defendant pulled along side the officers' car. Defendant asked Mulhall what they wanted. Mulhall said "two bags," indicating heroin. Defendant told the officers to follow him. He led the officers back to the same duplex on Olando Avenue. Once there, defendant got out of his car, walked over to the officers' car and handed Mulhall two "bags" of heroin. Mulhall handed defendant fifty dollars while Marlow discussed the possibly of purchasing larger quantities of heroin from defendant in the future. This prompted defendant to give the officers his pager number as well as a code number to key in when they called. After receiving the number, the officers left and turned the evidence over to CMPD property control in virtually the same manner as on 12 January 2000, except this time, defendant's name was written on the evidence envelope instead of the descriptive initials, "B/M."

At approximately 10:30 a.m. on 4 February 2000, Marlow paged defendant and arranged to purchase one gram of heroin for $250. The officers then drove to the duplex on Olando Avenue where defendant lived. Defendant met the officers at their car. Following a brief conversation, defendant gave Mulhall the heroin and Marlow gave defendant $250. The officers left and turned the evidence over to CMPD property control.

On 24 February 2000, Mulhall and Marlow met Arnell Huffman in the parking lot of Wayne Supermarket to purchase $1500 worth of heroin. Huffman got into the officers' car and directed them to drive to a residential area of North Pine Street. Huffman then got out of the officers' car and walked across North Pine Street where he met defendant and engaged in a brief conversation. Following this conversation, both Huffman and defendant walked back to the officers' car. Defendant briefly engaged Mulhall in conversation and then walked to the passenger side of the car and did the same to Marlow. Defendant told Marlow that the heroin the officers were supposed to buy was actually going to cost $1600 instead of $1500 as previously agreed. Defendant attributed the increase to a "misquote" in the price on the part of Huffman. Defendant then handed Marlow a bag containing approximately six grams of heroin. In return, Marlow gave defendant $1600. Following the exchange, the officers returned to the police department where the evidence was turned over to CMPD property control.

For the events that occurred on 12 January 2000, defendant was indicted on one count of sale of a controlled substance and one count

of possession with intent to sell or deliver a controlled substance. For the events of 4 February 2000, defendant was indicted on two counts of sale of a controlled substance and two counts of possession with intent to sell or deliver a controlled substance. For the events of 24 February 2000, defendant was indicted on one count of trafficking in drugs by possession. Defendant was convicted on all counts and sentenced to 115-125 months imprisonment and a $50,000 fine. Defendant appeals.

[1] Defendant first argues that there was a fatal variance between the allegations in the bills of indictment and the trial court's instructions to the jury. The sale indictment stemming from the events of 12 January 2000 charged that defendant "did unlawfully, willfully and feloniously sell *to P.J. Mulhall and M.D. Marlow*, a controlled substance, to wit: heroin . . . ." (Emphasis added.) The two sale indictments stemming from the events that occurred on 4 February 2000 charged that defendant "did unlawfully, willfully and feloniously sell *to P.J. Mulhall*, a controlled substance, to wit: heroin . . . ." (Emphasis added.) The trial court, in a single charge as to all of the sale offenses, gave the following instruction to the jury:

> The defendant has been accused of selling heroin, a controlled substance. Now I charge that for you to find the defendant guilty of selling heroin, a controlled substance, the State must prove beyond a reasonable doubt that the defendant knowingly sold heroin *to P.J. Mulhall or M.D. Marlow or both*, as the case may be, exchanging heroin for money, would be a sale of a controlled substance. So I charge that if you find from the evidence beyond a reasonable doubt, that on or about the alleged date, the defendant knowingly sold heroin *to P.J. Mulhall or M.D. Marlow or both*, as the case may be, it would be your duty to return a verdict of guilty as charged. (Emphasis added.)

Defendant argues that because two of the indictments allege that "only P.J. Mulhall" was the purchaser of the heroin and the remaining indictment alleged that "both P.J. Mulhall and M.D. Marlow" were the purchasers; the trial court's instruction that defendant could be convicted if the jury found that he "sold heroin to P.J. Mulhall or M.D. Marlow or both," amounted to plain error. Defendant contends that by instructing the jury in the disjunctive "or" where the indictment charges in the conjunctive "and," the trial judge submitted the case to the jury on a theory not charged in the bills of indictment. We disagree.

> The plain error standard requires a defendant to make a showing that absent the erroneous instruction, a jury would not have found him guilty of the offense charged. To rise to the level of plain error, the error in the instructions must be 'so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.'

State v. Lancaster, 137 N.C. App. 37, 46, 527 S.E.2d 61, 68 (2000) (citations omitted), *disc. review denied in part*, 352 N.C. 680, 545 S.E.2d 723 (2000).

Defendant correctly asserts that "an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered the controlled substance, if that person is known." *State v. Redd*, 144 N.C. App. 248, 256, 549 S.E.2d 875, 881 (2001). Furthermore, " '[i]t is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.' " *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986) (quoting *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)). Therefore, "the trial court should not give instructions which present to the jury possible theories of conviction which are either not supported by the evidence or not charged in the bill of indictment." *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). However, after careful review of the record and trial transcript, we conclude that the trial court's instruction did not present the jury with theories of conviction not charged in the bill of indictment.

We are guided by *State v. Lancaster*, 137 N.C. App. 37, 527 S.E.2d 61 (2000). In *Lancaster*, defendant was charged with kidnapping by an indictment which alleged the offense was perpetrated by "unlawfully confining, restraining *and* removing [the victim] from one place to another without her consent." *Id.* at 46, 527 S.E.2d at 67 (emphasis added). The trial court's instructions to the jury stated in pertinent part that "[i]f you find from the evidence beyond a reasonable doubt that . . . the defendant unlawfully confined a person, restrained a person, *or* removed a person from one place to another . . . it would be your duty to return a verdict of guilty . . . ." *Id.* at 46, 527 S.E.2d 68 (emphasis added).

The defendant in *Lancaster* argued, as defendant does here, that the conjunctive allegations of the indictment and the trial court's dis-

junctive instructions to the jury ran afoul of our Supreme Court's holding in *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). However, the *Lancaster* court distinguished *Tucker* on grounds that the indictment in *Tucker* limited the alleged kidnapping to one theory, while the jury instructions allowed for a conviction based on a different theory than the one set out in the indictment. *Lancaster*, 137 N.C. App. at 47, 527 S.E.2d at 68. The *Lancaster* court went on to hold that where the indictment charged defendant in the conjunctive, *i.e.*, "with kidnapping by 'confining, restraining *and* removing,' " a jury instruction in the disjunctive, which permitted conviction "upon a showing of *either* confining, restraining *or* removing" was permissible because it was not based upon "an 'abstract theory not supported by the bill of indictment.' " *Id.* (emphasis added). We conclude that *Lancaster* is controlling.

Here, indictment 00 CrS 124301 charges that defendant sold heroin to "P.J. Mulhall and M.D. Marlow." Applying *Lancaster*, a conviction would be permitted upon a showing that defendant sold heroin to either Mulhall, Marlow or both. Therefore, the instruction in the disjunctive did not permit conviction on an abstract theory, not supported by the bill of indictment as to that charge. Moreover, although the indictments in 00 CrS 124295 and 00 CrS 124298 charged that defendant sold heroin only to "P.J. Mulhall," we cannot say the trial court's instruction in this case allowed for conviction on any theory other than those alleged in the respective indictments.

It should be noted that the trial court instructed the jury as to all three indictments in one single charge. Furthermore, the trial court followed the disjunctive charge with the words "as the case may be." The inclusion of this language limited the jury to convicting defendant only upon the theories reflected in the respective indictments. Finally, the verdict sheets for 00 CrS 124295 and 00 CrS 124298 also indicate that conviction was expressly limited to the theory charged in the indictments. In each case the jury was presented with only two choices: "Guilty of sale of heroin . . . to P.J. Mulhall" or "Not guilty." On this record, we conclude that the trial court's instruction did not have a probable impact on the jury's finding of defendant's guilt. Accordingly, this assignment of error is rejected.

[2] Defendant next argues that the trial court improperly denied his motion to dismiss in case numbers 00 CrS 124298 and 00 CrS 124300, based on insufficiency of the evidence. Defendant contends that neither officer "actually identified" the heroin sold to them during the

second transaction that occurred on 4 February 2000 because Officer Marlow testified that State's Exhibit No. 8 was "the alleged heroin that was purchased from Mr. Shipp approximately 11:30 hours on the 24th of February," instead of the 4th of February. Defendant further argues that the State's evidence was insufficient to show that the substance that was purchased was "actually heroin." We disagree.

It is well established that when ruling on a motion to dismiss for insufficiency of the evidence,

> the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. The defendants' motion must be denied if the State has offered substantial evidence against defendant of every essential element of the crime charged. 'Substantial evidence' is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The test of the sufficiency of evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two.

State v. Porter, 303 N.C. 680, 685-86, 281 S.E.2d 377, 381-82 (1981) (citations omitted). Defendant's own evidence, if favorable to the State, may also be considered in ruling on the motion. *State v. Green*, 310 N.C. 466, 468, 312 S.E.2d 434, 435-36 (1984).

Here, both Officer Marlow and Officer Mulhall testified on direct examination that they purchased heroin from defendant at approximately 11:30 a.m. on 4 February 2000. Marlow further testified that immediately after the purchase was complete, he sealed the heroin (State's Exhibit No. 8) in an evidence envelope (State's Exhibit No. 7); obtained a complaint number; wrote the complaint number on the evidence envelope; and submitted both the evidence envelope and the evidence contained in it to CMPD property control. Marlow testified that the sequence of numbers in the complaint number ("2000-0204-120503") indicated that the number had been issued on 4 February 2000 at 12:05 p.m. Willie Earl Rose, a criminalist with the Charlotte-Mecklenburg Police Department's crime lab, testified as an expert in the area of forensic chemistry and controlled substance identification. Rose testified that he performed a chemical analysis of State's Exhibit No. 8 and found it to be 0.48 grams of heroin. Finally, defendant himself testified that he sold heroin to Mulhall and Marlow on 4 February 2000. We conclude there is ample evidence in the record to reasonably support the conclusions that: (1) defendant sold

State's Exhibit No. 8 to Mulhall and Marlow on 4 February 2000; and (2) that the substance sold was heroin. Accordingly, the trial court properly denied defendant's motion to dismiss.

[3] Defendant next argues that the trial court committed plain error by failing to correct improper statements made by the prosecutor during closing argument.

Defendant first contends that the prosecutor improperly asserted her personal opinion as to the credibility of a witness by arguing:

> I'm going to submit to you that the officers were telling the truth. And he sold it them to him. He didn't even blame it on Mr. Huffman. That's the most likely story he could give you. Wasn't me. Must have been him. He didn't even say that. Don't want to talk about it. Didn't sell drugs. No more.
>
> So it's going to come down to who you believe. It's not identity. He told you that this photograph right here was him. The person that they went back and identified was him.

Defendant next contends that the prosecutor engaged in uncomplimentary conduct toward defense counsel by arguing:

> Now Miss El-Khouri, and I like her, we're good friends outside the courtroom. It's her job to give you some smoke screens and to say hey, look at the monkey. Hey, look at the pretty bird. Don't look at what's right in front of you.

Defendant next contends that the prosecutor's portrayal of him as a car with faulty brakes improperly led the jury to base its decision on passion and prejudice, rather than the evidence. Defendant specifically cites the following argument:

> [MS. WEST] Can you go back home knowing you've just put that dangerous car back on the road. Cause that's what you're doing. You're putting Mr. Shipp who is an admitted drug dealer, he sold drugs twice, back on the street. He's dangerous to you.
>
> MS. EL-KHOURI: Objection.
>
> THE COURT: Overruled.
>
> MS. WEST: He's dangerous to you. He's dangerous to your family. And he's dangerous to everybody around you, just like that car that you put on the road when you bought it from the salesman.

Finally, defendant contends that because there was no testimony as to what would constitute an individual "hit" of heroin, the prosecutor argued matters outside the record by saying:

> These two baggies, you can assume, is about a hit each. This weighed point 09. Don't look like a lot, a little bit of powder, two hits. Err on the side of caution. We'll say one hit is point 05 of a gram. This is 5.53. Ladies and gentlemen, this is a little more than 111 hits of heroin.

Although defendant did not object at trial, he argues that "due to the inflammatory and highly prejudicial nature of the prosecutor's argument, the trial court should have intervened *ex mero motu* to cure the prejudice . . . ." We disagree.

"Trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). "Counsel may argue the facts in evidence together with all reasonable inferences that may be drawn therefrom in presenting counsel's side of the case." *State v. Abraham*, 338 N.C. 315, 338, 451 S.E.2d 131, 143 (1994). "Further, for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " *Soyars*, 332 N.C. at 60, 418 S.E.2d at 487-88 (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)).

> Where defendant fails to object to an alleged impropriety in the State's argument and so flag the error for the trial court, 'the impropriety . . . must be gross indeed in order for this court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.'

Abraham, 338 N.C. at 338, 451 S.E.2d at 143 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)). "In determining whether the prosecutor's argument was grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609 (1997), *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997). "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." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002).

After carefully reviewing the prosecutor's entire argument, paying particular attention to those portions to which defendant now assigns error, we conclude the prosecutor's argument was not so grossly improper as to require the trial judge to intervene *ex mero motu*. Moreover, defendant has not established that the jury probably would have reached a different result. Accordingly, this assignment of error is rejected.

[4] Finally, defendant argues that the trial court improperly denied his motion to sever the trial of the 12 January 2000 offenses. Defendant first argues that the offenses in this case lacked the requisite connection to be joined for trial. We disagree.

"It is well established that a trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985), *rev'd on other grounds*, 323 N.C. 306, 372 S.E.2d 704 (1988). "[T]wo or more offenses may be joined for trial when the offenses are based on the same act or transaction, or a series of acts or transactions connected together or constituting parts of a single scheme or plan." *State v. Manning*, 139 N.C. App. 454, 458, 534 S.E.2d 219, 223 (2000), *disc. review denied*, 353 N.C. 273, 546 S.E.2d 385 (2000). "A defendant is not prejudiced by the joinder of two crimes unless the charges are 'so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant.' " *State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994) (quoting *State v. Hammond*, 112 N.C. App. 454, 458, 435 S.E.2d 798, 800 (1993), *disc. review denied*, 335 N.C. 562, 441 S.E.2d 126 (1994).

In *State v. Manning*, 139 N.C. App. 454, 534 S.E.2d 219 (2000), defendant was charged in a total of fifteen different drug trafficking offenses, which occurred on four separate dates over six months. Defendant argued that joinder of the offenses was improper because (1) there was no connection between the offenses; and (2) it effectively "strengthen[ed] evidence of defendant's guilt on the weaker counts with evidence from the stronger counts." *Id.* at 460, 534 S.E.2d at 223. This Court rejected defendant's argument, finding that the evidence indicated that "defendant had a common, continual method of transacting drug sales," based on "the same pattern of operation between defendant and the informant . . . during this time." *Id.* at 461, 534 S.E.2d at 224. In reaching this conclusion, the *Manning* court relied on the following factors: (1) Defendant always retrieved the

drugs from a location "on or near his property"; (2) Defendant "would often plan the exchange . . . ahead of time; (3) Defendant "always took cash in payment"; and (4) Defendant "almost always" delivered the drugs in clear plastic bags. *Id.*

Here, defendant was charged with seven drug offenses involving both the possession and sale of heroin. The offenses occurred on three separate dates over the course of less than two months. The evidence further indicated that defendant and his associates frequently patrolled the area of Kohler and Statesville Avenues, an area that was known for heroin trafficking. Their purpose was to approach potential buyers to direct them to defendant's residence on Olando Avenue and sell those buyers heroin. Defendant also arranged drug sales in advance, both through his associates as well as through the use of a numerical pager and pre-designated codes. Moreover, defendant almost always retrieved the heroin from either his residence or from a gray Ford Tempo that he drove and kept on the property of his residence.

We conclude the evidence was sufficient to indicate that the acts or transactions were either connected together or constituted parts of a single scheme or plan to distribute heroin. We hold that the trial court did not abuse its discretion by consolidating all of the charges for trial.

Defendant next contends that severance of the charges was required to promote a fair determination of his guilt or innocence of each offense. Defendant submits that because the officers' reports concerning the 12 January 2000 offense identified the seller only as a "black male," the identity of the perpetrator of that offense was in issue. Defendant contends that joinder was improper because it prevented him from choosing not to testify as to the 12 January 2000 offenses in order to make the State prove his identity as the perpetrator. We disagree.

A defendant fails to show abuse of discretion on the part of the trial judge in joining two offenses for trial where "defendant's only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others." *State v. Sutton*, 34 N.C. App. 371, 374, 238 S.E.2d 305, 307 (1977), *disc. review denied*, 294 N.C. 186, 241 S.E.2d 521 (1978). "The defendant seeking to overturn the discretionary ruling must show that the joinder has deprived him of a fair trial." *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981).

Here, defendant has failed to show either that the trial court abused its discretion or that joinder deprived him of a fair trial. Mulhall testified that on 12 January 2000, he and Marlow purchased heroin from a black male. Following the 12 January 2000 purchase, Mulhall and Marlow identified defendant by viewing a book of police photographs. Mulhall further identified defendant as the seller in open court. Finally, defendant himself admitted that he was the person in the photograph the officers used to identify him. Accordingly, this assignment of error is rejected.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges TYSON and THOMAS concur.

STATE OF NORTH CAROLINA v. RUBEN ABURTO DIAZ AND JOSE JUAN ESPINOZA LOPEZ

No. COA02-145

(Filed 31 December 2002)

1. Drugs—cocaine trafficking—acting in concert

The trial court did not err by instructing the jury on acting in concert for cocaine trafficking charges that arose from observation of four men at a motel, and the discovery of two kilograms of cocaine on an embankment, where defendants argued that they were not present when the offenses occurred. However, defendants were present when the drugs were brought to the city and were involved in the transportation of the drugs between motels.

2. Evidence—detective's observations—rationally based on perceptions

The trial court did not err in a cocaine trafficking prosecution by allowing a detective to testify concerning "indicators of drug trafficking" during his personal observation of the events surrounding defendants' check-in at a motel where the detective merely explained why he was suspicious after observing defend-

ants' conduct and did not testify that defendants were in possession of drugs. The testimony was rationally based on the witness's perception and helpful to a clear understanding of a fact in issue.

3. Evidence—police officer's opinion—drug dealers' use of motels

The trial court in a cocaine prosecution correctly allowed an officer to testify about a special focus on hotels in Greensboro for drug interdiction because the officer's job and his experience made him better qualified than the jury to form the opinion that drugs had come into the city from individuals who were using hotels and motels within city limits.

4. Searches and Seizures—warrantless—motel rooms—rented by others

A cocaine defendant had no reasonable expectation of privacy in motel rooms which were searched without a warrant where both of the rooms were rented by others. One of the rooms was rented by the person who consented to the search and, while defendant may have possessed a second or third key to the other room, this does not confer a reasonable expectation of privacy.

5. Criminal Law—opening and closing arguments—multiple defendants—evidence offered by one

The trial court did not err in a cocaine prosecution of multiple defendants by denying one the last closing argument where another had introduced evidence. The right to open and close arguments belongs to the State where there are several defendants and one elects to offer evidence.

6. Appeal and Error—plain error analysis—not extended beyond evidence and instructions

Plain error analysis did not extend to the question of whether an experienced, competent interpreter should have been present at all times in the courtroom.

7. Drugs—cocaine—trafficking, possession, conspiracy—sufficiency of evidence

The evidence was sufficient for the trial court to deny defendant Lopez's motion to dismiss charges of trafficking in cocaine, possession, and conspiracy.

Appeal by defendants from judgments entered 14 August 2001 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 28 October 2002.

Roy Cooper, Attorney General, by Newton G. Pritchett, Jr., David J. Adinolfi, II, Assistant Attorneys General, for the State.

Staples Hughes, Appellate Defender, by Aaron Edward Carlos for defendant-appellant Diaz; and Angela H. Brown for defendant-appellant Lopez.

THOMAS, Judge.

Defendants, Ruben Aburto Diaz and Jose Juan Espinoza Lopez, appeal convictions of trafficking in cocaine by possessing in excess of 400 grams, possession with intent to sell or deliver cocaine, and conspiracy to traffic in cocaine. They were each sentenced to a minimum prison term of 175 months to 219 months. For the reasons herein, we find no error.

The State's evidence tends to show the following: Detective B.A. Bissett of the Greensboro Police Department's Vice and Narcotics Division received a telephone call from a confidential and reliable source. Based on the discussion that ensued, Bissett went to the Best Western Motel in Greensboro, North Carolina, and inquired about the registration of Lopez. Bissett discovered Lopez's full name, Jose Espinoza Lopez, his address in Reading, Pennsylvania, and that Lopez had a Pennsylvania license plate but a North Carolina driver's license. He further found that Lopez checked into Room 233 on the morning of 9 August 2001 without a reservation, paid for two nights in advance with cash, and requested no maid service. These facts heightened Bissett's suspicion of Lopez. Based on his experience as a narcotics detective, Bissett noted that people traveling long distances usually make reservations in advance and use a credit card. Further, regarding the "no maid service" request, Bissett noted that "individuals involved in the illicit drug trade do not want people coming in their room and doing anything because they're usually trying to hide something."

Bissett set up surveillance of Room 233 and Lopez's green Honda. Additional information from his source compelled Bissett to return to the motel office two days later, on 11 August 2001, to inquire about the registration of Arturo Gonzalez Ortuno. He learned that Ortuno checked into Room 244 without first making a reservation, paid with cash for five days, and requested no maid service.

Bissett then asked his department for assistance with surveillance so that both Room 233 and Room 244 could be observed. Early on the afternoon of 11 August 2001, a man identified as Diaz was seen leaving Room 233 and entering Room 244. This was the first time Bissett realized there was any link between the rooms and their occupants.

Soon thereafter, Diaz, Ortuno, a man named Jafet Gomez, and a fourth man never identified, were seen leaving Room 244 and getting into Ortuno's Eagle Vision vehicle. The police did not follow them. Upon return to the motel, the men went to Room 244. After a short while, they got back in the Eagle Vision with the police following them and went to a residence in Graham, North Carolina. After thirty minutes, the men left the Graham residence.

On the morning of 12 August 2001, Bissett noted that neither Diaz's green Honda nor Ortuno's Eagle Vision were in the motel parking lot. Seeing maids cleaning Room 244, Bissett asked a motel employee to retrieve the room's trash. The trash contained a receipt for digital scales, a piece of paper with handwritten calculations, and four different containers of inositol. Inositol is a substance mixed with cocaine to increase its weight, thereby increasing its street value. Bissett testified that scales are used to weigh and divide into grams the cocaine/inositol mix for the purpose of sale. Considering the purchase of scales, the calculations, and the amount of inositol, Bissett estimated that the individuals occupying the room "probably had somewhere in the neighborhood of six kilograms of cocaine."

Believing he then had probable cause to obtain a search warrant for both rooms, Bissett requested electronic surveillance of Room 233 and aid from additional police officers. Officer R.D. Koonce conducted video surveillance of Room 233 while other officers observed Room 244 and perimeter locations.

Shortly after noon, Ortuno arrived at the motel parking lot. Bissett watched as Ortuno took a paper bag from the trunk of a white Chevy Cavalier to Room 244. Soon thereafter, Ortuno and Gomez went to Room 233 where they remained for "quite some time." Diaz was observed exiting and then returning to Room 233 several times. Ortuno and Gomez then left the motel in Ortuno's vehicle.

Detective Kyle Shearer, having received a radio broadcast that Ortuno and Gomez were leaving the motel, followed them and maintained close visual surveillance. The two men eventually pulled over

to a curb, removed a box from the trunk, and put it on the roadside embankment. Told the men had returned to the motel, Detectives Shearer and Bissett went to the embankment and found a box containing approximately two kilograms of cocaine.

Koonce, meanwhile, maintained surveillance of the parking lot and Room 233. He observed Ortuno and Gomez return. The two men removed a small blue bag from the trunk of the white Chevy Cavalier and went to Room 233. Eventually, both men left Room 233 and went to Room 244. They then left the motel, Ortuno in the Eagle Vision and Gomez in the Chevy Cavalier. Ortuno and Gomez were followed by the police and, approximately eight miles from the motel, arrested. The Eagle Vision contained $6000 in cash. A blue apron containing $2000 was found in the Chevy Cavalier.

As Ortuno and Gomez were being arrested, Shearer remained at the motel and observed Diaz leaving Room 233 with two small suitcases and entering Room 244. Shearer took Diaz into custody and left him in Room 244 with several detectives. Upon returning to the parking lot, Shearer saw Lopez arriving in the green Honda. After identifying himself, Shearer arrested Lopez. Lopez admitted that he had rented Room 233, but said he was not staying in it. Shearer then escorted Lopez to Room 233, where Lopez consented to a search. The search revealed three "bricks," or kilos of cocaine.

Pursuant to a plea arrangement with the State, Ortuno testified against Diaz and Lopez. Ortuno admitted that, in exchange for $6000, he agreed to help Gomez "move" some packages arriving from Winston-Salem, North Carolina, which Gomez had said contained marijuana. When Diaz and Lopez arrived from Winston-Salem with luggage containing cocaine, Ortuno protested, but felt he had to do what he was told because of threats from Gomez. Lopez and Diaz then took the packages of cocaine to the Days Inn Motel in Greensboro.

Eventually, Ortuno and Gomez went to the Days Inn. There, Gomez told Diaz to put the packages in Gomez's white Chevy Cavalier. Ortuno, Gomez, and Diaz proceeded to rent rooms at Motel 8, a neighboring motel, with Lopez arriving later. Lopez asked Diaz if he had sold the packages. Diaz said he had not. Lopez responded that he would need to take them to Virginia. Ortuno testified that Lopez had agreed to pay Diaz $24,000. Lopez returned the next day and took Diaz to yet another motel because he said he believed people were watching them.

On 12 August 2001, Ortuno and Gomez attempted to sell two packages of the cocaine to a man in Burlington, North Carolina, but were told the cocaine was "not right" or "no good." Gomez was angered by this, and confronted Diaz. He told Diaz "he was not going to help him anymore. He told him to take his packages." Finally, Gomez agreed he would help but Diaz would have to wait a couple of days. Gomez then told Ortuno to take him somewhere to hide the packages. It was at this time that the two men were observed placing the box containing two kilograms of cocaine on the embankment.

After hiding the box, Ortuno and Gomez went to Room 233. There, Ortuno heard Diaz call Lopez and ask if he would arrive soon. Lopez said yes. Ortuno and Gomez then returned to their room. After receiving $6000, Ortuno left, "[b]ecause [he] didn't have anything else to do with them." He met Lopez and Diaz again in jail, however. Both defendants repeatedly told Ortuno not to say anything to the police.

The defendants elected not to present evidence and their motions to dismiss at the close of the State's evidence and at the close of all the evidence were denied.

The trial court instructed the jury that it could use the theory of acting in concert in addition to the theory of constructive possession as to the charges of trafficking in cocaine by possessing at least 400 grams and possession with intent to sell or deliver. The jury found defendants guilty.

On appeal, Diaz and Lopez each set forth four assignments of error. Diaz contends the trial court erred in: (1) giving a jury instruction on acting in concert; (2) overruling his objections to Bissett's testimony regarding "indicators of drug trafficking" and "special focus" of motels for drug trafficking; (3) not suppressing evidence seized during unreasonable searches; and (4) denying him the last closing argument.

Lopez asserts the trial court erred in: (1) giving a jury instruction on acting in concert; (2) overruling his objection to the testimony concerning indicators of drug trafficking; (3) trying him without a competent, experienced Spanish-speaking translator at all times in the courtroom; and (4) denying his motion to dismiss at the close of all the evidence for insufficiency.

We combine both defendants' assignments of error (1) and (2) above and address them first. We then address Diaz's two remaining

assignments of error. Finally, we examine Lopez's remaining two assignments of error.

[1] By their first assignment of error, defendants argue that the trial court erred in instructing the jury on the theory of acting in concert for the trafficking charges. Specifically, they assert: (1) there was insufficient evidence to support the instruction; and (2) the instruction, combined with a constructive possession instruction, was misleading and denied defendants their right to a unanimous jury verdict. We disagree.

Section 90-95(a) of the North Carolina General Statutes provides:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
>
> (2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;
>
> (3) To possess a controlled substance.

Section 90-95(h) provides:

> (3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, . . . or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:
>
> . . . .
>
> c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

The "knowing possession" element of the offense of trafficking by possession may be established by a showing that: (1) the defendant had actual possession; (2) the defendant had constructive possession; *or* (3) the defendant acted in concert with another to commit the crime. *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993) (emphasis added).

A defendant has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or with others, he has the power and intent to control its disposition or use. *State v. Crawford*, 104 N.C. App. 591, 600, 410 S.E.2d 499, 504 (1991). Constructive possession occurs when a defendant has both the power and intent to control the disposition of the contraband, although he is not in actual possession. *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Under the theory of acting in concert, a defendant need not do any particular act constituting some part of the crime. However, he must be "present at the scene of the crime" and "act[ ] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

The acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt. *State v. James*, 81 N.C. App. 91, 97, 344 S.E.2d 77, 81 (1986) (citing *State v. Baize*, 71 N.C. App. 521, 323 S.E.2d 36 (1984), *rev. denied*, 313 N.C. 174, 326 S.E.2d 34 (1985)). Our courts have instructed juries on both constructive possession and acting in concert in possession cases. *See State v. Garcia*, 111 N.C. App. 636, 433 S.E.2d 187 (1993); *State v. Autry*, 101 N.C. App. 245, 399 S.E.2d 357 (1991); *State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986); *State v. Diaz*, 78 N.C. App. 488, 337 S.E.2d 147 (1985), *reversed on other grounds*, 317 N.C. 545, 346 S.E.2d 488 (1986). Nonetheless, in *State v. Baize*, this Court held that "[w]e have found no cases to support a conviction for possession of drugs under the acting in concert doctrine when the drugs are on another person and *entirely* under that person's physical control." *Baize*, 71 N.C. App. at 529, 323 S.E.2d at 41. (Emphasis added).

Defendants argue that the acting in concert theory did not apply to the possession or trafficking charges because neither defendant was actually present when the offenses occurred. Just before Ortuno and Gomez placed the two kilograms of cocaine on the roadside embankment, Diaz was seen going back and forth between Rooms 233 and 244. While the drugs were being placed on the embankment, Diaz was being arrested as he was leaving Room 233 and entering Room 244. Further, he was not present when the police discovered cocaine in Room 244.

Likewise, Lopez was not present when the drugs were left on the embankment. He was arrested in the parking lot upon his return to the motel after the arrests of Gomez and Ortuno. He was then

escorted by police to Room 244. He had checked out of that room the day before, on 11 August 2001, and had not been seen there since 10 August 2001.

Nonetheless, both defendants were present when the drugs were brought to Greensboro from Winston-Salem, according to the testimony of Ortuno. Further, both defendants transported the drugs to the Days Inn Motel when they checked out of the Best Western Motel.

In giving the instruction, the trial court relied on *State v. Garcia*, 111 N.C. App. 636, 433 S.E.2d 187 (1993). In *Garcia*, there was evidence that the defendant had constructive possession *and* was acting in concert. Here, there is evidence that both defendants were present when the trafficking and possession offenses occurred. We therefore hold that the trial court did not err in instructing the jury on acting in concert.

[2] By their second assignment of error, defendants contend the trial court erred in overruling their objections to Bissett's testimony regarding "indicators of drug trafficking" and "special focus" of motels for drug trafficking. They argue the opinion testimony was more prejudicial than probative of any fact in issue and should have been excluded under Rule 701 of the North Carolina Rules of Evidence. We disagree.

Rule 701, which governs opinion testimony by lay witnesses, states that:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2001).

Defendants object to Bissett's testimony concerning his personal observation of the events surrounding defendants' check-in at the motel. Based on this observation, Bissett became "suspicious," and said it lead him to further investigate by "set[ting] up surveillance . . . to watch and see what the individuals that are there are doing."

Such testimony was rationally based on Bissett's perception and helpful to a clear understanding of the determination of a fact in issue. Bissett did not state that it was his opinion that defendants

were in possession of drugs. He was merely explaining why he was suspicious of defendants after observing their conduct. His testimony was helpful to the fact-finder in having a clear understanding of his investigative process. As such, it was admissible.

[3] Diaz further objects to Bissett's testimony concerning "special focus" on hotels in Greensboro for drug interdiction purposes. However, Rule 702 provides:

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

N.C. Gen. Stat. § 8C-1, Rule 702 (2001).

The nature of Bissett's job and his experience make him better qualified than the jury to form the opinion that "a large influx of narcotics . . . have come into the city" by "individuals [who] were utilizing hotels and motels within the city limits to distribute narcotics." We therefore hold that Bissett's testimony was correctly allowed. This assignment of error has no merit.

[4] By defendant Diaz's third assignment of error, he contends he is entitled to a new trial because the trial court erred in failing to suppress evidence seized during the warrantless and unreasonable searches of Rooms 233 and 244. We disagree.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In order to challenge a search as unreasonable under the Fourth Amendment, an individual must show a "legitimate expectation of privacy" in the area searched. *Rakas v. Illinois*, 439 U.S. 128, 138, 58 L. Ed. 2d 387, 398 (1978), *reh'g denied*, 439 U.S. 1122, 59 L. Ed. 2d 83 (1979).

Lopez consented to the search of Room 233, which Lopez himself had rented. Fourth Amendment rights are personal; they may not be asserted vicariously. *State v. Jordan*, 40 N.C. App. 412, 252 S.E.2d 857 (1979) (holding that because defendant did not have a legitimate expectation of privacy in his passenger's pocketbook and therefore even if the search was unreasonable it did not violate defendant's Fourth Amendment rights). Therefore, Diaz's ar-

gument that his rights were violated by the search of Room 233 is without merit.

Diaz also did not have a legitimate expectation of privacy in Room 244, which was rented by Ortuno. *See United States v. Grandstaff*, 813 F.2d 1353 (9th Cir. (Ariz.) 1987), cert. denied, 484 U.S. 837, 98 L. Ed. 2d 78 (1987) ("Although a guest who stays overnight and keeps personal belongings in residence of another might have a reasonable expectation of privacy . . . mere presence in hotel room of another is not enough."). Additionally, in *State v. McMillan*, 147 N.C. App. 707, 557 S.E.2d 138 (2001), *disc. review denied*, 355 N.C. 219, 560 S.E.2d 152 (2002), this Court held that an individual has no legitimate expectation of privacy in a hotel room that he is not renting and in which he does not plan to spend the night.

Diaz argues, however, that the search violated his rights because Gomez had given him the key to Room 244. He maintains that since Ortuno gave the only testimony relevant to the matter, and he testified that Diaz did have a key, the trial court's finding that Diaz did not have a key to Room 244 is error. Even assuming Gomez had given Diaz a key to Ortuno's room, Diaz's Fourth Amendment rights were not violated. While possession of a second or third key to Room 244 may have given Diaz a subjective expectation of privacy in the room, we do not think such mere possession confers a reasonable expectation of privacy, an expectation "rooted in 'understandings that are recognized and permitted by society.' " *Minnesota v. Olson*, 495 U.S. 91, 100, 109 L. Ed. 2d 85, 95 (1990). As Diaz had no legitimate expectation of privacy in Rooms 233 and 244, his rights were not violated by those searches. This assignment of error lacks merit.

[5] By defendant Diaz's final assignment of error, he contends he is entitled to a new trial because the trial court denied him the last closing argument. We disagree.

When a defendant does not present any evidence during the guilt-innocence phase, he is entitled to both the first and the last closing arguments. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976). However, "when there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State." *Id.* at 231, 221 S.E.2d at 365.

In the instant case, although Diaz did not introduce evidence, defendant Lopez introduced evidence of Ortuno's driver's license. Lopez's introduction of this evidence thus denied Diaz the opportu-

nity for the last closing argument. *See State v. Reeb*, 331 N.C. 159, 415 S.E.2d 362 (1992). Consequently, this assignment of error is overruled.

[6] By his third assignment of error, defendant Lopez argues that it was plain error for him to be tried without a competent, experienced interpreter present at all times in the courtroom to translate the proceedings as they occurred and he is entitled to a new trial. We disagree.

We note that counsel did not object and we consider this argument under a plain error analysis. *State v. Perkins*, 154 N.C. App. 148, 571 S.E.2d 645 (2002). Plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "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." *State v. Jones*, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704, *appeal dismissed, rev. denied*, 352 N.C. 153, 544 S.E.2d 235 (2000).

However, our Supreme Court has declined to extend plain error analyses beyond issues regarding jury instructions and evidentiary matters. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Since defendant's contentions do not involve jury instructions or evidentiary matters, we likewise decline to extend a plain error analysis to his argument and do not reach it.

[7] By defendant Lopez's final assignment of error, he argues the trial court erred in denying his motion to dismiss based on insufficiency of the evidence. We disagree.

In considering 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, 528 S.E.2d 29 (2000). The standard of review for a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993), *disc. review denied*, 336 N.C. 612, 447 S.E.2d 407 (1994). Substantial evidence is defined as the amount of "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 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. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Under the charge of possession with the intent to sell or deliver cocaine, the State has the burden of proving: (1) the defendant possessed the controlled substance; and (2) with the intent to sell or distribute it. *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72-73 (1996). To prove the offense of trafficking in cocaine by possessing in excess of 400 grams, the State must show: (1) possession of cocaine; and (2) that the amount possessed was more than 400 grams. *State v. Mebane*, 101 N.C. App. 119, 123, 398 S.E.2d 672, 675 (1990), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994). Criminal conspiracy involves an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. *State v. Richardson*, 100 N.C. App. 240, 395 S.E.2d 143, *appeal dismissed and rev. denied*, 327 N.C. 641, 399 S.E.2d 332 (1990). Conspiracy may be proven by direct or circumstantial evidence. *State v. Lyons*, 102 N.C. App. 174, 401 S.E.2d 776, *cert. denied*, 329 N.C. 791, 408 S.E.2d 527, *aff'd*, 330 N.C. 298, 412 S.E.2d 308 (1991).

In the instant case, there was evidence that: (1) Lopez transported the drugs to Greensboro from Winston-Salem; (2) Lopez met with Diaz, Gomez and Ortuno in a motel room; (3) Lopez rented a room at the motel under suspicious circumstances; (4) Lopez did not relinquish his key and had continuous access and control of his room; (5) all co-defendants discussed the sale of the drugs; (6) Lopez stated he needed to take the unsold drugs to Virginia; (7) Lopez's room had approximately six kilograms of cocaine and packaging materials; (8) Lopez had agreed to pay Diaz what looked to be $24,000; (9) Lopez took Diaz to another hotel because he believed people were watching them; and (10) Lopez told Ortuno not to say anything to the police. In the light most favorable to the State, there was sufficient evidence of trafficking, possession and conspiracy elements and that Lopez was one of the perpetrators. This argument is overruled.

We therefore find no error in defendants' convictions.

NO ERROR.

Chief Judge EAGLES and Judge TYSON concur.

N.C. MONROE CONSTRUCTION COMPANY, PLAINTIFF AND THIRD-PARTY PLAINTIFF v. THE STATE OF NORTH CAROLINA; THE OFFICE OF STATE BUDGET AND MANAGEMENT; AND MARVIN K. DORMAN, JR., IN HIS CAPACITY AS STATE BUDGET DIRECTOR, DEFENDANTS, AND DEWBERRY & DAVIS AND MILLER BUILDING CORPORATION, THIRD-PARTY DEFENDANTS

No. COA01-1478

(Filed 31 December 2002)

1. **Appeal and Error—appealability—partial summary judgment—certification**

A prison construction claim was immediately appealable where the trial court granted a motion for summary judgment from the State, which did not dispose of all the claims in the case, but the court certified that there was no just reason for delay.

2. **Contracts—prison construction—valid only after bond referendum and ratification**

An agreement for plaintiff to serve as program manager for prison construction was valid where it was entered into after voters approved a bond act and the General Assembly ratified a revenue act which expressly authorized contracts for Correction facilities. An earlier agreement was without authority.

3. **Contracts—prison construction—two part appropriation—contract for entire amount—second part contingent**

Plaintiff was entitled to perform the entirety of its duties as program manager for prison construction for the State of North Carolina where the State contended that plaintiff's contract could not have been valid for a portion of the funds enacted but not appropriated. While an agency may not commit the State to spending funds not appropriated, the plain language of the agreement limited plaintiff's ability to perform as to these funds until they were appropriated, which was eventually done.

4. **State—contracts—two part appropriation—initial contract for entire amount**

The language of the 1991 Revenue Act granted authority to the Office of State Budget and Management to contract for the entire of amount of bonds for prison construction, even though later enactments claimed to prevent agencies from contracting for services with some of the funds.

5. Contracts—State construction—oversight agency changed—contract not invalidated

The 1993 transfer of authority to oversee a State prison construction program from one agency (OSBM) to another (OSC) did not invalidate a 1991 contract between plaintiff and OSBM establishing plaintiff as the program manager for the entire project. The 1991 agreement specifically encompassed the entire amount of the project, including the portion not appropriated until 1993, and OSBM entered into the contract with plaintiff on behalf of the State. Simply transferring authority to carry out the particulars of the program from one State agency to another does not allow the State to disregard the provisions of the 1991 agreement.

6. Contracts—State construction—two part appropriation—oversight agency changed

The State's action in not allowing plaintiff to perform the remainder of a 1991 contract to serve as program manager for prison construction was a breach of contract, for which plaintiff was entitled to damages, where the funds were appropriated in two parts, the state agency overseeing the program was changed with the second appropriation, and the State claimed that the 1991 contract with plaintiff was therefore invalid.

7. Contract—mutual mistake—State construction contract—change of oversight agency—funds not yet appropriated

The defense of mistake of fact did not apply to a State construction contract for which money was appropriated in two parts, with the oversight agency changing with the second appropriation, even though the State contended that there was a mutual mistake in the belief that the original agency would continue to administer the project and that there was authority to enter into a contract for the use of funds not yet appropriated. The transfer of oversight from one agency to another was irrelevant because the contract was with the State, and the contract was authorized because it was contingent on funds being appropriated.

8. Contracts-quasi-contract—not an affirmative defense

The State's argument of unjust enrichment as a defense to its own termination of a contract was misplaced; unjust enrichment is a quasi-contractual theory of recovery, not an affirmative defense.

Appeal by plaintiff from judgment entered 20 August 2001 by Judge John R. Jolly, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 11 September 2002.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Michael D. Meeker, Clinton R. Pinyan, and Andrew J. Haile, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Roy A. Giles, Jr. and Assistant Attorney General Jeffrey B. Parsons, for the State.

McGEE, Judge.

In response to a federal court mandate to promptly relieve prison facility overcrowding in North Carolina, the General Assembly enacted legislation in 1987 that transferred the responsibility and authority to design and construct prisons from the Office of State Construction (OSC) to the Office of State Budget and Management (OSBM) and exempted prison construction from various statutory requirements to help expedite prison construction. OSBM began discussions in 1987 with N.C. Monroe Construction Company (plaintiff) about building prisons for the State.

The General Assembly enacted the State Prison and Youth Facilities Bond Act, ch. 935, 1989 N.C. Sess. Laws 294 (Bond Act) on 16 July 1990. The Bond Act authorized the issuance of $200 million in state bonds, pending voter approval in November 1990. The Bond Act did not explicitly authorize State agencies to enter into contracts for the expenditure of bond proceeds, but reserved to the General Assembly the power to provide such authorization at a later date.

Plaintiff and the State entered into a management agreement on 1 August 1990 (August 1990 Agreement). C.C. Cameron, head of OSBM and Executive Assistant to the Governor for Budget and Management, negotiated and executed the August 1990 Agreement for the State. The August 1990 Agreement established plaintiff as program manager "for services in connection with the construction of those facilities described in Section 6 of . . . the State Prison and Youth Services Facilities Bond Act . . . ." Section 6 of the Bond Act provided that

> [t]he proceeds of bonds and notes shall be allocated and expended for the purposes of paying the cost of prison and youth services facilities as provided in this act, the particular projects

> within such purposes and the projected allocations therefor to be determined by legislative action of the General Assembly at the 1991 session or any subsequent session.

§ 6, ch. 935, 1989 N.C. Sess. Laws 294, 298. North Carolina voters approved the Bond Act on 6 November 1990. C.C. Cameron left state government service the following month and was replaced by Marvin Dorman (Dorman), formerly second in command at OSBM as the Deputy State Budget Officer.

The General Assembly ratified the Appropriations and Budget Revenue Act of 1991, ch. 689, 1991 N.C. Sess. Laws 1894 (Revenue Act), on 13 July 1991. The Revenue Act provided for the appropriation of $112.5 million in bonds for

> financing the cost of . . . State prison facilities and youth services facilities, including, without limitation, the cost of constructing capital facilities, renovating or reconstructing existing facilities, acquiring equipment related thereto, purchasing land, paying costs of issuance bonds and notes and paying contractual services necessary for the partial implementation of the purposes of the bond act.

§ 239(a), ch. 689, 1991 N.C. Sess. Laws 1894, 2125. Section 239 of the Revenue Act allocated $103.4 million of the $112.5 million towards the construction of prison projects in the State and the remainder to construction projects in the Division of Youth Services. *Id.* at 2125-26. Section 239 left the remaining $87.5 million of the overall $200 million to be used as determined by subsequent legislative action during that same session or any later session of the General Assembly. *Id.* Section 239(f) granted OSBM the ability to contract for prison facilities, stating that

> [w]ith respect to facilities authorized for the Department of Correction, the Office of State Budget and Management may contract for and supervise all aspects of administration, technical assistance, design, construction or demolition of prison facilities in order to implement the providing of prison facilities under the provisions of this act.

Id. at 2127.

At the request of Dorman, plaintiff and the State executed a second contract on 18 September 1991 (September 1991 Agreement), covering the same general services as the August 1990 Agreement,

with two significant differences. First, both the August 1990 Agreement and the September 1991 Agreement name the State and plaintiff as the parties to the contract and state that the contract is

> for services in connection with the construction of those facilities described in Section 6 of . . . [the] Bond Act (200 Million Bond Issue), as enacted during the 1989 Session (May 1990 Session) of the North Carolina General Assembly . . ., a copy which is attached hereto.

However, the September 1991 Agreement includes a provision immediately after the above cited language that specifies the contract includes the entire $200 million under the Bond Act and gives the rationale for including the entire amount. The provision includes facilities

> for which appropriations have been made for the Department of Corrections pursuant to Section 239(c) in House Bill 83 as enacted in the 1991 Session of the North Carolina General Assembly, *as well as the facilities for which appropriations shall be made for the balance of the $87,500,000 authorized as part of the 200 Million Bond Issue.*
>
> The facilities for which appropriations have not been made are being contracted for because a) a portion of the appropriations which are to be subsequently made will be necessary to complete the facilities authorized by the current appropriation, b) *planning for the entire 200 Million Bond Issue will substantially decrease delays which would otherwise occur in construction of facilities for which appropriations are to be made subsequently, and c) savings will be realized by the State of North Carolina as a result of the economy of scale for the total 200 Million Bond Issue.*

(emphasis added).

A second key addition in the September 1991 Agreement was to section 6.1, which originally established the reimbursement rate for the initial $103.4 million portion of the construction project. A provision was added governing the reimbursement rate for the remaining portions of the $200 million when appropriated by the General Assembly.

At the request of the General Assembly, Dorman presented a list of prison projects to be constructed from the remaining $87.5 million

to the Senate Finance Committee on 4 June 1992. However, the General Assembly did not appropriate funds for those projects at that time. The General Assembly enacted the Act of July 24, 1992, ch. 1036, 1991 Sess. Laws 1106 (1992 Appropriations Act), which gave the General Assembly the discretion to select the particular projects on which the remaining $87.5 million would be spent, provided that expenditures should not be made, nor contracts entered into concerning the remaining $87.5 million until the General Assembly enacted a schedule for those funds; the Act directed OSC to consider alternative delivery systems that could expedite the construction of prison facilities. The following day, 25 July 1992, the General Assembly rewrote the Revenue Act, changing the list of facilities approved under section 239(c) of the original bill and, under section 239(f), requiring OSBM to include OSC, the Department of Correction, and the Department of Insurance in the construction process under the Bond Act. Capital Improvements Appropriations Act of 1992, ch. 1044, § 41, 1991 N.C. Sess. Laws 1158, 1202-05.

Almost a year later, the General Assembly ratified the Act of July 24, 1993, ch. 550, 1993 N.C. Sess. Laws 2906 (1993 Appropriations Act), which replaced OSBM with OSC as the agency authorized to contract for and supervise construction of prison facilities. The 1993 Appropriations Act also appropriated the remaining $87.5 million from the Bond Act and repealed sections 1 through 4 of the 1992 Appropriations Act. The General Assembly eliminated the prohibitions on entering into contracts from the portion of section 2 of the 1993 Appropriations Act, analogous to the portion of repealed section 2 of the 1992 Appropriations Act.

Plaintiff was informed its services would no longer be needed in conjunction with the construction of facilities under the Bond Act. Plaintiff was paid for all work it had performed under the $103.4 million portion of the project. Plaintiff submitted claims for payment under the $87.5 million portion of the Bond Act to OSBM on 14 May 1997, and to OSC on 1 July 1997, both of which were denied.

Plaintiff filed a complaint on 22 May 1998 seeking damages for breach of contract by the State. The State filed an answer and counterclaim on 2 September 1998. The State filed a motion for summary judgment dated 31 May 2000. Plaintiff filed an affidavit of its president, Carl Monroe, dated 4 January 2001. The State moved to strike portions of the affidavit on 10 January 2001. The trial court entered an order on 2 August 2001 denying the State's motion to strike and granting the State's motion for summary judgment. Plaintiff filed a motion

to amend the judgment on 6 August 2001, seeking a finding and conclusion that there was no just reason for delay in entry of a final judgment as to one or more but fewer than all of the claims or the parties, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). The trial court granted plaintiff's motion and added the requested finding to the revised judgment entered on 20 August 2001. Plaintiff appeals from the revised judgment.

[1] We must first determine whether the amended order of the trial court is immediately appealable. The order of the trial court granting the State's motion for summary judgment did not dispose of all the claims in this case, in particular counterclaims and third-party claims, which makes it an interlocutory order. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001) states that in an action involving multiple claims or parties, if the trial court enters a final judgment as to a claim or a party and certifies there is no just reason for delay, the judgment is immediately appealable, requiring appellate review. *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). The trial court may render its judgment immediately appealable by a Rule 54(b) certification only if the judgment is final. *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). In the case before us, the trial court in its amended judgment correctly made a finding of fact and conclusion of law that its judgment was a final judgment as to plaintiff's claims against the State and certified there was no just reason for delay, thus requiring review on appeal by this Court.

Plaintiff argues that the trial court erred in granting summary judgment to the State because there is a genuine issue of material fact as to whether the State breached or wrongfully terminated valid and enforceable agreements for plaintiff to serve as program manager for the construction of prisons in North Carolina. The State responds that the trial court correctly granted its motion for summary judgment since the legislative enactments in the record show that OSBM had no authority to enter into a contract with plaintiff with respect to the $87.5 million portion of the bond program. The State therefore argues that with no authority to enter into a valid contract, "the State is immune from suit in relation to the $87.5 million portion of the bond program."

Summary judgment should be granted only when no genuine issue of material fact is presented. *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 801 (2002). "On appeal, this Court must view

the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Id.* (citing *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 213, 373 S.E.2d 887, 888 (1988)).

[2] The State contends that only the September 1991 Agreement is a valid contract. We agree. OSBM had no authority to enter into the August 1990 Agreement since the voters of North Carolina had not yet approved the bond referendum authorizing the bond issuance. *See Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998) (the State is liable only for "*valid*" contracts that are " '*authorized by law*' ") (quoting *Smith v. State*, 289 N.C. 303, 322, 222 S.E.2d 412, 425 (1976)). However, in September 1991, the State entered into a second agreement with plaintiff, the September 1991 Agreement. By that time, OSBM had authority to enter into agreements on behalf of the State concerning the construction of prisons under the Bond Act, since the North Carolina voters approved the Bond Act on 6 November 1990 and the General Assembly ratified the Revenue Act on 13 July 1991, which expressly granted authority to OSBM to enter into contracts on behalf of the State with respect to "facilities authorized for the Department of Correction." § 239(f), ch. 689, 1991 N.C. Sess. Laws 1894, 2127.

[3] We next review whether OSBM had authority to enter into a contract for the $87.5 million portion of the Bond Act, in addition to the $103.4 million covered by the September 1991 Agreement. Plaintiff argues that section 239(f) of the Revenue Act granted OSBM the ability to contract for all prison facilities under the Bond Act, and that no language in the Revenue Act limits this authority. Section 239(f) states that

> [w]ith respect to facilities authorized for the Department of Correction, the Office of State Budget and Management may contract for and supervise all aspects of administration, technical assistance, design, construction or demolition of prison facilities in order to implement the providing of prison facilities under the provisions of this act . . . .

Id.

The State asserts several arguments as to why the attempt of OSBM to enter into a contract covering the $87.5 million was invalid. The State first argues that it could not enter into a contract for the $87.5 million without a legislative appropriation already in place. In

support of its argument the State cites N.C. Gen. Stat. § 143-16.3, *Whitfield*, 348 N.C. at 42, 497 S.E.2d at 415, and *Smith*, 289 N.C. at 322, 497 S.E.2d at 425. The State, however, mischaracterizes the language of N.C.G.S. § 143-16.3 by stating in its brief that the statute prohibits a state agency from "commit[ting] the State to the expenditure of funds which have not been appropriated for the purpose of the contract." The pertinent portion of N.C. Gen. Stat. § 143-16.3 (2001) states that "no funds from any source . . . may be expended for any new or expanded purpose, position or other expenditure for which the General Assembly has considered but not enacted an appropriation of funds for the current fiscal budget." N.C.G.S. § 143-16.3 only prohibits the actual expenditure of funds if not appropriated. As both parties acknowledge, the $87.5 million was not expended before funds were appropriated. In fact, the September 1991 Agreement stated that notices to proceed for the remaining $87.5 million portion of the bond program work were not to be issued until no later than thirty days after appropriations were made for that portion of the program.

The State contends that because of this language, the September 1991 Agreement by its terms "tied [plaintiff's] performance of duties for that portion of the bond program to subsequent legislative enactments." The State attempts to expand the language in the September 1991 Agreement to encompass any subsequent legislative enactments. We disagree with this characterization. The plain terms of the above cited language limit plaintiff's ability to perform the September 1991 Agreement only in that plaintiff could not perform as to the remaining $87.5 million until the General Assembly appropriated those funds. If the General Assembly had not appropriated the funds, then plaintiff could not have performed on the remainder of the $87.5 million. Despite several interceding legislative enactments affecting the ability of the General Assembly to appropriate the bond program's remaining funds, and the transfer of State oversight to OSC, the General Assembly did appropriate the $87.5 million on 24 July 1993. According to the terms of the September 1991 Agreement, plaintiff was entitled to perform its duties for the $87.5 million portion of the Bond Act upon appropriation.

[4] The State next argues that OSBM did not have authority to enter into the portions of the September 1991 Agreement in which services covering the $87.5 million were addressed. "Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by

law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach." *Whitfield*, 348 N.C. at 43, 497 S.E.2d at 415 (citing *Smith*, 289 N.C. at 322, 222 S.E.2d at 425). Thus if OSBM had never been granted authority to enter into a contract covering the $87.5 million, plaintiff could not proceed with its claim against the State.

As discussed above, the State had the power to authorize agencies to enter into contracts concerning the $200 million under the Bond Act. Plaintiff argues that the General Assembly, through section 239(f) of the Revenue Act granted this authorization to OSBM. The State essentially argues that OSBM was not expressly authorized to enter into a contract for the $87.5 million. There is no dispute that the legislative enactments claiming to prevent agencies from contracting for services under the $87.5 million were enacted well after the effective date of the September 1991 Agreement. Further, it is undisputed that no such explicit limitations as those in the 1992 Appropriations Act were present in legislation at the time the September 1991 Agreement was executed. The facts surrounding the circumstances of what legislative enactments were in place at the time the September 1991 Agreement was executed are not in dispute. The determinative issue is whether section 239(f) of the Revenue Act granted authority to OSBM to enter into contracts involving the entire $200 million under the Bond Act. While the language of section 239(f) could have been drafted more clearly, we interpret the section to grant authority to OSBM to contract for the entire $200 million. Therefore, as a matter of law, the portion of the September 1991 Agreement governing the $87.5 million was part of a valid contract, authorized by law. The State is therefore not entitled to summary judgment.

[5] The State argues that when the General Assembly finally appropriated the balance of the bond funds, it did so through OSC, not OSBM, and that this appropriation to an alternate state agency rendered invalid any potential authorization through the September 1991 Agreement. The State in effect argues that because OSBM entered into the contract on behalf of the State, that by transferring authority to enter into such construction contracts, as well as authority to manage the prison construction project from OSBM to OSC, the State does not have to honor the construction contract with plaintiff that it entered into through OSBM. We disagree.

The September 1991 Agreement contains language that specifically encompasses the entire $200 million, including the $87.5 million at issue in this case. OSBM entered into this contract with plaintiff;

however, it did so on behalf of the State. At all relevant points in the contract, the parties named are plaintiff and the State. The September 1991 Agreement is a contract between plaintiff and the State. Simply transferring authority to carry out the particulars of a program covered by this contract from one state agency to another does not allow the State to disregard the provisions in the September 1991 Agreement. We hold that the transfer of authority from one state agency to another to oversee the prison construction project does not invalidate the September 1991 Agreement between plaintiff and the State.

[6] Plaintiff was informed by Dorman that it would no longer be used as the project manager for the remaining portions of the construction project, despite the September 1991 Agreement. It is undisputed that the State did not use plaintiff as program manager for the remaining $87.5 million under the Bond Act. "[W]hen the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract . . . a plaintiff [may] proceed with a claim against the State upon the State's breach." *Whitfield*, 348 N.C. at 43, 497 S.E.2d at 415 (citing *Smith*, 289 N.C. at 322, 222 S.E.2d at 425). As determined above, the State had entered into a valid contract, authorized by law. The State's action in not allowing plaintiff to perform the remainder of the September 1991 Agreement was a breach of that contract, for which plaintiff is entitled to damages.

[7] The State argues, however, there are affirmative defenses that prevent plaintiff from recovering as a result of the State's failure to use plaintiff as project manager for the $87.5 million portion of the construction project. The State argues a mutual mistake of fact as a defense barring plaintiff's breach of contract claim. As this Court stated in *Lancaster v. Lancaster*,

> [i]t is well established that the existence of a mutual mistake as to a material fact comprising the essence of the agreement will provide grounds to rescind a contract. *See Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 251, 395 S.E.2d 160, 162 (1990). "A mutual mistake of fact is a mistake 'common to both parties and by reason of it each has done what neither intended.' " *Swain v. C & N Evans Trucking Co., Inc.*, 126 N.C. App. 332, 335, 484 S.E.2d 845, 848 (1997) (citation omitted).

138 N.C. App. 459, 465, 530 S.E.2d 82, 86 (2000).

Plaintiff argues that the State cannot avoid its obligations under the September 1991 Agreement by claiming that both parties were mistaken in believing that OSBM would continue to administer the construction project. We have already determined that the contract involved is one between plaintiff and the State, and that the transfer of oversight authority from OSBM to OSC was thus irrelevant for purposes of enforcing the September 1991 Agreement. Furthermore,

> to justify a recision of a contract for a mutual mistake of fact, the mistake must concern facts as they existed at the time of the making of the contract; reliance on a prediction as to future events will not support a claim for recision based on mutual mistake of fact.

Opsahl v. Pinehurst Inc., 81 N.C. App. 56, 62, 344 S.E.2d 68, 72 (1986), *disc. review improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987) (citations omitted). The transfer of authority to administer the prison construction project from OSBM to OSC was the type of "future event" that does not support a claim of mutual mistake of fact.

However, the State argues that the parties were mistaken as to whether OSBM originally had authority to enter into the portion of the September 1991 Agreement purporting to cover the $87.5 million. As discussed above, the State had authority to authorize an agency to enter into a contract for the remaining $87.5 million since it was contingent on those funds being appropriated. Further, we have already determined that OSBM was expressly authorized by the State to enter into a contract that encompassed the $87.5 million portion of the Bond Act on 18 September 1991. Therefore, the State's defense based on mutual mistake of fact is without merit.

[8] The State next argues "the affirmative defense of unjust enrichment." Unjust enrichment, however, is a quasi-contractual theory of recovery, not an affirmative defense. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). Further, unjust enrichment applies in the absence of a contract. *Lagies v. Myers*, 142 N.C. App. 239, 254, 542 S.E.2d 336, 345, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001) (citation omitted). The State's attempt to argue unjust enrichment as a defense to its own termination of a contract is misplaced. The State's argument of an affirmative defense of unjust enrichment is also without merit.

In summary, we hold that: (1) the terms of the September 1991 Agreement covered the entire $200 million of the Bond Act; (2) based

on the undisputed facts, OSBM had been granted authority by the General Assembly to enter into contracts covering the entire $200 million under the Bond Act and thus the September 1991 Agreement was a valid contract authorized by law, *see Whitfield*, 348 N.C. at 42-43, 497 S.E.2d at 415; (3) transferring authority to oversee the prison construction project from OSBM to OSC did not invalidate the September 1991 Agreement; and (4) the State's termination of the September 1991 Agreement was a breach of contract. "In the appropriate case, summary judgment may be rendered against the moving party." *Candid Camera Video v. Matthews*, 76 N.C. App. 634, 637, 334 S.E.2d 94, 96 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 879 (1986) (citation omitted). Therefore, we reverse the trial court's grant of summary judgment for the State, and remand to the trial court with instructions to grant summary judgment for plaintiff and to determine plaintiff's damages.

We need not address plaintiff's remaining assignments of error in view of our above determinations.

Reversed and remanded.

Judges GREENE and THOMAS concur.

VALERIE MESCHTER WILLIAMS, PLAINTIFF-APPELLANT v. JANICE T. LEVINSON, DURHAM CHILD CARE COUNCIL, INC. (FORMERLY KNOWN AS DURHAM DAY CARE COUNCIL, INC.), AND CHILD CARE SERVICES ASSOCIATION, DEFENDANTS-APPELLEES

No. COA01-808

(Filed 31 December 2002)

1. Appeal and Error—appealability—partial summary judgment—certification

A partial summary judgment was correctly certified for immediate appeal where the action arose from a car accident which occurred while defendant Levinson was driving to an office Christmas party and summary judgment was granted for defendant employer. There is a distinct possibility of a second trial and inconsistent verdicts if it is later determined that summary judgment was improperly granted for the employer.

2. Negligence—respondeat superior—wreck while driving to Christmas party

Summary judgment was correctly granted for defendant CCSA in an automobile negligence action where CCSA's employee, Levinson, was involved in an automobile accident while driving to the office Christmas party. Plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact as to whether Levinson was within the scope of employment at the time of the accident.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 26 February 2001 by Judge Evelyn W. Hill in Superior Court, Durham County. Heard in the Court of Appeals 8 October 2002.

Moore & Van Allen, PLLC, by Lewis A. Cheek, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by C. Ernest Simons, Jr., for defendants-appellees.

McGEE, Judge.

Valerie Meschter Williams (plaintiff) was driving her Chevrolet automobile in an eastbound direction through the Centura Bank parking lot located at 500 Morgan Street in Durham, North Carolina at approximately 2:40 p.m. on 19 December 1996. Plaintiff came to a stop at the driveway entrance of the parking lot located off Morris Street. At the same time, Janice T. Levinson (Levinson) made a left turn from a parking deck onto Morris Street in a southbound direction in her Plymouth automobile. When Levinson approached the parking lot entranceway on Morris Street, Levinson swerved to the right, striking the left front portion of plaintiff's vehicle. Levinson claimed that she swerved to avoid an oncoming vehicle that had crossed the center line into Levinson's lane of traffic. At the time of the accident, Levinson was an employee of Durham Day Care Council, Inc. (DDCC). Levinson's general job responsibilities included office support, such as setting up receptions, providing refreshments and lunches for DDCC's monthly board meetings, and serving as backup receptionist. Through a series of business transactions DDCC became Durham Child Care Council, Inc. (DCCC) and then merged with Child Care Services Association (CCSA). For the purposes of this opinion, CCSA will be used when reference to DDCC, DCCC, or CCSA is necessary.

At the time of the collision, Levinson was driving from her place of employment to a Christmas party sponsored by her employer, CCSA. The CCSA-sponsored Christmas party was held at an offsite location at 206 North Dillard Street in Durham, which CCSA rented for the Christmas party. CCSA closed its offices at approximately 1:30 p.m. on 19 December 1996 so that employees who chose to attend the Christmas party could do so. The Christmas party was held for employees only, as opposed to the Christmas banquet held later that month, which was normally attended by the CCSA board of directors and others from the community. CCSA provided food and beverage for the party, but employees were encouraged to bring a dessert. In addition, employees were responsible for the music and were asked to bring a "white elephant" gift to the party. Levinson, whose job responsibilities included planning for the Christmas banquet, had no responsibilities in connection with the Christmas party.

CCSA informed its employees of the party by announcing it at the staff meeting and by posting announcements in the office. Employees were not required to rsvp for the Christmas party and despite the fact that all employees attended the Christmas party, attendance was understood to be voluntary. Attendance was not taken at the party. Employees were paid for a full day of work whether or not they attended the Christmas party. Any employee who did not attend the Christmas party did not have to remain at work. The only activities at the Christmas party other than general socializing between employees were the exchange of the "white elephant" gifts, and the taking of an employee group photo, for which employees had been encouraged to dress up. After the collision, Levinson arrived at the Christmas party, where she and several employees remained until approximately 6:00 p.m.

This is an appeal by plaintiff from summary judgment granted for defendants, and therefore, this Court must view the record in the light most favorable to plaintiff and draw all reasonable inferences in plaintiff's favor. *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 801 (2002) (citing *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 213, 373 S.E.2d 887, 888 (1988)). Plaintiff alleges that as a proximate result of the collision she suffered "serious, painful, and permanent bodily injuries, including, but not limited to, injuries to her lower back." Plaintiff alleged that as a result of these injuries, she has incurred medical and other expenses, lost earnings, pain and suffering, and permanent impairment.

Plaintiff filed an amended complaint on 17 December 1999 seeking from Levinson and CCSA, *inter alia*, damages for personal injuries resulting from the alleged negligent operation of a motor vehicle by Levinson, an employee of CCSA. Defendant Levinson served her answer to the amended complaint on 19 January 2000. Defendant CCSA served its answer to the amended complaint 16 June 2000. Levinson served her answers to plaintiff's first set of interrogatories on 3 February 2000. Levinson served supplemental answers to plaintiff's first set of interrogatories on 12 January 2001. On 3 February 2000, Levinson also served her responses to plaintiff's first request for production of documents. Levinson served her answers to plaintiff's second set of interrogatories on 1 March 2000. CCSA served both its responses to plaintiff's first set of interrogatories and its responses to plaintiff's first request for production of documents on 29 September 2000. On 19 December 2000, plaintiff deposed Levinson. CCSA filed a motion for summary judgment dated 17 January 2001. The trial court granted CCSA's motion for summary judgment on 26 February 2001. The trial court entered an order on 13 March 2001 certifying the 26 February 2001 judgment for immediate appeal. Plaintiff appeals from the 26 February 2001 judgment granting CCSA's motion for summary judgment.

[1] We must first determine whether the judgment of the trial court is immediately appealable. The judgment of the trial court granting defendant CCSA's motion for summary judgment did not dispose of all of the claims in this case, in particular the claims against defendant Levinson, which makes the judgment interlocutory. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "An appeal does not lie to the [appellate courts] 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." *Id.* The right to avoid two trials on the same issues, which could result in different juries rendering inconsistent verdicts is a substantial right. *Turner v. Norfolk Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citing *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982)). In the present case, the trial court correctly determined that the only basis asserted by plaintiff for liability on the part of defendant CCSA, was under the theory of *respondeat superior*, and that the issue determined on CCSA's motion for summary judgment was whether defendant Levinson was acting within the scope of her employment at the time of the collision. The trial court was also correct in its determination that, despite the grant of summary judgment

for CCSA, a trial could proceed with respect to defendant Levinson alone. Thus, if it was later determined that the trial court improperly entered summary judgment for defendant CCSA, the distinct possibility exists that a second trial would be required as to defendant CCSA, since CCSA would not have had an opportunity to participate in the previous trial. As such, the trial court was correct in certifying the present case for immediate appeal so as to avoid the possibility of inconsistent verdicts. *See id.*

[2] Plaintiff's sole assignment of error is that the trial court erred by granting summary judgment for CCSA in that there is a genuine issue of material fact regarding whether Levinson was acting within the course and scope of her employment at the time of the automobile collision on 19 December 1996. Summary judgment should be granted only where no genuine issue of material fact is presented. *Gaskill*, 147 N.C. App. at 140, 554 S.E.2d at 12. We must view the record in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor. *Id.* (citing *Aetna Casualty & Surety Co.*, 92 N.C. App. at 213, 373 S.E.2d at 888).

An employer may be held liable for an employee's negligent operation of the employee's personal vehicle if the employee is acting within the course and scope of employment. *Ellis v. American Service Co.*, 240 N.C. 453, 456, 82 S.E.2d 419, 420-21 (1954) (citations omitted). "Where the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the question is one for the jury." *Medlin v. Bass*, 327 N.C. 587, 593, 398 S.E.2d 460, 463 (1990).

The parties cite *Camalier v. Jeffries*, 340 N.C. 699, 460 S.E.2d 133 (1995) and *Chastain v. Litton Systems, Inc.*, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106, 77 L. Ed. 2d 1334 (1983), as controlling in this case. Plaintiff argues that the present case is more analogous to *Chastain* than to *Camalier*. The *Chastain* decision, which our Supreme Court cited in *Camalier*, 340 N.C. at 713-14, 460 S.E.2d at 140, but never decided whether it was a correct application of North Carolina law by the Fourth Circuit, reversed a grant of summary judgment for the employer. 694 F.2d 957, 962 (4th Cir. 1982). The *Chastain* Court noted that there was evidence that the party was held on business premises, during normal business hours, that employees were compensated for being at the party, and that in order to be compensated, employees had to be at the party by 8:00 a.m. 694 F.2d at 959.

In contrast, defendant CCSA argues that *Camalier* is the more analogous of the two cases. In *Camalier*, our Supreme Court affirmed an award of summary judgment for the employer-defendant, holding that as a matter of law, the employee was not acting within the scope of employment when the employee was attending an employer-hosted social function, nor when he was traveling home from the social function. *Camalier*, 340 N.C. at 714-15, 460 S.E.2d at 140-41. The Supreme Court determined that the plaintiff's evidence was insufficient to forecast a genuine issue of material fact as to whether the employee's attendance was within the scope of his employment where the employee never stated he felt compelled to attend the party. *Id.* at 714, 460 S.E.2d at 140-41. The plaintiff's evidence consisted of the deposition testimony of a business expert "who opined that the party enhanced the business interests of the Publishing Company by encouraging employees to work hard to achieve similar recognition, by developing good morale and camaraderie among employees, and by generally increasing the productivity and profitability of the business," and the allegedly negligent employee's statements that he "felt his attendance at the party 'would help' and that he was concerned his failure to attend 'might be noticed.' " *Id.*

The Supreme Court then contrasted the plaintiff's forecast of the evidence with the defendant's forecast. The Supreme Court noted that the "[d]efendants presented substantial evidence that [the allegedly negligent employee] and other . . . employees were not required to attend the party." *Id.* at 714-15, 460 S.E.2d at 141. The Supreme Court emphasized that "[n]o record of attendance was taken, and there was no evidence that an employee's failure to attend would have resulted in adverse consequences." *Id.* at 715, 460 S.E.2d at 141. Another factor in the Supreme Court's decision was that the party was held on a day when the employee did not usually work, and after his usual working hours. *Id.* Additionally, in *Camalier*, employees were not compensated for attending the party and were not required to work if they did not attend the party. *Id.* The Supreme Court also cited that the party was not held at the employer's place of business and that the employee, who was employed as a reporter, was not "reporting" at the party. *Id.* The Supreme Court then determined that the defendants had met their burden of showing that the plaintiffs could not produce evidence to support their contention that the employee's attendance at the party was within the scope of his employment. *Id.* It should be noted that while the facts in *Camalier* are more like those in the case before us, both the *Chastain* Court and our Supreme Court in *Camalier* used similar factors in reaching

their decisions. *Compare* 694 F.2d at 959, 962, *with* 340 N.C. at 714-15, 460 S.E.2d at 140-41.

There were several factors considered by the Supreme Court in *Camalier*: (1) whether the employee performed any of her job functions while attending the employer-sponsored social function; (2) whether the social function did more for the employer than simply boost morale and camaraderie among employees; (3) whether there was a specific benefit to productivity or profitability of the business resulting from the social function; (4) whether the social function was held during normal business hours; (5) whether the social function was held at the place of business or some other facility; (6) whether employees were compensated for the time spent attending the social function; (7) whether an employee was required to work if that employee chose not to attend the social function; (8) whether an employee stated that he felt compelled to attend the social function, or rather, simply felt that his attendance would help, might be noticed, or other such feelings; (9) whether there was evidence that an employee's failure to attend the social function would result in adverse consequences for the employee; (10) whether attendance was taken at the social function; and (11) whether there was any other evidence that employees were required to attend the social function. The Supreme Court did not specifically cite any of these factors as determinative in its analysis.

In the case before us, plaintiff presented evidence that Levinson was driving on the way to an employer-sponsored Christmas party from her place of employment at the time the collision in question occurred. Normally, driving to and from an employee's place of employment is not within the scope of employment. *Hooper v. C.M. Steel, Inc.*, 94 N.C. App. 567, 569, 380 S.E.2d 593, 594-95 (1989) ("An employee is not engaged in the prosecution of his employer's business, however, while using his own vehicle for transportation to or from the place of employment.") (citations omitted). However, if an employee is driving between offices or locations, at both of which the employee will be in the scope of employment, a different result may be necessary. *See Miller v. Wood*, 210 N.C. 520, 187 S.E.2d 765 (1936); *Welch v. Thompson*, 399 P.2d 748 (Mont. 1965). Therefore, the determinative question in the present case is whether Levinson's attendance at the CCSA-sponsored Christmas party was within the scope of her employment. We review the record considering the factors noted above to determine whether plaintiff has forecast sufficient evidence to create a genuine issue of ma-

terial fact as to whether Levinson's attendance at the Christmas party, and thus the drive from the office to the party, was within the scope of her employment.

Plaintiff has forecast no evidence showing that Levinson, a receptionist and office worker at CCSA, was performing any of her normal job functions while attending the employer-sponsored Christmas party. Levinson's uncontradicted deposition testimony was that while one of the responsibilities of her job was to help plan the Christmas banquet, the Christmas social event sponsored by CCSA, which served as its primary outreach event to the community, she had no part in planning the employee Christmas party held on 19 December 1996.

In addition, plaintiff has not shown that the employer-sponsored social function did more for CCSA than simply boost morale and camaraderie among employees, nor has she shown that there was a specific benefit to productivity or profitability of the business resulting from the Christmas party. In fact, the evidence tended to show that another employer-sponsored event, the Christmas banquet, was the social event CCSA used to develop relations with the outside community. At the Christmas party, there were no speeches, no awards, nor any special recognitions. The only evidence of an activity at the Christmas party, other than general socializing and holiday revelry, was the taking of an employee group photo. The taking of an employee group photo to be handed out to all the employees falls within the morale and camaraderie boosting functions our Supreme Court found insufficient in *Camalier*. *See Camalier*, 340 N.C. at 714, 460 S.E.2d at 140-41. Certainly if the giving of speeches and awards at an employer-sponsored party is insufficient to overcome an employer's motion for summary judgment, the taking of a group photo would not satisfy that burden. *See id.*

The employer-sponsored social event did occur during CCSA's normal business hours. However, the uncontradicted evidence showed the employer-sponsored Christmas party was not held on business premises but at an offsite premises, specifically rented for the purpose of holding the Christmas party. Further, the CCSA office closed that day at approximately 1:30 p.m. so that all employees could attend the Christmas party if they chose to do so. The fact that the office was closed during the time the Christmas party was held makes the case more analogous to the situation in *Camalier*, where the employer-sponsored social event was held on a weekend after normal business hours. *See id.* at 715, 460 S.E.2d at 141. Additionally, it

should be noted that Levinson and several other employees remained at the Christmas party well after normal business hours, and that no employee was expected to return to work that day after the party was over.

While plaintiff forecast evidence that Levinson was being paid while attending the employer-sponsored social event, the evidence also showed that all employees were paid for a full day, whether or not they attended the party. There was no requirement such as that found in *Chastain* that employees had to report to the party to be paid for the day. In the present case, plaintiff has not produced evidence that an employee stated that he or she felt compelled to attend the employer-sponsored social function. While Levinson testified that she felt attendance was "expected," this is analogous to the statements made in *Camalier* that our Supreme Court found insufficient. *See* 340 N.C. at 714, 460 S.E.2d at 140-41. Further, plaintiff's argument that, due to the small number of employees at CCSA, an employee's absence from the Christmas party would definitely be noticed, also falls short under *Camalier*. *See id.* Plaintiff did not forecast any evidence that adverse consequences would result from non-attendance at the employer-sponsored social function. In fact as stated above, there was uncontradicted evidence that an employee would still have been compensated for a full day of employment whether or not the employee attended the party. Attendance was not taken at the party. Finally, plaintiff has failed to forecast any other evidence that attendance was required. In fact the evidence in the record shows that employees were not required to rsvp, and that attendance was understood not to be required.

After reviewing the entire record in light of the factors discussed above, we find this case to be quite similar to the *Camalier* case in that plaintiff has failed to forecast evidence sufficient to create a genuine issue of material fact as to whether Levinson was within the scope of employment at the time of her alleged negligence, and that CCSA is entitled to judgment as a matter of law. Therefore, we affirm the trial court's grant of summary judgment to defendant CCSA.

Affirmed.

Judge WYNN concurs.

Judge GREENE dissents with a separate opinion.

GREENE, Judge, dissenting.

This appeal raises two issues: (I) whether defendant Levinson's attendance at the party was in the scope of her employment, and if so, (II) whether defendant Levinson's travel to the party was in the scope of her employment.

I

I disagree with the majority that Camalier is more analogous to this case than Chastain. In Chastain, employees were required to be at work at the normal starting time to be paid for the day. *Chastain v. Litton Systems, Inc.*, 694 F.2d 957, 959 (4th Cir. 1982). The holiday party took place on a normal work day, during normal working hours. *Id. Camalier*, on the other hand, involved a retirement party on a weekend during evening hours at a private home. *Camalier v. Jeffries*, 340 N.C. 699, 704, 714-15, 460 S.E.2d 133, 134-35, 141 (1995). There was no requirement the employees be at the party and neither were they paid for attending. *Id.* at 714-15, 460 S.E.2d 141. Moreover, it was not a holiday party reserved for employees but a retirement party to which over 300 guests had been invited. *Id.* at 712, 460 S.E.2d at 139.

In the present case, plaintiff's forecast of the evidence tends to show on the day of the party, CCSA employees were required to report for work to be paid for a full day and the party took place during normal working hours and was reserved for employees. Although attendance was not required, defendant Levinson stated attendance was expected. This testimony is bolstered by the fact all of CCSA's employees attended the party. One of the activities at the party was an employee group photo, for which the employees were encouraged to dress up, that was to be given to all employees at a later date and conceivably could be used as a record of attendance. This forecast of the evidence, taken in the light most favorable to plaintiff, creates a genuine issue of material fact as to whether attendance at the party was within the course and scope of her employment. *See id.* at 706, 460 S.E.2d 136 (summary judgment is proper when, taking the evidence in the light most favorable to the party against whom summary judgment is sought, there is no genuine issue of material fact).

II

An employer is liable, under the doctrine of respondeat superior, for the negligence of his employees if that negligence was within the scope of the employment. 30 C.J.S. *Employer-Employee* § 204 (1992);

see Ellis v. Service Co., Inc., 240 N.C. 453, 456, 82 S.E.2d 419, 420 (1954). As a general rule, an employee is not within the scope of her employment "while operating h[er] personal car to the place where [s]he is to perform the duties of h[er] employment . . . nor while leaving h[er] employment to go to h[er] home." *Ellis*, at 456, 82 S.E.2d at 420. An employee's operation of her personal vehicle, however, is within the scope of employment if it occurs pursuant to a specific or implied authorization of the employer or is "incidental to the conduct authorized." 30 C.J.S. *Employer-Employee* § 205; *see Miller v. Wood*, 210 N.C. 520, 524, 182 S.E. 765, 768 (1936).

In this case, there is evidence sufficient to support a conclusion that CCSA impliedly authorized its employees to drive their personal vehicles to the party. Indeed, because the party was away from the usual place of business and the employer provided no transportation, there was no reasonable alternative. Thus, a genuine issue of material fact exists on whether defendant Levinson's travel to the party was within the scope of her employment.

Accordingly, summary judgment was entered in error. I would reverse and remand this case for trial.

STATE OF NORTH CAROLINA v. STEPHEN ARCHIE SHORES

No. COA01-1435

(Filed 31 December 2002)

Constitutional Law—right to remain silent—comment upon

The trial court erred in a second-degree murder prosecution by allowing the prosecutor to ask defendant about his post-arrest silence and then to comment on that silence during closing arguments. It seems probable that the prosecutor's questions and argument contributed to defendant's conviction because his testimony about the threat posed by the victim was crucial to self-defense and the State's examination and closing argument left the jury with the inference that part of defendant's testimony was an after-the-fact creation.

Appeal by defendant from judgment entered 20 February 2001 by Judge Jerry Cash Martin in Surry County Superior Court. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defendant Staples S. Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

THOMAS, Judge.

Defendant, Stephen Archie Shores, appeals from judgment entered on his conviction of second degree murder. For the reasons herein, we order a new trial.

Defendant contends the trial court erred by (1) admitting evidence of his post-arrest silence and allowing the State to comment on such evidence in closing argument, (2) failing to intervene *ex mero motu* to correct two grossly improper comments made by the State's attorney during closing argument, (3) admitting irrelevant and highly prejudicial evidence of defendant's prior threats against unrelated third parties, (4) admitting irrelevant and prejudicial evidence of other crimes committed by defendant, and (5) denying his request for a jury instruction on the duty to retreat.

The State's evidence tends to show defendant and the victim, Albert Shore, were in Jerry's Lounge in Surry County with four other people on Sunday, 8 August 1999. Shore arrived there early in the evening and proceeded to use cocaine and drink alcohol. Defendant arrived at approximately 9:30 p.m., drank beer, played pool, sat in his favorite bar stool, and generally kept to himself.

At approximately 11:15 p.m., the bartender announced "last call." Defendant was sitting at the bar and had not talked to Shore during the evening. Shore walked past defendant on his way to the bathroom and called defendant a "narc." Shore suspected defendant had informed on two people recently arrested for illegal drug possession. When Shore came out of the bathroom, defendant said, "I know you ain't talking about me because I ain't done nothing." Shore replied, "I'm not talking about you, but I can be." Shore then walked behind the bar and began arguing with defendant, calling defendant an "SOB" and telling him "to leave" because he was "barred" from the lounge.

As the argument between the two escalated, Shore grabbed defendant's beer bottle from his hand and smacked him in the face. Defendant fell and then moved away from the bar. Shore continued to shout, "You're fucking barred and don't ever come back." Shore then

threw the beer bottle at defendant. The bottle hit defendant and exploded. Defendant continued to move back.

Shore came from behind the bar, approached defendant, and began punching him. Defendant fell to the floor and covered his head. Shore continued punching defendant in the head, hitting him approximately thirty times. Shore eventually stopped, grabbed defendant by the neck, dragged him across the floor and threw him outside.

Defendant reentered the bar approximately ten to twenty seconds later holding a pistol. Shore ducked behind one side of a pool table while defendant ducked behind the other. Defendant then fired a shot. Shore stood up and defendant fired a second shot. Shore fell to the floor with defendant firing a third shot and finally leaving the lounge. The autopsy showed Shore suffered three gunshot wounds.

Defendant voluntarily surrendered at approximately 5:29 a.m., on 9 August 1999. He was read his *Miranda* rights and stated, "The only reason I did it, I was afraid of him. I thought he was going to kill me." Defendant was then taken to the hospital and treated for injuries he suffered during the altercation.

Defendant was subsequently transported from the hospital to the police station where he was again advised of his *Miranda* rights, both orally and in writing. Defendant waived his rights and gave an oral statement. He said Shore reached across the bar and hit him in the eye, threw a beer bottle at him, knocked him to the floor, and beat him on the head several times. He then pulled a gun from his right rear pocket and shot Shore a couple of times.

Defendant, meanwhile, testified that he arrived at Jerry's Lounge around 9:30 p.m. and was sitting at the bar at "last call." He and Shore were not having any problems with one another that night when Shore suddenly approached him from behind, hit him on the head, grabbed his beer bottle and ordered him to "get out." Defendant backed toward the door. Shore then threw the beer bottle at him. The bottle hit defendant on the side of the head and exploded. At that time, defendant "wasn't moving too good" and "was pretty-much addled." Shore then approached defendant, grabbed him by the hair, threw him to the floor, and began beating him over the head. Defendant testified, "[Shore] hit me a lot of times. I was begging him to stop, but he just kept hitting me . . . every time he hit me I could see stars." Defendant tried to cover his head and did not strike back.

Shore finally let defendant up, but then kicked defendant in the rear and out the front door of the bar. Shore, standing in the doorway as defendant fell to the ground, said, "[I am] going to get [my] gun and kill [you]."

As Shore went back inside the bar, defendant became fearful that Shore was going to retrieve a gun and come back out to shoot him. Defendant pulled his .25 caliber pistol from his pants pocket and immediately reentered the bar. Shore saw defendant, moved to his left and crouched behind a pool table. Defendant then heard someone yell "he's got a gun." He thought Shore had retrieved a gun so defendant then ducked behind the other end of the pool table.

According to defendant, Shore stood up and started approaching him. Defendant responded by firing one shot. Shore "kept coming around the table" so defendant fired again. Shore "still kept coming," and was within three feet of defendant, so defendant fired a third shot from his crouched position. Shore fell to the floor and defendant left the lounge. Defendant testified to firing "three rapid succession shots" all within "maybe five seconds" and stated that when he shot "I was in fear of my life."

The jury was instructed on first degree murder, second degree murder, voluntary manslaughter and not guilty. It returned a verdict of guilty of second degree murder and defendant was sentenced accordingly.

Defendant first contends the trial court erred in allowing the State to ask questions regarding his post-arrest silence and then to comment on such evidence during closing argument. We agree.

The evidence shows defendant was arrested at approximately 5:29 a.m., on 9 August 1999, and orally advised of his *Miranda* rights, including the right to remain silent. Defendant then stated, "The only reason I did it, I was afraid of him. I thought he was going to kill me." Later that morning, at approximately 9:10 a.m., defendant was taken to the police station and advised both orally and in writing of his *Miranda* rights. Defendant waived his rights and gave a short statement. He said Shore had reached across the bar and hit him in the eye, threw a beer bottle at him, knocked him to the floor, and beat him on the head several times. He then pulled a gun from his right rear pocket and shot Shore a couple of times.

Defendant exercised his right to remain silent from that point until his testimony at trial.

On direct examination, defendant testified to a full exculpatory account of the events. He stated Shore kicked him several times and out the lounge's front door, and threatened from the doorway "to get his gun and kill [defendant]." Defendant responded by pulling his gun from his pocket and returning inside.

During cross-examination, the State's attorney repeatedly questioned defendant about whether he had ever informed law enforcement that Shore kicked him out the front door of the lounge and threatened to kill him. The following are excerpted portions of the exchange between the prosecutor and defendant:

Q. Mr. Shore—Shores, this story that you've told the ladies and gentlemen of the jury today, have you told anybody else this story?

A. No, sir. My attorney is all.

Q. Sir?

A. My lawyer.

Q. Your lawyer. Anybody else?

A. No.

Q. You haven't told the DA's office, have you?

A. No, sir.

Q. Haven't told the investigating officer, Johnny Belton, have you?

A. No.

Q. Haven't told any other officers, have you?

A. No, sir.

Q. Haven't went over to the Sheriff's Department and told them that story, have you?

MR. GARY VANNOY: Objection, Your Honor.

THE COURT: Court will sustain.

Q. Did you tell anybody other than your lawyer?

MR. GARY VANNOY: Objection.

THE COURT: Objection overruled. You may answer.

A. No, sir.

. . .

Q. Mr. Shore [sic], you didn't call up Officer Cook and say, listen, I want to add some more to that statement, did you?

A. No, sir.

Q. You didn't call him up and say, listen, I want to tell you how he said he had a gun, he was going to go get it and kill me. You didn't call him up and tell him that, did you?

A. No, sir.

Q. You didn't call him up and say, listen, I want to tell you about how he was kicking me also.

A. No, I didn't. I didn't know I could do that.

Q. Between August the 8th, 1999 and today you didn't know that you could call up the officer and tell him your story?

MR. GARY VANNOY: Objection.

THE COURT: Objection overruled. You may answer.

A. No, I didn't know.

. . . .

During the State's rebuttal case, the prosecutor also questioned Officer Cook concerning defendant's exercise of his right to remain silent following his 9 August 1999 statement. The following exchange took place.

Q. Did [defendant] ever tell you about any kicking incident in which Albert Shore kicked Stephen Shores down and kicked him on the floor?

MR. GARY VANNOY: Objection.

THE COURT: Objection overruled. You may answer.

A. No, sir, he didn't.

Q. Did he at any time tell you about any kicking?

A. No, sir.

Q. Did he at any time tell you that Albert Shore said, "I've got a gun; I'm going to go get it, and I'm going to kill you?"

A. No, sir.

Q. Did he at any time tell you that after stepping outside he walked back in the place of business and had a gun that was on his hip and he pulled it out?

A. No, sir.

. . .

Q. At any time after you advised him of his rights, he gave you that statement, did he ever come to you again and tell you anything additional?

A. No, sir.

MR. GARY VANNOY: Objection.

THE COURT: Objection overruled.

Q. Did he at any time call you and tell you any additional statements?

A. No, sir.

. . . .

Finally, the prosecutor made reference to defendant's silence during his closing argument:

Ladies and gentleman of the jury, what would be wrong when you're represented by a lawyer [with] calling up the police or having the lawyer call them up and say "let me tell you some more, let me tell you the rest of this?" He didn't do that. He didn't call the DA's office. He didn't call any police officer. He didn't call the investigating officer. He didn't do any of that. Right on that stand he said "I have told this story for the first time today other than [to] my lawyers."

Ladies and gentlemen of the jury, ask yourself now "why on earth would I wait until now to try to tell that story if I had that kind of story? Why would I do that?

. . . .

"It is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States

Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001).

The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976), that it is fundamentally unfair and a deprivation of a defendant's due process rights under the Fourteenth Amendment to impeach the defendant on cross-examination by questioning him about his silence. *Id.* at 618, 49 L. Ed. 2d at 98; *accord State v. Hoyle*, 325 N.C. 232, 236, 382 S.E.2d 752, 754 (1989); *State v. Williams*, 67 N.C. App. 295, 298-99, 313 S.E.2d 170, 172 (1984). This is so because once a person under arrest has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), which includes the right to remain silent, there is an implicit promise that his silence will not be used against him. *Doyle*, 426 U.S. at 618, 49 L. Ed. 2d at 98; *Hoyle*, 325 N.C. at 236, 382 S.E.2d at 754.

In *Hoyle*, the defendant was arrested, charged with murder and advised of his *Miranda* rights. He told the officers he would not sign a waiver of his rights without a lawyer being present but that he would answer some questions. He then answered some of the officers' questions but when asked "what happened when the [victim] followed him to his truck?" he replied he would "rather not say without having talked with his lawyer." The officers did not question him further.

At trial, the defendant testified that he was attacked by the victim when he went to his truck, the two men struggled for defendant's gun, and, during the struggle, the gun discharged and the victim was shot. The prosecutor repeatedly questioned both the officer and defendant as to whether the defendant had informed anyone that the victim had attacked him on the night of the murder. The prosecutor also made references in his closing argument to the defendant's failure to tell the police of his defense.

The Supreme Court held that the prosecutor's questions and argument to the jury violated the defendant's right to not have his silence used against him. *Hoyle*, 325 N.C. at 237, 382 S.E.2d at 754.

In *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980), the defendant was arrested and transported to the police station where a detective began reading the indictments to him. The defendant, who had not been given his *Miranda* warnings, interrupted the reading of the indictments and stated, "Hell, I sold heroin before, but

I didn't sell heroin to this person." He made no other statements to the officers.

At trial, defendant testified to an alibi that placed him out of town on the night of the alleged crime. On cross-examination, the State's prosecutor was permitted over the defendant's objection to ask whether he had previously told the police, any of the district attorneys or anyone else about the alibi to which he testified at trial.

On appeal, the Supreme Court first noted that, with or without *Miranda* warnings, the defendant's exercise of his right to remain silent was guaranteed by the state and federal constitutions. The Court reasoned that the defendant's failure "to state his alibi defense at the time the indictment was being read to him or at any time prior to trial did not amount to a prior inconsistent statement." Therefore, the Court concluded it was prejudicial error to allow the defendant to be cross-examined as to why he did not tell the officers of the alibi he used at trial. *Id.* at 387, 271 S.E.2d at 277.

Recently, in *State v. Ward*, 354 N.C. 231, 555 S.E.2d 251 (2001), our Supreme Court addressed the use of a defendant's right to remain silent in the context of a closing argument in a capital sentencing proceeding. There, the defendant gave a statement to police after being arrested in which he denied his participation in the crimes. He stated that on the day of the murder he woke up at 7:45 a.m. and stayed with his wife and father.

At the sentencing hearing, the prosecutor argued the following regarding the defendant's post-arrest silence while at Dorothea Dix Hospital:

> He started out that he was with his wife and child or wife and children or something on that morning. We know he could talk, but he decided just to sit quietly. He didn't want to say anything that would "incriminate himself." So he appreciated the criminality of his conduct all right.
>
> He was mighty careful with who [sic] he would discuss that criminality, wasn't he? He wouldn't discuss it with the people at Dix.

Id. at 266, 555 S.E.2d at 273.

After recognizing a defendant's general right to remain silent under the state and federal constitutions, the Supreme Court stated:

> A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional. "A statement that may be interpreted as commenting on a defendant's decision [to remain silent] is improper if the jury would naturally and necessarily understand the statement to be a comment on the [exercise of his right to silence.]".
>
> Applying these principles to the argument in question, we hold that the prosecutor impermissibly commented on defendant's silence in violation of his rights under the state and federal Constitutions. As we noted in *Mitchell*,
>
> "district attorneys and assistant district attorneys have a duty as officers of the court and as advocates for the people to conduct trials in accordance with due process and the fair administration of justice and should thus refrain from arguments that unnecessarily risk being violative of a defendant's constitutional rights, thereby necessitating new trials."

Id. (citations omitted).

Here, we are constrained to hold that the rule set forth in *Doyle* and applied by our Supreme Court in *Hoyle*, *Lane* and *Ward* was violated in this case. Defendant initially waived his right to remain silent and gave police two statements on 9 August 1999 describing the incident. At trial, he gave a more detailed exculpatory account of the incident. His account at trial was not inconsistent with the statements given to police. He merely provided more detail concerning his fear that Shore was going to kill him.

From 9 August 1999 until his testimony at trial, defendant had a constitutional right to remain silent. The State attorney's questions and his argument to the jury violated defendant's right to remain silent.

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(b) (2001); *Hoyle*, 325 N.C. at 237, 382 S.E.2d at 754. The test is whether the appellate court can declare a

belief that there is no reasonable possibility that the violation might have contributed to the conviction. *Lane*, 301 N.C. at 387, 271 S.E.2d at 277.

Here, we are required by applicable precedent to hold that there was a violation of defendant's constitutional rights. The State's cross-examination of defendant, examination of the officer and closing argument attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that part of defendant's testimony was an after-the-fact creation. Defendant's testimony about Shore's threat was crucial to his defense which centered on self-defense and heat of passion. It seems probable that the State's questions and its closing argument contributed to his conviction. Since we cannot declare beyond a reasonable doubt that there was no reasonable possibility that the prosecutor's conduct might have contributed to defendant's conviction, we hold it was sufficiently prejudicial to warrant a new trial.

Three of defendant's remaining assignments of error are not sufficiently likely to occur at a new trial, so we decline to address them. We do wish, however, to briefly address defendant's contention that the trial court erred in not intervening *ex mero motu* in the State's closing argument, which he contends contained two grossly improper remarks.

We take this opportunity to bring attention to our Supreme Court's recent decision in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002). It emphasized an attorney's professional and ethical responsibilities to avoid closing arguments which are abusive, injected with personal opinion and experience or otherwise stray from the record. *Id.* at 134-35, 558 S.E.2d at 108-09.

For the reasons herein, we award defendant a new trial.

New trial.

Chief Judge EAGLES and Judge MARTIN concur.

BREVORKA v. WOLFE CONSTR., INC.

[155 N.C. App. 353 (2002)]

PETER BREVORKA AND WIFE CAROLE BREVORKA, PLAINTIFFS v.
WOLFE CONSTRUCTION, INC., DEFENDANT

No. COA02-5

(Filed 31 December 2002)

1. Appeal and Error—appealability—denial of motion for stay—right to arbitrate

Although defendant's appeal in a claim arising out of the purchase of a new home from the denial of its motion to stay plaintiffs' action pending arbitration is an appeal from an interlocutory order, it may be immediately appealed because the right to arbitrate a claim affects a substantial right.

2. Arbitration and Mediation—denial of motion to stay proceeding—signing enrollment form with arbitration provision

The trial court erred in a claim arising out of the purchase of a new home by denying defendant's motion to stay plaintiffs' action pending arbitration even though plaintiffs contend the parties' signing of an enrollment form for a limited warranty agreement containing an arbitration provision does not constitute a contract, because: (1) by signing an enrollment form, the signatories are by definition committing to something; and (2) one who signs a written contract is bound by the contract unless the failure to read is justified by some special circumstances, and there are no special circumstances in this case.

3. Arbitration and Mediation—denial of motion to stay proceeding—scope of agreement

The trial court erred in a claim arising out of the purchase of a new home by denying defendant's motion to stay plaintiffs' action pending arbitration even though plaintiffs contend their claims for breach of implied warranty of habitability or workmanlike construction, breach of express warranties, willful misrepresentation, and negligent misrepresentation do not arise within the scope of the arbitration agreement, because the claims are either excluded by the terms of the parties' agreement or fall within the scope of the arbitration provision.

Chief Judge EAGLES dissenting.

Appeal by defendant from order entered 3 October 2001 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 28 October 2002.

Alexander, Ralston, Speckhard & Speckhard, L.L.P., by Stanley E. Speckhard, for plaintiff-appellees.

Tuggle Duggins & Meschan, P.A., by Kenneth J. Gumbiner, for defendant-appellant.

THOMAS, Judge.

Defendant, Wolfe Construction, Inc., appeals the denial of its motion to stay plaintiffs' action pending arbitration.

Defendant contends the trial court erred in concluding that plaintiffs' claims for relief do not arise under the parties' limited warranty agreement and are, therefore, not subject to an arbitration provision. For the reasons herein, we reverse.

On 26 May 1999, plaintiffs, Peter and Carole Brevorka, signed an "Offer To Purchase and Contract" for a new house constructed by defendant at 25 Rosebay Lane, Greensboro, North Carolina. Plaintiffs closed on the house on 4 August 1999. Three weeks later, on 25 August 1999, plaintiffs received a letter from defendant offering them an extended limited warranty, referred to as the Quality Builders Warranty Corporation Limited Warranty Agreement. On 27 August 1999, plaintiffs signed the enrollment form, acknowledging their receipt of the limited warranty and acceptance of its terms. The enrollment form reads, in pertinent part:

> C. Both the Builder and the purchaser(s) must sign this Enrollment form. By signing, the purchaser acknowledges that he has read the attached Agreement and has received a copy of this page and the Agreement itself.

The agreement contains a detailed description of all the express warranties applicable to plaintiffs' home, some of which extend up to ten years, and includes the following disclaimer:

> 10. Other than the Expressed Warranties contained herein, there are no other warranties expressed or implied including Implied Warranty of Merchantability or Implied Warranty for Particular Purpose.

It also contains a detailed four step Complaint and Claim Procedure. Step Four of that procedure includes an arbitration provision which reads, in pertinent part:

> D. Step Four. If you disagree with the investigator's report, you have (30) days to notify QBW and the Builder, in writing, that you disagree. In such event, disputes on covered items shall be submitted for arbitration to the American Arbitration Association (AAA) or such other independent arbitration service as may be designated by QBW, for resolution in accordance with the rules and regulations of the AAA or such other service. You must pay the cost of arbitration when filing a claim. *Such arbitration shall be a condition precedent to the commencement of any litigation by the homeowner or builder arising out of or connected with the rights and obligations created by this Agreement.* (Emphasis added)
>
> . . . .

If the complaint and claim procedure is not followed and the arbitration provision is not honored, the agreement states:

> If you institute legal proceedings against the Builder or QBW for any obligation arising or claimed to have arisen under this Agreement prior to giving the Builder or QBW the proper notices and opportunities to cure provided under this Agreement and prior to using the dispute settlement procedure herein, you agree to indemnify the Builder and QBW for all costs and expenses of such litigation, including reasonable attorneys' fees, regardless of whether you have an otherwise legitimate claim under this Agreement. . . .

Plaintiffs filed the instant complaint on 16 February 2001 asserting claims against defendant for breach of the implied warranty of habitability or workmanlike construction, breach of express warranties, willful misrepresentation and negligent misrepresentation. Plaintiffs allege the house was constructed "in a manner contrary to and different from the agreement between the parties," "in a defective manner, with poor and faulty workmanship," "in a careless and negligent manner," and not "in compliance with applicable building codes and regulations." Plaintiffs' complaint identifies twenty-two conditions which they claim "constitute major structural defects." Plaintiffs also set forth seven express "warranties and contractual obligations" allegedly breached by defendant. Finally, plaintiffs allege

defendant and its agents and employees willfully and negligently made certain false representations prior to and in connection with the contract for the purchase of the house.

Defendant filed an answer denying the essential allegations of plaintiffs' complaint and asserting numerous affirmative offenses, and a counterclaim for breach of contract and unfair and deceptive trade practices. Defendant later filed a motion to stay plaintiffs' action pending arbitration and a request for attorneys' fees.

Following a hearing on defendant's motion, the trial court found that plaintiffs had signed the limited warranty agreement but concluded their claims did not arise under the agreement. Therefore, the arbitration provision did not apply and defendant was not entitled to a stay of plaintiffs' action.

Defendant contends all of plaintiffs' claims fall within the scope of the limited warranty agreement and are, therefore, subject to arbitration prior to litigation. Plaintiffs counter that: (1) no agreement to arbitrate exists because the limited warranty agreement is not a contract between the parties; and (2) the rights and obligations they seek to enforce predate and exist independent of the limited warranty.

[1] Initially, we note that the trial court's order is interlocutory because it fails to resolve plaintiffs' claims. *See Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001). While interlocutory orders are generally not immediately appealable, this Court has consistently held that an order denying arbitration may be immediately appealed because it involves a substantial right, the right to arbitrate a claim, which may be lost if appeal is delayed. *Id.*; *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999); *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998).

In considering a motion to compel arbitration, the trial court must determine (1) whether the parties have a valid agreement to arbitrate, and (2) whether the subject in dispute is covered by the arbitration agreement. *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 455, 531 S.E.2d 874, 876 (citing *Paine Webber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)), *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000). The trial court's conclusion is reviewable *de novo* by this Court. *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678.

[2] We first address plaintiffs' argument that there is no agreement to arbitrate because the limited warranty agreement does not constitute

a contract between the parties. Specifically, plaintiffs contend their signatures on the enrollment form merely acknowledge they received and read the agreement but do not bind them to its terms, in particular the arbitration provision. We disagree.

"Enrollment" is defined as "the act or an instance of enrolling," while "enrolling" is defined as "entering one's name on a list, *esp.* as a commitment to membership." Oxford American Dictionary (1999), p. 319. By signing an enrollment form, the signatories are by definition committing to something. The enrollment form here repeatedly refers to the limited warranty agreement. Thus, we reject plaintiffs' contention that they are not contractually bound by the terms of the limited warranty.

Included in the limited warranty is an agreement to arbitrate any disputes or claims arising thereunder. The duty to read an instrument, or have it read before signing it, is a positive one, and one who signs a written contract without reading it when able to do so is bound by the contract unless the failure to read is justified by some special circumstances. *See Massey v. Duke University*, 130 N.C. App. 461, 464-65, 503 S.E.2d 155, 158 (1998); *see also Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963); *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962). There are no special circumstances present here. Accordingly, we conclude the parties have a valid agreement to arbitrate all claims arising under the limited warranty.

[3] Next, we determine whether plaintiffs' claims for relief fall within the scope of the arbitration agreement. *See Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 731 (1985) ("only those disputes which the parties agreed to submit to arbitration may be so resolved"). In so doing, we are guided by the strong state and federal public policy favoring the settlement of disputes by arbitration. *See Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 785 (1983), *superseded by statute on other grounds as stated in Bradford-Scott Data v. Physician Computers Network*, 128 F.3d 504 (7th. Cir. 1997); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984); *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992); *Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986); *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984); *Raspet*, 147 N.C. App. at 135, 554 S.E.2d at 678; *Rodgers Builders*, 76 N.C. App. at 24-25, 331 S.E.2d at 731. "[This] strong public policy requires that the courts resolve any doubts con-

cerning the scope of arbitrable issues in favor of arbitration." *Johnston County*, 331 N.C. App. at 91, 414 S.E.2d at 32.

Plaintiffs' complaint sets forth claims for breach of the implied warranty of habitability or workmanlike construction, breach of express warranties, willful misrepresentation and negligent misrepresentation. We consider each in turn.

In *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776 (1974), the Supreme Court stated the implied warranty governing the sale of a dwelling by the builder-vendor as follows:

> [I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together will all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Id. at 62, 209 S.E.2d at 783; *accord Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 200, 225 S.E.2d 557, 566-67 (1976). This implied warranty arose in the instant case when the parties closed on the house and plaintiffs received the deed.

However, the law allows a builder and a purchaser to enter into a binding agreement that such implied warranty does not apply to their particular transaction. *Griffin*, 290 N.C. at 202, 225 S.E.2d at 567. Such exclusion must be clear and unambiguous and reflect that the parties intend such a result. *Id.* Here, the limited warranty agreement, which was signed by both parties, states that, other than the express warranties contained therein, "there are no other warranties express or implied" covering plaintiffs' purchase of the house. The words "there are no other warranties express or implied" are sufficient to exclude the implied warranty of habitability or workmanlike construction from the parties' transaction. Accordingly, plaintiffs contractually relinquished their right to sue in a court of law for breach of such implied warranty.

Plaintiffs also allege defendant breached certain express warranties which predate and exist independent of the limited warranty agreement. They claim that such warranties can be found in the purchase contract, homeowner's manual and closing punch list.

However, the "Offer To Purchase and Contract" in this case makes no mention of any express warranties and contains a standard merger clause declaring that the entire agreement of the parties is contained in the writing. *See Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984). Further, the disclaimer provision in the limited warranty agreement expressly disclaims any and all express warranties other than those contained therein. Accordingly, we conclude that the only express warranties contained in the parties' transaction for the house are those stated in the agreement. Pursuant to the arbitration provision, any dispute concerning those warranties must be submitted to arbitration prior to litigation.

In their remaining claims, plaintiffs allege defendant willfully misrepresented certain material facts and negligently supplied false information in connection with the contract for the purchase of the house. However, courts generally agree "that whether a claim falls within the scope of an arbitration clause and is thus subject to arbitration depends not on the characterization of the claim as tort or contract, but on the relationship of the claim to the subject matter of the arbitration clause." *Rodgers Builders*, 76 N.C. App. at 24, 331 S.E.2d at 731.

In *Bos Material Handling v. Crown Controls Corp.*, 137 Cal. App. 3d 99, 105-06, 186 Cal. Rptr. 740, 742-43 (1982), the court interpreted an arbitration clause in a dealer agreement. The clause provided that "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration . . ." That court held the language to be sufficiently broad to include tort as well as contract claims which " 'have their roots in the relationship between the parties which was created by the contract,' " including the plaintiff's claims for wrongful termination of the dealership, fraud, unfair competition, restraint of trade, and wrongful misrepresentation.

Similarly, in *Rodgers Builders*, this Court interpreted the language in an arbitration clause that "[a]ll claims, disputes and other matters in question . . . arising out of, or relating to, the Contract Documents or the breach thereof, . . . shall be decided by arbi-

tration . . ." It was held sufficiently broad to encompass that plaintiff's claims for tortious conduct on the part of defendants which occurred in connection with the formation, performance and alleged breach of the contract between the parties. These included the plaintiff's claim for punitive damages based on the defendant's negligent or fraudulent misrepresentation as to the owner of the property to which the contract related. *Rodgers Builders*, 76 N.C. App. 25-26, 331 S.E.2d at 732.

The language of the arbitration provision here is likewise sufficiently broad to include plaintiffs' claims for willful and negligent misrepresentation. The claims concern whether the house was constructed in a workmanlike manner and in accordance with the express warranties plaintiffs allege existed independent of the limited warranty agreement. However, any such express warranties were disclaimed by plaintiffs when they signed the enrollment form for the limited warranty. The only warranties that now exist are those present in the agreement.

The arbitration provision applies to any "covered items" and matters "arising out of or connected with the rights and obligations created by the [limited warranty]." We conclude there is a sufficiently strong connection between plaintiffs' misrepresentation claims and the express warranties set forth in the parties' agreement to bring the claims within the arbitration provision.

The limited warranty agreement entered into by the parties is valid and effective and the claims raised in the complaint are either excluded by the terms of the parties' agreement or fall within the scope of the arbitration provision. Accordingly, the trial court erred in denying defendant's motion to stay plaintiffs' action pending arbitration. The order is reversed and the cause remanded for entry of a stay of plaintiffs' action pending arbitration.

Reversed and remanded.

Judge TYSON concurs.

Chief Judge EAGLES dissents in a separate opinion.

EAGLES, Chief Judge, dissenting.

I respectfully dissent from the portion of the majority's opinion which holds that the "plaintiffs contractually relinquished their right to sue in a court of law for breach of" implied warranty. The majority

concludes that language in the limited warranty agreement served to waive plaintiffs' implied warranty of habitability or workmanlike quality of construction. I disagree.

"The doctrine of implied warranty of habitability requires that a dwelling and all of its fixtures be 'sufficiently free from major structural defects, and . . . constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction.' " *Allen v. Roberts Constr. Co.*, 138 N.C. App. 557, 571, 532 S.E.2d 534, 543, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000) (quoting *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974)). "The implied warranty of workmanlike quality of construction [or habitability] does not exist by reason of a representation or inducement made by the builder-vendor, nor does it exist by reason of a representation or inducement made by the builder's sales agent, the real estate broker. Instead, it exists *by operation of law*." *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 202, 225 S.E.2d 557, 568 (1976) (emphasis in original).

"[A] builder-vendor and a purchaser could enter into a binding agreement that such implied warranty would not apply to their particular transaction." *Id.* at 202, 225 S.E.2d at 567. However, "[s]uch an exclusion, if desired by the parties to a contract for the purchase of a residence, *should be accomplished by clear, unambiguous language, reflecting the fact that the parties fully intended such result*." *Id.* at 202, 225 S.E.2d at 568 (emphasis added).

Here, the language that purports to exclude the warranties is: "Other than the Expressed Warranties contained herein, there are no other warranties expressed or implied including Implied Warranty of Merchantibility or Implied Warranty for Particular Purpose, which implied warranties are specifically excluded." This language does not clearly and unambiguously show that both parties intended to exclude the implied warranty of habitability or workmanlike quality of construction.

Further, the limited warranty agreement in its "General Terms Governing Interpretation and Operation" provides that: "This agreement is separate and apart from your contract with your Builder. It cannot be altered or amended in any way by any other agreement which you have. Contractual disputes shall not involve [Quality Builders Warranty Corporation ("QBW")]."

Here, the defendant is Wolfe Construction, the residential homebuilder from whom plaintiffs bought their home. "[A] *builder-vendor*

impliedly warrants to the initial purchaser that a house and all its fixtures will provide the service or protection for which it was intended under normal use and conditions." *Lyon v. Ward*, 28 N.C. App. 446, 450, 221 S.E.2d 727, 729 (1976) (emphasis added). "The warranty arises by operation of law and imposes strict liability on the *builder-vendor*." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 792, 561 S.E.2d 905, 909 (2002) (emphasis added). The limited warranty agreement, by its terms, "is separate and apart from" plaintiffs' contract with Wolfe Construction.

Accordingly, I would hold that the plaintiffs are not barred by the limited warranty agreement with QBW from maintaining an action for breach of the implied warranty of habitability or workmanlike quality of construction against the builder, Wolfe Construction. For these reasons, I would affirm the order of the trial court.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, PLAINTIFF v. J. CLAYTON NARRON, AND WIFE PAULA NARRON, DEFENDANTS

No. COA02-137

(Filed 31 December 2002)

1. Appeal and Error—appealability—partial summary judgment—writ of certiorari

There was no need to determine whether a substantial right was affected by a partial summary judgment where the Court of Appeals had issued a writ of certiorari.

2. Insurance—disputed appraisal of damage—jurisdiction to modify—no existing civil action

The trial court did not err by granting summary judgment for defendants in a declaratory judgment action brought by an insurance company arising from a disputed appraisal of hurricane damage. Although plaintiff-insurer contended that the court had jurisdiction to confirm, modify or vacate the award pursuant to the Uniform Arbitration Act, this appraisal was not part of an arbitration proceeding in an existing civil action, but a process invoked by the parties via the policy to resolve a dispute over the amount of the loss.

3. Declaratory Judgments—claim to determine amount of insurance loss—not an interpretation of policy—improper claim

A claim involving a disputed damage appraisal under an insurance policy was not properly brought pursuant to the Declaratory Relief Act where plaintiff-insurer did not request an interpretation of the appraisal provision, but filed a complaint asking that the court set the amount of the loss while an appraisal proceeding was pending.

4. Insurance—appraisal umpire—ex parte meeting—not impeaching circumstance

Plaintiff-insurer did not show that ex parte communications with an appraisal umpire constituted an impeaching circumstance requiring that the award be overturned where there was no evidence of fraud or conniving, the umpire met with both appraisers three times, the appraisers could not agree on an amount, plaintiff's appraiser did not provide the umpire with supporting documentation, the umpire did not believe he needed anything else from plaintiff, the umpire's figures were closer to those of defendant's appraiser, and the umpire orally discussed a final amount with that appraiser.

5. Insurance—appraisal of damage—mistake—award not invalid

There was no need to invalidate a hurricane damage appraisal award based on the inclusion of non-hurricane damage; mistakes by appraisers are not sufficient to invalidate an award fairly and honestly made.

6. Insurance—appraisal—award attacked through other policy provisions

Where the parties to an insurance dispute proceeded with an appraisal which resulted in a binding determination of loss, plaintiff-insurer could not contend that other provisions in the contract invalidated the resulting award.

7. Appeal and Error—mootness—sanctions—notice of appeal struck—certiorari granted

Appellate arguments about whether the trial court had jurisdiction to strike a notice of appeal as a Rule 11 sanction were moot where the Court of Appeals granted a writ of certiorari.

Appeal by plaintiff from orders entered 18 September 2001, 27 September 2001 and 16 November 2001 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 9 October 2002.

Cranfill, Sumner & Hartzog, LLP, by William W. Pollock, for plaintiff-appellant.

Armstrong & Armstrong, PA, by L. Lamar Armstrong, Jr., and Thomas S. Berkau, for defendants-appellees.

BRYANT, Judge.

Plaintiff insurer, Harleysville Mutual Insurance Company, appeals from orders granting defendants insureds' motions for: 1) partial summary judgment for failure to state a claim upon which declaratory judgment may be granted; 2) summary judgment for breach of contract; and 3) Rule 11 sanctions.

Plaintiff provided homeowner's insurance to defendants, Clayton and Paula Narron. On 15 September 1999, Hurricane Floyd blew a large tree onto defendants' Johnston County home, causing substantial damage. By mid-December 1999, defendants were unable to settle their claim with plaintiff and requested that the dispute be settled according to the appraisal provision set out in their insurance policy [the policy].

The appraisal provision stated in pertinent part:

> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. *A decision agreed to by any two will set the amount of loss.*

(emphasis added.). The policy also contained a provision for "Loss Payment," which stated:

We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

a. Reach an agreement with you;

b. There is an entry of a final judgment; or

c. *There is a filing of an appraisal award with us.*

(emphasis added.).

In February 2000, the appraisal process began and proceeded according to the policy. On 18 July 2000, the day the appraisers' documentation was due to the umpire, plaintiff filed a complaint for a declaratory judgment, seeking a declaration that the replacement cost value of the damage to defendants' home was $155,313.16 and the actual cash value was $107,854.44, and that the appraisal process was subject to impeachment. Defendants moved to dismiss, answered plaintiff's allegations and filed counterclaims for breach of contract and unfair and deceptive trade practices.

After three meetings with the umpire, the appraisers were unable to agree on the replacement cost value. Determining that the estimate of defendants' appraiser was closest to his own, the umpire then met with only defendants' appraiser. Thereafter, the umpire issued an appraisal award, signed also by defendants' appraiser, setting the amount of loss.

By consent order, plaintiff amended its complaint to include allegations that the appraisal award was secured by fraud or undue means. Defendants filed a motion for partial summary judgment on plaintiff's declaratory judgment action and their breach of contract counterclaim. On 23 August 2001, the trial court granted partial summary judgment in defendants' favor as to plaintiff's declaratory judgment complaint. The trial court found, however, that defendants' breach of contract counterclaim could not be adjudicated in the declaratory judgment action. Therefore, the court retained jurisdiction over the breach of contract claim and treated the allegations in plaintiff's complaint as affirmative defenses to that claim.

On 27 September 2001, the trial court issued an order granting summary judgment in favor of defendants based upon their breach of contract claim. On 19 October 2001, plaintiff appealed both the partial summary judgment of their declaratory relief action and the

partial summary judgment adjudicating defendants' breach of contract claim.

On 30 October 2001, defendants moved the trial court for Rule 11 sanctions, alleging that plaintiff violated its agreement to re-calendar the case for trial, and that this was done as a tactic to delay the trial. On 16 November 2001, the trial court issued an order imposing sanctions for Rule 11 violations, striking plaintiff's notice of appeal.

On 21 November 2001, plaintiff filed verified petitions to this Court seeking a writ of supersedeas and a writ of certiorari, arguing that the trial court had no jurisdiction to impose sanctions for filing a notice of appeal. Pursuant thereto, this Court granted both a writ of supersedeas and a writ of certiorari.

Plaintiff presents four assignments of error on appeal: whether the trial court erred in I) concluding that it lacked subject matter jurisdiction over plaintiff's declaratory judgment action and that plaintiff failed to state a claim for declaratory relief; II) in granting defendants' relief on the breach of contract claim where there remained issues of material fact; and III) striking plaintiff's notice of appeal without jurisdiction to do so. We disagree and affirm the orders of the trial court.

[1] Preliminarily, we note that plaintiff argues on appeal that a substantial right is affected, thus allowing appellate review of the trial court's interlocutory orders. Plaintiff forgets, however, that this Court has issued a writ of certiorari to address the merits of the appeal. *See* N.C.R. App. P. 21(a)(1). Therefore, we need not determine whether the trial court's order affects a substantial right but will address the appeal on its merits.

I.

[2] We will first address plaintiff's argument that the trial court erred in granting partial summary judgment as to its declaratory judgment claim.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001). In ruling on a motion for summary judgment, the trial court is required to view the evidence in the

light most favorable to the non-moving party. *Wrenn v. Byrd*, 120 N.C. App. 761, 763, 464 S.E.2d 89, 90 (1995).

It is well-established in North Carolina that where "contractual appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances." *Enzor v. N.C. Farm Bureau Mut. Ins. Co.*, 123 N.C. App. 544, 545-46, 473 S.E.2d 638, 639 (1996); *see also N.C. Farm Bureau v. Harrell*, 148 N.C. App. 183, 185, 557 S.E.2d 580, 581 (2001), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 606 (2002); *McMillan v. State Farm Fire and Casualty Co.*, 93 N.C. App. 748, 751-52, 379 S.E.2d 88, 90 (1989).

Plaintiff contends that either party to an appraisal process may bring an action to confirm, modify or vacate an appraisal award, and that a declaratory judgment action is the appropriate method in which to do so. Therefore, according to plaintiff, the trial court retained jurisdiction to adjudicate its declaratory judgment action, and, furthermore, it stated a claim as to the same. We disagree.

In support of its argument, plaintiff cites *Hooper v. Allstate Ins. Co.*, 124 N.C. App. 185, 476 S.E.2d 380 (1996). However, we find *Hooper* distinguishable from the present case. In *Hooper*, the insureds, whose property suffered fire damage, filed an action against their homeowner's insurance company. *Id.* at 185, 476 S.E.2d at 381. Following the filing of a "Tender of Judgment" by the insurer, the *Hooper* plaintiffs filed motions to strike and for arbitration. *Id.* As part and parcel of arbitration, the parties began the appraisal process, which was governed by an appraisal clause in the homeowner's insurance policy. *Id.* Following the appraisal process, the insureds filed a motion for order setting loss. *Id.* at 186, 476 S.E.2d at 381. The trial court denied the motion and the insureds appealed.

The *Hooper* Court first noted that the insured's "motion to set the loss . . . was in reality a request for confirmation of the appraisers' report . . . ." *Id.* at 188, 476 S.E.2d at 382. The Count noted that "[w]hile a *final arbitration award* is not properly before us for review . . . , '[j]udicial review of an arbitration award is limited to the determination of whether there exists one of the specific grounds for vacating the award under the arbitration statute.' " *Id.* at 189, 476 S.E.2d at 382-83 (quoting *Sentry Building Systems v. Onslow County Bd. of Education*, 116 N.C. App. 442, 443, 448 S.E.2d 145, 146 (1994)). The Court applied the Uniform Arbitration Act (UAA) in determining that the trial court had three options in reviewing an arbitration

award: 1) to confirm; 2) to vacate; or 3) to modify or correct. *Id.* at 186, 476 S.E.2d at 381. Based upon the trial court's failure to exercise any of these options, the *Hooper* Court vacated the trial court's order and remanded the case. *Id.* at 189, 476 S.E.2d at 383.

Unlike the appraisal process in *Hooper*, the appraisal in the present case was not part and parcel of an arbitration proceeding in an existing civil action where, under the UAA, the trial court had the authority to confirm, vacate, or modify an appraisal award. Rather, the parties here invoked the appraisal process via the policy to resolve a dispute over the amount of loss, as opposed to first invoking the jurisdiction of the court in a civil action.

In fact, this Court has recognized that appraisal provisions are analogous to arbitrations, in that they provide a "mechanism whereby the parties can rapidly and inexpensively determine the amount of property loss without resorting to court process." *PHC, Inc. v. N.C. Farm Bureau Mutual Ins. Co.*, 129 N.C. App. 801, 804, 501 S.E.2d 701, 703 (1998); *Envor*, 123 N.C. App. at 546, 473 S.E.2d at 639-40 (noting that an appraisal is "analogous to an arbitration proceeding," in that "[i]n arbitration 'errors of law or fact . . . are insufficient to invalidate an award fairly and honestly made' "). However, we have explicitly held that where, as here, an appraisal provision does not mandate the application of the UAA, the Act's provisions are inapplicable. *PHC*, 129 N.C. App. at 804, 501 S.E.2d at 703; *compare Harrell*, 148 N.C. App. 183, 557 S.E.2d 580 (finding that umpire in appraisal did not exceed scope of powers, as specified by UAA, albeit without challenge by parties as to whether UAA provisions were actually applicable). Plaintiff is thus incorrect in its assertion that under *Hooper*, the trial court in the case *sub judice* was allowed to vacate or otherwise modify the appraisal award via the UAA.

[3] Furthermore, plaintiff's claim was not properly brought pursuant to the mechanisms of the Declaratory Relief Act, N.C.G.S. § 1-253, *et. seq.* (2001). To sustain a declaratory judgment action, the trial court must find that "an actual controversy exist[s] both at the time of the filing of the pleading and at the time of hearing." *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986) (citation omitted). This jurisdictional prerequisite ensures that the trial court will not be adjudicating a mere difference in the parties' opinions or issuing "a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (citations omitted).

> A declaratory proceeding can serve a useful purpose where the plaintiff seeks to clarify its legal rights in order to prevent the accrual of damages, or seeks to litigate a controversy where the real plaintiff in the controversy has either failed to file suit, or has delayed in filing. However, *a declaratory suit should not be used as a device for "procedural fencing."*

Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 578-79, 541 S.E.2d 157, 164 (2000) (emphasis added) (quoting *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 377 (4th Cir. 1994)), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 433 (2001).

We recognize that declaratory judgment actions are appropriate proceedings in which to determine the parties' rights under an insurance contract, even prior to a breach of that contract. *See* N.C.G.S. § 1-254. Further, given the appropriate set of facts, an insurance company may certainly be able to challenge an appraisal award as being subject to fraud, duress, or other impeaching circumstances in a declaratory relief action. However, neither of the above situations existed in the case *sub judice*. Plaintiff did not request an interpretation of the appraisal provision; rather, while the binding appraisal proceeding was pending, plaintiff filed its complaint, albeit later amended, requesting that the trial court set the amount of loss. The appraisers, not the court, had the authority under the appraisal provision to set the amount of loss. Moreover, plaintiff filed its action in Wake County, where venue was improper, and, at the same time, filed a separate motion to stay appraisal in Johnston County. Here, plaintiff's contention that the award was subject to impeachment is better addressed as a defense to the breach of contract action than as a declaratory judgment action which appears to be little more than a case of "procedural fencing." Accordingly, we conclude that the trial court was correct in granting defendants summary judgment as to plaintiff's declaratory judgment action. This assignment of error is overruled.

II.

[4] Plaintiff next argues that the court erred in granting summary judgment as to defendants' breach of contract claims because there were genuine issues of fact as to certain impeaching circumstances which could invalidate the appraisal award and as to whether defendants failed to fulfill their obligation under the insurance policy.

As noted *supra*, an appraisal award is binding where the relevant appraisal provision has been followed and there is no evidence of fraud, duress, or impeaching circumstances. *See Enzor*, 123 N.C. App. at 545-46, 473 S.E.2d at 639. Here, plaintiff claims that impeaching circumstances existed based upon the bias of the umpire, C. P. Thompson. To support its argument, plaintiff notes that: 1) there was an "*ex parte*" meeting between Thompson and defendants' appraiser, Lewis O'Leary; and 2) O'Leary included items in his appraisal report that were not damaged due to the hurricane.

Plaintiff contends that the so-called "*ex-parte*" meeting between Thompson and O'Leary represented impeaching circumstances based upon several cases which we find distinguishable from the facts of the case *sub judice*. In *Grimes v. Insurance. Co.*, 217 N.C. 259, 7 S.E.2d 557 (1940), the only North Carolina case cited by plaintiff, our Supreme Court found that an appraisal award was invalid where, after naming appraisers, one of the parties was not notified of the appraisal proceedings and did not have an opportunity to be heard. *Grimes* is clearly distinguishable in that plaintiff is not claiming that it did not have an opportunity to be heard, only that its appraiser was absent from the last of many meetings in the appraisal process.

The cases from other jurisdictions presented by plaintiff in support of its argument are also distinguishable from the present case. Illustrative of that distinction is the comparison of the case before us to that of *Zoni v. Importers & Exporters Ins. Co.*, 12 A.2d 575 (Pa. 1940). In *Zoni*, the insured moved to set aside an appraisal award on the grounds of fraud, alleging that the insurance company's appraiser met with the umpire "secretly and without notice to or knowledge of the plaintiff or her representative . . . and for the purpose of unlawfully and fraudulently reaching a figure for the loss lower than the actual amount." *Id.* at 577. The *Zoni* court concluded that the resulting appraisal was invalid because the umpire met exclusively with one parties' appraiser without presence or notice to the other. *Id.* at 577. Importantly, the *Zoni* court focused on the secretive and fraudulent nature of the meeting. *Id.*; *Providence Washington Ins. Co. v. Gulinson*, 215 P. 154 (Colo. 1923) (invalidating appraisal award where one appraiser and one umpire met in secret after only one meeting with the other appraiser and no further attempts by the umpire to have a meeting between the three); *see also Hozlock v. Donegal Co./Donegal Mut. Ins. Co.*, 745 A.2d 1261 (Pa. Super.) (recognizing that *Zoni* court "particularly stressed the fact that it appeared as if the umpire and one appraiser connived to fix a fraudulent award"), *appeal denied*, 795 A.2d 977 (Pa. 2000).

Our review of the relevant case law leads us to conclude that the existence of impeaching circumstances is to be determined on a case by case basis. In the present case, there was no evidence of fraud or conniving actions on the part of the umpire O'Leary to exclude plaintiff's appraiser, Bryant, from the appraisal process. The policy required that to set the amount of loss, any two participants as between the insurer's appraiser, insured's appraiser or umpire had to agree on the amount. Thompson, the umpire, testified in his deposition that he met with both appraisers together three times: on 29 September 2000, 4 November 2000 and 16 December 2000. At the December meeting, the appraisers could not agree on an amount. Thompson testified that plaintiff's appraiser, Evan Bryant, did not provide him with the supporting documentation he requested. Bryant told Thompson that he left it at the airport and never provided the requested documentation. Bryant did not request additional time, and had been told that Thompson was close to issuing an award. Thompson, therefore, did not believe that he needed to wait for anything else from plaintiff. According to Thompson, "I felt there was no purpose after three meetings, and he having given me his final report."

Because O'Leary's figures were closer to what Thompson believed to be an accurate amount to repair defendants' house, and because one of the appraisers had to agree with Thompson for an award to issue, Thompson orally discussed a final amount with O'Leary. We conclude that plaintiff failed to show that the *ex parte* communications with O'Leary constituted an impeaching circumstance such that the appraisal award must be overturned.

[5] We further find that there was no reason to invalidate the appraisal award based upon what plaintiff alleged was O'Leary's mistake in setting the amount of loss to include non-hurricane damage. We have previously held that mistakes by appraisers, like those made by arbitrators, are insufficient "to invalidate an award fairly and honestly made." *Harrell*, 148 N.C. App. at 187, 557 S.E.2d at 582 (citation and internal quotation marks omitted).

[6] Next, plaintiff argues that an issue of fact existed as to defendants' obligation under the insurance contract to repair damage to their house. Because the parties proceeded with appraisal, the result of which was a binding determination of loss, plaintiff cannot now contend that other provisions in the contract serve to invalidate the resulting appraisal award. *See Harrell*, 148 N.C. App. 183, 557 S.E.2d

580 (holding that given binding nature of appraisal award and in absence of impeaching circumstance, a provision in insurance contract contrary to appraisal award did not invalidate the award). This assignment of error is therefore overruled.

III.

[7] Finally, plaintiff argues that the trial court usurped our jurisdiction in striking plaintiff's notice of appeal as a sanction for Rule 11 violations. Because we have granted plaintiff a writ of certiorari, agreeing to hear plaintiff's appeal on its merits, we conclude that its arguments concerning whether the trial court erred in striking its notice of appeal are moot.[1]

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

MICHELE BATTLE PHILLIPS, PLAINTIFF v. A TRIANGLE WOMEN'S HEALTH CLINIC, INC. AND STUART L. SCHNIDER, M.D., DEFENDANTS

MICHELE BATTLE PHILLIPS, PLAINTIFF v. STUART L. SCHNIDER, M.D., DEFENDANT

No. COA01-1418

(Filed 31 December 2002)

1. Medical Malpractice—certification—telephone call—doctor's uncertain memory

The trial court erred by dismissing plaintiff's medical malpractice claim for not complying with the "willingness to testify" requirement of N.C.G.S. § 1A-1, Rule 9(j)(1) where the doctor first testified in probabilities because he could not remember the substance of a two year old telephone conversation and then, having reflected on the conversation, recalled having stated his willingness to testify prior to the lawsuit being filed. There was no clear contradiction by the doctor, who was not a party, in his deposition and his later affidavit.

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1. The trial court also taxed defendants' costs and attorney's fees against plaintiff. However, plaintiff does not argue on appeal that the trial court erred in so doing. By failing to argue error, plaintiff has abandoned any issues with regards to whether the sanction was proper. N.C.R. App. P. 28(a).

2. Unfair Trade Practices—doctor's qualifications—learned professions exception

The trial court did not err by granting summary judgment for defendant on an unfair and deceptive practices claim filed with a medical malpractice action. Although plaintiff contends that the learned professions exception of N.C.G.S. § 75-1.1 does not exclude defendant's alleged misrepresentations that he was a board certified OB-GYN because those activities involve commercial activity, the evidence does not indicate the manner in which the communication was made. Moreover, defendant's professional services were the essence of his relationship with plaintiff and plaintiff consulted with defendant in his professional capacity to obtain those services.

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiff from orders entered 26 October 2000 and 6 August 2001 by Judge Abraham Penn Jones, and from orders entered 16 March 2001 and 6 August 2001 by Judge Donald W. Stephens in the Wake County Superior Court. Heard in the Court of Appeals 20 August 2002.

Burford & Lewis, P.L.L.C., by Robert J. Burford, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and Richard V. Stevens, for defendant-appellee.

HUNTER, Judge.

Michele Battle Phillips ("plaintiff") appeals the dismissal of her medical malpractice claim and the granting of summary judgment on her unfair and deceptive business practices claim against Stuart L. Schnider, M.D. ("defendant"). We reverse in part and affirm in part.

On or about 29 April 1994, plaintiff underwent an abortion at A Triangle Women's Health Clinic, Inc. ("the Clinic"). Plaintiff selected defendant to perform the procedure based on his representations that he was a board certified specialist in obstetrics and gynecology ("OB-GYN"). During the abortion procedure, plaintiff incurred severe damage to her uterus and bowel that caused excessive hemorrhaging. Plaintiff was immediately transferred to the University of North Carolina Hospital in Chapel Hill where she underwent emergency abdominal surgery. Ultimately, plaintiff had to have

a total hysterectomy on 3 March 1995 as a result of the complications arising from the abortion.

On 25 June 1997, plaintiff filed a complaint against defendant in Wake County Superior Court alleging, in part, that defendant was liable for medical malpractice, as well as unfair and deceptive business practices pursuant to Section 75-1.1 of the North Carolina General Statutes.[1] In connection with her medical malpractice claim, plaintiff's complaint included the required certification as per Rule 9(j) of the North Carolina Rules of Civil Procedure. Plaintiff also filed a designation of expert witnesses on 31 July 1998, which designated Michael C. Goodman, M.D. ("Dr. Goodman") as one such expert.

Dr. Goodman's deposition was taken on 18 March 1999. During his deposition, Dr. Goodman testified that he had received a telephone call from plaintiff's counsel, Robert J. Burford ("Burford"), in May of 1997 regarding plaintiff's case, but Dr. Goodman could not remember the substance of that conversation. When asked whether he would have expressed an opinion regarding plaintiff's case over the phone or waited until he had first reviewed plaintiff's records, Dr. Goodman testified: "Well, I probably would have given [Burford] an idea of whether I thought I should see the case or not. That's about as far as I could go over the telephone." Dr. Goodman further testified that he reviewed plaintiff's records sometime after his conversation with Burford and sent Burford a letter dated 11 November 1997 containing his initial opinions regarding the care plaintiff had received from defendant.

On 8 November 1999, defendant filed a motion to dismiss and/or summary judgment on plaintiff's medical malpractice claim. This motion was based primarily on defendant's belief that Dr. Goodman's deposition failed to establish his "willingness to testify" as a medical expert on plaintiff's behalf prior to the filing date of her lawsuit as required by Rule 9(j). However, before the trial court ruled on this motion, the affidavit of Dr. Goodman was filed on 1 December 1999. Relevant portions of the affidavit were as follows:

> 4. From Mr. Burford's prior experience with me, he is aware that I am willing to serve as an expert witness at trial on any case that I review, and at [plaintiff's] trial I would be willing to testify regarding my opinion of the appropriateness of the medical care rendered . . . .

1. Plaintiff's complaint also named the Clinic as a defendant and alleged various claims against it; however, none of those claims are at issue in this appeal.

> 5. My recollection is that in his discussion with me in May 1997, Mr. Burford read information to me verbatim from the patient's medical records, as well as gave me a factual outline of the medical care rendered according to [plaintiff's] medical records . . . .
>
> . . . .
>
> 8. Based upon the information outlined to me . . . I gave Mr. Burford my opinion that the double perforation of [plaintiff's] uterus, the perforation of her broad ligament, the bruising of her cecum, the leaving of products of conception in her uterus, and [defendant's] failure to know or to detect that any of this damage had occurred was, in my professional opinion, to a reasonable degree of medical certainty, clearly outside the applicable standard of care.

Nevertheless, on 26 October 2000, an order was entered dismissing plaintiff's action to the extent that it did not comply with Rule 9(j)'s "willingness to testify" requirement. The court denied defendant's motion for summary judgment on plaintiff's unfair and deceptive business practices claims. Although the court later granted plaintiff's motion for reconsideration, a new order was entered on 6 August 2001 that re-affirmed the dismissal.

Subsequent to the court's dismissal of plaintiff's claim on Rule 9(j) grounds, defendant moved for modification of the court's previous summary judgment ruling so as to grant defendant summary judgment on plaintiff's unfair and deceptive business practices claim. The modified order was granted on 19 March 2001 and stated that "G.S. §75-1.1, et. seq. does not apply to professional services rendered by a member of a learned profession." Plaintiff once again moved for reconsideration on 29 March 2001. The court denied plaintiff's motion in an order filed on 6 August 2001, which stated that there was "**no just reason for delay**" an entry of final judgment of dismissal on plaintiff's unfair and deceptive business practices claim. Plaintiff appeals the court's orders with respect to (1) her alleged noncompliance with Rule 9(j) and (2) her unfair and deceptive business practices claim.

I.

[1] The first issue presented to this Court is whether the trial court erred in dismissing plaintiff's medical malpractice claim based on her

alleged non-compliance with Rule 9(j)'s "willingness to testify" requirement. We conclude the court did err.

Rule 9(j) states, in pertinent part, that a complaint alleging medical malpractice shall be dismissed unless the

> pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and *who is willing to testify that the medical care did not comply with the applicable standard of care*[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2001) (emphasis added). Our appellate courts have not clearly set forth the standard by which to review a trial court's motion to dismiss pursuant to Rule 9(j). Nevertheless, when ruling on such a motion, a court must consider the facts relevant to Rule 9(j) and apply the law to them. Thus, a plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. *See* N.C. Gen. Stat. § 1A-1, Rule (9)(j). A question of law is reviewable by this Court *de novo*. *See Trapp v. Maccioli*, 129 N.C. App. 237, 241 & n. 2, 497 S.E.2d 708, 711 & n. 2 (1998).

Here, plaintiff's claim was dismissed based on Dr. Goodman's testimony in his 18 March 1999 deposition that: "Well, I probably would have given [plaintiff's attorney] an idea of whether I thought I should see the case or not. That's about as far as I could go over the telephone." However, plaintiff later filed the affidavit of Dr. Goodman on 1 December 1999 (filed after defendant sought a motion to dismiss on 8 November 1999), which stated the doctor gave his opinion to Burford during a telephone conversation before seeing plaintiff's records and prior to the filing of her lawsuit. Although the trial court set forth no specific reason for concluding plaintiff had not complied with Rule 9(j) requirements, the only logical explanation for its conclusion was that the court determined the doctor's affidavit was not credible.[2]

With respect to testimony contained in depositions and affidavits, this Court held in *Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978) that "contradictory testimony contained in

2. Although not raised as an issue by either party, we note this Court holds that Rule 9(j)'s "willingness to testify" requirement is met when a medical expert opines during a telephone conversation that the applicable standard of care was breached. *See Hylton v. Koontz*, 138 N.C. App. 511, 530 S.E.2d 108, *disc. review denied*, 353 N.C. 264, 546 S.E.2d 98 (2000), *rehearing dismissed*, 353 N.C. 373, 547 S.E.2d 10 (2001).

an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion [because] the only issue of fact raised by the affidavit is the credibility of the affiant." The holding in *Mortgage* addressed clear contradictions made by a party. Defendant essentially contends this holding is applicable to the present case because it supports the court's grant of summary judgment on plaintiff's medical malpractice claim. We disagree.

There are two important distinctions between the case *sub judice* and *Mortgage*. The first, and most obvious, is that Dr. Goodman is not a party to this action; he is an expert witness testifying on behalf of a party. Secondly, in his deposition, Dr. Goodman never affirmatively denied giving his opinion to plaintiff's attorney over the telephone. On the contrary, the doctor testified in terms of probabilities because he could not immediately remember the substance of his telephone conversation with Burford that had occurred approximately two years earlier. After having time to reflect on that conversation, Dr. Goodman's affidavit was filed in which he recalled stating his willingness to testify on plaintiff's behalf prior to her lawsuit being initiated. Thus, there was no clear contradiction by Dr. Goodman, a non-party, in his deposition and later filed affidavit.

Accordingly, having met all the requirements of Rule 9(j), the court erred in dismissing plaintiff's medical malpractice claim on Rule 9(j) grounds.[3]

II.

[2] The second issue presented to this Court is whether the trial court erred in granting summary judgment on plaintiff's unfair and deceptive business practices claim under Section 75-1.1. We conclude that the court did not err.

Section 75-1.1 was enacted for the purpose of providing "a civil means to maintain ethical standards of dealings between persons

3. Alternatively, plaintiff argues compliance with Rule 9(j) is irrelevant to her medical malpractice claim because this Court held in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001), *appeal granted*, 355 N.C. 348, 561 S.E.2d 498 (2002), that Rule 9(j) was unconstitutional. However, our Supreme Court recently vacated that part of the *Anderson* holding, concluding that this Court erred in addressing the constitutionality of Rule 9(j) because that issue was not raised at the trial level and thus was not properly before us. *Anderson v. Assimos*, 356 N.C. 415, 572 S.E.2d 101 (2002). Likewise, Rule 9(j)'s constitutionally was not raised by plaintiff at the trial level in the present case. Plaintiff raised this particular issue for the first time on appeal. Since this issue is once again not properly before this Court and in light of the Supreme Court's recent decision, we are compelled to address plaintiff's medical malpractice claim under the auspices that Rule 9(j) remains constitutional.

engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." *United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986). In order to establish a claim under this statute, "plaintiffs must show (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to them." *Burgess v. Busby*, 142 N.C. App. 393, 406, 544 S.E.2d 4, 11, *reh'g denied*, 355 N.C. 224, 559 S.E.2d 554 (2001). In its broadest sense, "commerce" comprehends intercourse for the purposes of trade in any form. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311 (1999). Our statutes define "commerce" as "all business activities, however denominated, but does not include *professional services rendered by a member of a learned profession.*" N.C. Gen. Stat. § 75-1.1(b) (2001) (emphasis added). Thus, despite Section 75-1.1 being subject to a reasonably broad interpretation, the General Assembly expressly excludes the rendition of professional services by a member of a learned profession from the definition of "commerce." *Sharp v. Gailor*, 132 N.C. App. 213, 217, 510 S.E.2d 702, 704 (1999). *See also Sara Lee Corp.*, 351 N.C. at 32, 519 S.E.2d at 311.

By enacting Section 75-1.1, the General Assembly's primary concern was "with openness and fairness in those activities which characterize a party as a 'seller.' " *Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 317, 233 S.E.2d 895, 899 (1977). When distinguishing a medical professional, such as a physician, from a seller, we have recognized as follows:

> [T]he essence of the transaction between the retail seller and the consumer relates to the article sold, and that the seller is in the business of supplying the product to the consumer. It is the product and that alone for which he is paid. The physician offers his professional services and skill. It is his professional services and his skill for which he is paid, and they are the essence of the relationship between him and his patient.

Batiste v. Home Products Corp., 32 N.C. App. 1, 6, 231 S.E.2d 269, 279 (1977). Therefore, this Court has ultimately held that "medical professionals are expressly excluded from the scope of N.C.G.S. § 75-1.1(a) and thus it clearly does not follow that a statement by a medical professional, criminal or otherwise, is governed by this particular statute." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001).

In the case *sub judice*, plaintiff contends that the "learned profession" exception of Section 75-1.1 does not exclude defendant's alleged misrepresentations that he was a board certified OB-GYN because those misrepresentations involve "commercial" activity, not the rendering of "professional services." However, the evidence does not indicate the manner in which defendant's certification (or lack thereof) was communicated to plaintiff in order to reach that conclusion. In the absence of such evidence, we are unable to discern whether the alleged misrepresentations were made during a consultation with plaintiff or "in the nature of an advertisement" as determined by the dissent.

Nevertheless, the evidence clearly indicates, and the parties do not dispute, that defendant is a member of a learned profession who provided professional (although allegedly negligent) medical services to plaintiff. Defendant's professional services and skills were the essence of his relationship with plaintiff, and plaintiff consulted with defendant in his professional capacity for the purposes of obtaining those services. *See Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 901 (1982). Furthermore, this Court recently held that the actions of a medical professional fall within the "learned profession" exception of Section 75-1.1(b) even after that professional provided a letter to other medical professionals in his county with the alleged intention of discouraging them from providing health care to an individual. *See Burgess*, 142 N.C. App. at 407, 544 S.E.2d at 11-12. As the statements made in that letter were not governed by Section 75-1.1(a) due to the "learned profession" exception, so too are the alleged misrepresentations made by defendant. *See Gaunt*, 139 N.C. App. 778, 534 S.E.2d 660. Thus, previously established precedent compels us to conclude that the trial court did not err in granting summary judgment on plaintiff's claim for unfair and deceptive trade practices.

In conclusion, we reverse the dismissal of plaintiff's medical malpractice claim; however, we affirm the court's grant of summary judgment on plaintiff's unfair and deceptive trade practices claim.

Reversed in part and affirmed in part.

Judge TIMMONS-GOODSON concurs.

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

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

While I concur in part I of the majority opinion, I disagree with the majority's construction of N.C. Gen. Stat. § 75-1.1(b), which would exclude from the definition of commerce *any* act committed by a member of a learned profession.

This Court has previously stated that:

> In order for the learned profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services.

Reid v. Ayers, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citation omitted). By focusing solely on the first factor, the majority mistakenly relies on two recent opinions of this Court. *See Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4 (2001); *Gaunt v. Pittaway*, 139 N.C. App. 778, 534 S.E.2d 660 (2000). Neither *Burgess* nor *Gaunt* stand for the proposition that a defendant's status as a member of a learned profession alone will suffice to bar an action for unfair and deceptive practices.

In *Gaunt*, the plaintiffs did not argue the defendants' actions did not constitute professional services rendered. *Gaunt*, 139 N.C. App. at 784, 534 S.E.2d at 664. Instead, the plaintiffs asserted that because the defendants' actions were criminal, they could not be considered *legal* medical services. Responding to the question presented, this Court then addressed only the first prong of the test outlined in *Reid*.

While in *Burgess* this Court placed great emphasis on the defendant's status as a member of the medical profession, it ultimately concluded the plaintiffs' claim for unfair and deceptive practices was barred because "this [was] a matter *affecting the professional services rendered* by members of a learned profession and therefore [fell] within the exception in N.C.G.S. § 75-1.1(b)." *Burgess*, 142 N.C. App. at 407, 544 S.E.2d at 11-12 (emphasis added).

The dispositive issue in this case is whether an alleged misrepresentation regarding a professional's certification as an OB-GYN is exempted under section 75-1.1(b) as a "professional service[] rendered."

The rendering of a professional service is limited to the performance of work "[c]onforming to the standards of a profession" and "commanded or paid for by another." *American Heritage College Dictionary* 1092 (3d ed. 1993) (defining "professional"); *Webster's Third New International Dictionary* 2075 (1968) (defining "service"). In *Reid*, this Court held that "[a]dvertising is not an essential component to the rendering of legal services and thus would fall outside the exemption." *Reid*, 138 N.C. App. at 267, 531 S.E.2d at 236. The learned profession exception also does not apply "when the [professional] is engaged in the entrepreneurial aspects of [his] practice that are geared more towards [his] own interests, as opposed to the interests of [his] clients." *Id.*

In this case, Dr. Stuart L. Schnider (defendant) allegedly misrepresented his certification as an OB-GYN. This statement was outside the scope of any work commanded or paid for by plaintiff. Instead it was in the nature of an advertisement of defendant's certification and thus does not constitute a "professional service[] rendered." Accordingly, the learned profession exception is inapplicable, and the trial court erred in dismissing plaintiff's claim for unfair and deceptive practices. This matter should therefore be reversed and remanded.

GLORIA L. CHILDS AND KIMBERLY F. CHILDS, PLAINTIFFS-APPELLEES v. JARVIS EUGENE JOHNSON, JR., AND FORSYTH COUNTY, DEFENDANTS-APPELLANTS

No. COA02-4

(Filed 31 December 2002)

1. Appeal and Error—appealability—denial of summary judgment—sovereign immunity

A denial of summary judgment was immediately appealable because the motion was based on sovereign immunity.

2. Public Officers and Employees—lawsuit against—capacity not clear—deemed official only

An EMS director was deemed to be sued in his official capacity only because the plaintiff did not provide a clear statement of the capacity in which defendant was being sued.

3. Immunity—sovereign—EMS supervisor—personal errand in county car

The trial court correctly denied defendants' motion for summary judgment as to defendant's sovereign immunity, and the case was remanded for entry of summary judgment for plaintiffs on that issue, where an EMS director was involved in an accident while stopping at a bank in a county-owned vehicle on his way to work. Looking at the actions of the EMS employee at the time of the alleged negligence, the uncontested evidence was that the employee was turning into the bank to obtain money for personal use and was not responding to a call or performing EMS duties.

4. Appeal and Error—appealability—amended claims—no new motion for summary judgment—no ruling by trial court

Defendants could not contend on appeal that summary judgment should have been granted for them on plaintiff's equal protection claim (arising from Forsyth County paying other claims but not plaintiffs') where defendants sought summary judgment on the basis of governmental immunity, plaintiffs amended their claim to add the equal protection claim, defendants did not amend their motion for summary judgment or file an additional motion, and the trial court ruled only on governmental immunity and not the added claim.

Appeal by defendants from order entered 22 October 2001 by Judge Clarence Carter in Superior Court, Forsyth County. Heard in the Court of Appeals 8 October 2002.

Lewis & Daggett, P.A., by Hugh J. Eighmie II, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Allan R. Gitter and Oliver M. Read IV, for defendants-appellants.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for unnamed defendant-appellee Windsor Insurance Company.

McGEE, Judge.

Gloria L. Childs and Kimberly F. Childs (plaintiffs) were traveling in a westerly direction on New Walkertown Road in Winston-Salem, North Carolina in a 1989 Chevrolet driven by Gloria F. Childs at about 8:00 a.m. on the morning of 12 December 1997. At that same time,

defendant Jarvis Eugene Johnson, Jr. (Johnson) was traveling on New Walkertown Road from the opposite direction, driving a 1997 Ford sports utility vehicle (SUV) owned by defendant Forsyth County. Johnson made a left turn across New Walkertown Road to enter a bank parking lot. Johnson claimed that traffic was stopped in two of the three westbound lanes of New Walkertown Road, and that cars in those lanes motioned Johnson to cross in front of them. While crossing the westbound lanes, the front of plaintiffs' Chevrolet struck Johnson's SUV. The collision resulted in both property damage to the vehicles involved and personal injury to both plaintiffs.

At the time of the collision, Johnson was an employee of Forsyth County, serving as Forsyth Emergency Medical Services (EMS) director. Forsyth EMS is a governmentally-operated provider of paramedic emergency health care. Johnson stated that he was on call twenty-four hours a day while in Forsyth County. The SUV he was operating was owned by Forsyth County and was provided for Johnson's use within the borders of the county at Forsyth County's expense in connection with Johnson's position as Forsyth EMS director. At the time of the collision, Johnson was driving to his office. However, Johnson took a detour from the drive to his office and turned into the bank parking lot for the purpose of conducting his own personal financial business. Johnson stated that he was going to "obtain cash for his daily needs."

At the time of the collision, Forsyth County had an insurance policy in place with a "self insured retention" of $250,000.00. However, there was evidence presented that Forsyth County had an additional policy as well, which had a "self insured retention" of $10,000.00. Forsyth County admitted that it had provided ambulance service to individuals outside of Forsyth County and that it had paid claims related to the operation of its EMS vehicles both before and after the collision on 12 December 1997. However, Forsyth County contends it has not paid any claims for personal injury related to collisions involving its EMS vehicles since our Court's holding in *McIver v. Smith*, 134 N.C. App. 583, 584, 518 S.E.2d 522, 524 (1999), *review improvidently granted*, *McIver v. Smith*, 351 N.C. 344, 525 S.E.2d 173 (2000).

Plaintiffs filed a complaint on 14 November 2000 seeking, *inter alia*, damages from defendant Johnson, and pursuant to the doctrine of *respondeat superior*, from Johnson's employer, Forsyth County, as a result of the collision between Johnson and plaintiffs. Plaintiffs alleged that Forsyth County had waived governmental

immunity by purchasing insurance, and that Johnson was not operating the county-owned SUV for public benefit at the time of the collision. Plaintiffs also served the complaint on the unnamed defendant Windsor Insurance Company (Windsor), a potential uninsured motorist carrier.

Johnson and Forsyth County filed their answer on 4 December 2000 asserting the defense of governmental immunity as a complete bar to recovery by plaintiffs. Defendants also filed a request for the amount of monetary relief sought by each plaintiff pursuant to N.C. Gen. Stat. § 1A-1, Rule 8. Plaintiffs served their notice of monetary relief sought on defendants, demanding compensatory damages of $25,000.00 for plaintiff Gloria L. Childs and compensatory damages of $5,000.00 for plaintiff Kimberly F. Childs. The notice stated that, in accordance with N.C.G.S. § 1A-1, Rule 8, the notice would not be filed with the trial court until the above captioned action was called for trial.

Johnson and Forsyth County filed a motion for summary judgment on 15 December 2000. In their motion, defendants asserted as their basis for entitlement to summary judgment, that "having not purchased liability insurance for claims below $250,000," defendants were entitled to summary judgment on the basis of governmental immunity. Unnamed defendant Windsor elected to appear and served its answer dated 22 January 2001. Plaintiffs filed a motion for leave to amend their complaint, which was granted. The amended complaint included additional allegations that Forsyth County had violated plaintiffs' due process and equal protection rights because it paid the claims of similarly situated parties but refused to pay plaintiffs' claims. Defendants Johnson and Forsyth County filed their answer to the amended complaint on 30 January 2001. The parties conducted discovery.

The trial court denied Johnson and Forsyth County's motion for summary judgment on 22 October 2001, stating "that there is a genuine issue of material fact with regard to whether Defendant Forsyth County is entitled to governmental immunity under the facts of this case." Defendants Johnson and Forsyth County appeal from the trial court's order.

I.

[1] We note that appeals involving the denial of a motion for summary judgment are interlocutory and generally not immediately

appealable. *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). However, a "trial court's denial of [a] motion for summary judgment on the issue of governmental immunity is immediately appealable." *Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995) (citation omitted). Defendants' appeal is properly before this Court.

Defendants assign as error the trial court's failure to grant their motion for summary judgment on the grounds that sovereign immunity bars plaintiffs' action against Johnson and Forsyth County.

In *Dawes v. Nash Cty.*, 148 N.C. App. 641, 643, 559 S.E.2d 254, 256 (2002), our Court stated that

> [s]ummary 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 judgment as a matter of law." N.C.R. Civ. P. 56(c) (2000). Summary judgment may also be granted when the non-moving party cannot survive an affirmative defense. *McIver v. Smith*, 134 N.C. App. 583, 584, 518 S.E.2d 522, 524 (1999). Sovereign immunity is such an affirmative defense. *Id.*

Johnson and Forsyth County must demonstrate that they are " 'entitled to the insurmountable affirmative defense of governmental immunity.' " *Id.* (quoting *McIver*, 134 N.C. App. at 584, 518 S.E.2d at 524). On appeal this Court must view the record in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 801 (2002) (citing *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 213, 373 S.E.2d 887, 888 (1988)).

[2] In *Dawes*, our Court summarized the law on governmental immunity in this State:

> "In North Carolina the law on governmental immunity is clear." [*McIver*, 134 N.C. App.] at 585, 518 S.E.2d at 524. In the absence of some statute that subjects them to liability, the State, its municipalities, and the officers and employees thereof sued in their official capacities, are shielded from tort liability when discharging or performing a governmental function. *See id.*; *Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87

> (1998). "Like cities, counties have governmental immunity when engaging in activity that is clearly governmental in nature and not proprietary." *McIver*, 134 N.C. App. at 585, 518 S.E.2d at 524. This Court has previously held that "county-operated ambulance service is a governmental activity shielded from liability by governmental immunity." *Id.* at 588, 518 S.E.2d at 526. Thus, Nash County would be entitled to governmental immunity from Plaintiff's claim, unless Nash County has in some way waived its governmental immunity.

148 N.C. App. at 643-44, 559 S.E.2d at 256. Governmental immunity protects not only the county, but also its officers and employees when they are sued in their official capacities. *Schlossberg v. Goins*, 141 N.C. App. 436, 440, 540 S.E.2d 49, 52 (2000), *appeal dismissed and disc. review denied*, 355 N.C. 215, 560 S.E.2d 136 (2002). While it is not clear from the record whether Johnson has been sued in his individual or official capacity, plaintiffs have the burden of indicating in what capacity defendants are being sued. *Reid v. Town of Madison*, 137 N.C. App. 168, 171-72, 527 S.E.2d 87, 90 (2000) (citations omitted). Absent a clear statement as to a defendant's capacity, the action will be deemed to be against the individual in his official capacity. *Id.* (citations omitted). As there is no such clear indication in this case, we deem that Johnson was sued in his official capacity only.

[3] The trial court denied Johnson and Forsyth County's motion for summary judgment, concluding that there was a genuine issue of material fact as to whether governmental immunity barred plaintiffs' claims. As stated above, a governmental entity is immune from liability for the torts of its officers and employees which are committed while the officers and employees are performing governmental functions. *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970); *Dawes*, 148 N.C. App. at 643, 559 S.E.2d at 256.

While the doctrine of sovereign immunity has been cited as the public policy of North Carolina, *see Steelman v. New Bern*, 279 N.C. 589, 594, 184 S.E.2d 239, 242 (1971), our Supreme Court has approvingly cited "the modern tendency to restrict rather than to extend the application of governmental immunity." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 529-30, 186 S.E.2d 897, 908 (1972) (citations omitted).

Governmental immunity is dependent on the acts of the employee being committed while the employee is carrying out a governmental function. *Wilkerson v. Norfolk Southern Railway Co.*, 151 N.C. App.

332, 338-39, 566 S.E.2d 104, 109 (2002). Defendants argue that *McIver v. Smith*, 134 N.C. App. 583, 518 S.E.2d 522 (1999), is controlling in this case, and entitles them to summary judgment. In *McIver*, our Court held that a county-operated ambulance service is a governmental activity, and thus shielded from liability by governmental immunity. 134 N.C. App. at 588, 518 S.E.2d at 526. Plaintiffs and Windsor argue that *McIver* can be distinguished on its facts since the county employee in that case was responding to a 911 call in a county-owned ambulance and had activated the ambulance's emergency lights and siren. *Id.* at 584, 518 S.E.2d at 524. The decision in *McIver* held that the provision of an ambulance service by a governmental entity is a governmental function. *Id.* at 588, 518 S.E.2d at 526. The issue in the case before us is whether the governmental immunity, as discussed in *McIver*, applies to government-provided EMS services in general or if it is limited to when the officers and employees are carrying out specific EMS functions, such as when an EMS vehicle is being used to provide direct emergency services. We do not read *McIver* to grant wholesale immunity to employees and agents of county-provided EMS services.

As our Court stated in *Jones*, 120 N.C. App. at 304, 462 S.E.2d at 247 (quoting *Beach v. Tarboro*, 225 N.C. 26, 28, 33 S.E.2d 64, 65-66 (1945)):

> In determining whether an activity is governmental, our Supreme Court [has] explained the court must focus on the mission of the city's employee who allegedly caused injury: "The mission of the town's employee, out of which the alleged injury to the plaintiff arose, is the determining factor . . . not what such employee was called upon to do at other times and places, but what he was engaged in doing at the particular time and place alleged."

Therefore, although *McIver* determined that county provision of EMS services is a governmental function in general, we must look at what Johnson "was engaged in doing at the particular time and place alleged." *Id.*

Decisions in other North Carolina cases have gone beyond the initial inquiry of whether the general occupation of the negligent employee is a governmental function to look at the actions of the employee or officer at the time the alleged negligence occurred. *See, e.g., Schlossberg*, 141 N.C. App. at 440, 540 S.E.2d at 52 (court noted that officers' actions constituted a governmental function since the officers were acting in their official police capacities when they

attempted to apprehend the plaintiff); *Williams v. Holsclaw*, 128 N.C. App. 205, 208, 495 S.E.2d 166, 168, *aff'd per curiam*, 349 N.C. 225, 504 S.E.2d 784 (1998) (court focused on the fact that the officer was performing his official police duties when he was responding to a call at the time of the collision); *Wall v. City of Raleigh*, 121 N.C. App. 351, 354, 465 S.E.2d 551, 553 (1996) (court noted that a city was entitled to immunity in suits arising from the collection of fines and late fees from parking violations as such collection is a governmental function, since such collection was necessary to enforce parking regulations); *Jones*, 120 N.C. App. at 305, 462 S.E.2d at 247 (court noted that where the police officer was assigned to patrol the fair in her capacity as a member of the police force and was responding to another officer's radio call for assistance at the time of the alleged negligence, the officer was performing a governmental function); *Lyles v. City of Charlotte*, 120 N.C. App. 96, 100, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996) (court noted that the training and supervision of officers by a police department are governmental functions and therefore the city had immunity from liability for torts committed by its officers while engaged in instructing the plaintiff in the emergency use of a portable radio); *Barnett v. Karpinos*, 119 N.C. App. 719, 460 S.E.2d 208, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 232 (1995) (court noted that officers were executing a search warrant and seizing the plaintiffs in their law enforcement capacity, thus conducting a governmental function); *Mullins v. Friend*, 116 N.C. App. 676, 680, 449 S.E.2d 227, 230 (1994) ("A police officer in the performance of his duties is engaged in a governmental function.") (citing *Galligan*, 276 N.C. at 175, 171 S.E.2d at 429); *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235-36, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990) ("[A] county normally would be immune from liability for injuries caused by negligent social services employees working in the course of their duties."). Although the law in North Carolina is clear that law enforcement is a governmental function, the appellate courts of this State have often noted whether the law enforcement officer was engaged in law enforcement activities at the time of the alleged negligence.

We see no reason to create a different rule for county-provided EMS services. While the provision of EMS services by a county is a governmental function, we must look at the particular actions by an EMS employee or agent to determine whether he is performing an EMS function, and therefore a governmental function, at the time of the alleged negligence.

Defendants argue that Johnson was performing a governmental function at the time of the collision, because he was on call twenty-four hours a day when in Forsyth County and he drove a vehicle owned by Forsyth County for use in connection with his position as Forsyth EMS director. Plaintiffs and Windsor argue that because Johnson was on a personal errand, he was not acting for a public purpose at the time of the collision, and therefore governmental immunity would not normally apply. At the time of the collision Johnson was driving to his office in a county-provided SUV. "The general rule in this state is that an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment." *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996) (citation omitted). Defendants admit Johnson was not responding to an emergency call at the time of the accident, nor was he performing any particular EMS duties; in fact, the uncontested evidence in the record indicates that Johnson was turning into a bank to get money for his personal use. Johnson's detour into the bank was not related to his job responsibilities with Forsyth EMS.

Careful review of the evidence in the record shows that the facts pertinent to whether Johnson was engaged in a governmental function at the time of the accident are not in dispute. In the case before us there is no genuine issue of material fact concerning the issue of whether Johnson was engaged in a governmental function at the time of the collision. We hold that he was not. In appropriate cases, where there is no genuine issue of material fact, summary judgment may be granted for the non-moving party. *Candid Camera Video v. Matthews*, 76 N.C. App. 634, 637, 334 S.E.2d 94, 96 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 879 (1986) (citations omitted). Plaintiffs are entitled to judgment as a matter of law on defendants' defense of governmental immunity. We therefore affirm the trial court's denial of defendants' motion for summary judgment and remand with instructions that the trial court grant summary judgment for plaintiffs as to defendants' defense of governmental immunity.

II.

[4] Defendants attempt to argue in their brief that the trial court erred by not granting summary judgment to defendants on plaintiffs' claim that plaintiffs' equal protection rights were violated. However, in defendants' motion for summary judgment, they explicitly sought summary judgment only on the basis of governmental immunity. We recognize that plaintiffs amended their complaint to add an equal protection claim after defendants initially moved for summary judgment.

However, when a motion for summary judgment cites specific grounds as the basis for that motion and the non-moving party adds claims that are not addressed by the motion for summary judgment, if the moving party feels it is entitled to judgment on the new claims as well, the better practice is to amend their original motion to address the new claims by the non-moving party, or to file a new motion for summary judgment addressing those claims. We note that defendants in this case did not amend their original motion for summary judgment or file an additional summary judgment motion, despite over seven months elapsing between the date defendants answered the amended complaint and the date of hearing on their motion for summary judgment.

Further, the trial court, in its 22 October 2001 order, clearly only ruled on the motion for summary judgment as it pertains to the governmental immunity claim by defendants. The record does not show any evidence that the trial court ruled on plaintiffs' equal protection claim. If a party desires for this Court to review a decision by a trial court, it is the responsibility of that party to obtain a ruling from the trial court for this court to review. *See Electronic World, Inc. v. Barefoot*, 153 N.C. App. 387, 395, 570 S.E.2d 225, 231 (2002) (citing N.C.R. App. P. 10(b)(1) (2002)). Since the record does not show that the trial court ruled on any issue other than defendants' motion for summary judgment based on the defense of governmental immunity, the equal protection claim is not properly before us. *Id.*

We affirm the trial court's denial of Johnson and Forsyth County's motion for summary judgment and remand with instructions that the trial court grant summary judgment to plaintiffs as to defendants' defense of governmental immunity.

Affirmed in part; remanded in part.

Judges GREENE and WYNN concur.

G. WAYNE OVERTON, PETITIONER-APPELLEE v. CAMDEN COUNTY AND THE CAMDEN COUNTY BOARD OF ADJUSTMENT, RESPONDENTS-APPELLANTS

No. COA02-275

(Filed 31 December 2002)

1. Zoning—judicial review of board of adjustment—standard

The trial court properly applied the de novo standard of review to whether a county board of adjustment applied the correct ordinance and interpreted it properly. Both are questions of law.

2. Zoning—successive ordinances—time of enforcement controls

The trial court did not err by applying the zoning ordinance in effect at the time of enforcement (the Unified Development Ordinance) rather than the ordinance in effect at the time of the violation (the Camden County Zoning Ordinance) in a case involving the replacement of an existing mobile home.

3. Zoning—successive ordinances—nonconforming use—replacement—conditional use permit required

In an action involving the replacement of a mobile home under one zoning ordinance (the Camden County Zoning Ordinance) and an enforcement action under a subsequent ordinance (the Unified Development Ordinance), the failure of petitioner to obtain a conditional use permit required by the first ordinance disqualified the replacement mobile home as a continuing nonconforming use under the second because that ordinance required a nonconforming use to be otherwise lawful on the effective date of the ordinance. Moreover, petitioner did not obtain a building permit for the replacement, although it is not clear whether the board of adjustment ruled this a violation of the first or the second ordinance.

4. Zoning—conditional use permit—timing—conditions

In a case involving the replacement of a mobile home, the initial failure of the board of adjustment to require a conditional use permit does not prevent the subsequent requirement of a permit, and reasonable conditions could be attached. The conditions imposed by the board at an earlier stage of this case would be appropriate if attached to a conditional use permit.

Appeal by respondents from an order entered 25 October 2001 by Judge James R. Vosburgh in Superior Court, Camden County. Heard in the Court of Appeals 16 October 2002.

Hornthal, Riley, Ellis & Maland, L.L.P., by Donald I. McRee, Jr., for petitioner-appellee.

Herbert T. Mullen, Jr. and Shelley T. Eason, for respondents-appellants.

McGEE, Judge.

G. Wayne Overton (petitioner) is the owner of property located at 1330 South NC 343 in Camden County, North Carolina (the property). Petitioner first placed a mobile home on the property in 1972. Petitioner replaced the original mobile home on the property with another mobile home (replacement mobile home) in 1995 without obtaining a building permit or a conditional use permit from Camden County. The Camden County Code Enforcement Officer (Enforcement Officer) mailed petitioner a certified letter on 18 February 2000 advising petitioner of violations of sections 3.02, 3.05, 7.07(C-4), and 8.06 of the Camden County Zoning Ordinance (CCZO). The CCZO was enacted and effective on 20 December 1993. It was replaced on 1 January 1998, by the Camden County Unified Development Ordinance (UDO). Petitioner appealed the Enforcement Officer's decision to the Camden County Board of Adjustment (Board of Adjustment) on 6 March 2000.

The Board of Adjustment issued a decision on 10 April 2000 finding (1) petitioner in violation of the "adopted ordinance" for failing to secure a building permit before replacing the original mobile home with the replacement mobile home; (2) allowing the replacement mobile home to remain on the site upon petitioner obtaining a building permit and the paying of a fifty dollar fine; and (3) subjecting petitioner to the additional conditions that the replacement mobile home must be removed if vacated for more than sixty days, that the lot must be maintained, that only one person could live in the replacement mobile home, and that the replacement mobile home must have been manufactured after 1 July 1976.

Petitioner filed a petition for a writ of certiorari for review by the Camden County Superior Court on 9 May 2000. He contended that the Board of Adjustment had no authority to impose the additional conditions cited above on its decision to allow the replacement mobile home to remain on the property. The trial court entered an order on

25 October 2001 concluding, *inter alia*, that: (1) the "Board of Adjustment erroneously applied the [CCZO] to Petitioner, the [replacement] mobile home, and the Property where such ordinance had been replaced as of January 1, 1998 by the . . . UDO"; (2) the "Board of Adjustment erroneously failed to apply the . . . UDO"; (3) "Petitioner's replacement mobile home constituted a 'nonconforming situation' . . . protected under the . . . UDO, and Article 14 of the UDO [did] not require a conditional use permit for Petitioner's continued use of his mobile home as a 'nonconforming situation' "; (4) "[t]he only permit required of Petitioner under the UDO was a building permit"; and (5) the "Board of Adjustment was without authority to impose the [additional] conditions . . . ." The order vacated the Board of Adjustment's decision and remanded the matter to the Board of Adjustment for issuance of a building permit for the replacement mobile home, without the unauthorized conditions, upon payment by petitioner of the required seventy-five dollar fee and fifty dollar fine. Respondents appeal the order.

When a superior court grants certiorari to review the decision of a board of adjustment, "the superior court sits as an appellate court, and not as a trier of facts." *Sun Suites Holdings, LLC v. Board of Alderman of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (quoting *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997)). The superior court's review is limited to determinations of whether

> "1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious."

Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust., 152 N.C. App. 474, 567 S.E.2d 440, 441 (2002) (quoting *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 390, 552 S.E.2d 265, 267 (2001), *rev'd per curiam on other grounds*, 355 N.C. 269, 559 S.E.2d 547 (2002). If the superior court is reviewing either the sufficiency of the evidence or whether the board's decision was arbitrary and capricious, the superior court applies the "whole record test." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001). Errors of law are reviewed *de novo*. *Id.* An appel-

late court's review of the trial court's zoning board determination is limited to determining whether the superior court applied the correct standard of review, and to determine whether the superior court correctly applied that standard. *Id.* at 102-03, 535 S.E.2d at 417.

[1] We first decide whether the trial court exercised the appropriate scope of review. The issues presented for review at each stage of these proceedings relate to which ordinance to apply and the proper interpretation of that ordinance, both of which present questions of law, requiring a *de novo* review. *Id.* at 103, 535 S.E.2d at 417. The trial court applied the *de novo* standard of review, and therefore, we must determine whether the trial court was correct in its exercise of the *de novo* review. *Id.*

[2] Respondents argue that the trial court erred in applying the UDO to petitioner's zoning violation, instead of the CCZO. Our State's courts have not decided the issue of which zoning ordinance to apply when an alleged violation occurs while one ordinance is in effect, but enforcement is sought only after a new ordinance has replaced the previous ordinance. At the time of the alleged violation, being the replacement of a mobile home by petitioner in 1995, the CCZO was the zoning ordinance in effect. However, when the enforcement action was brought by Camden County, the UDO had superceded the CCZO.

In *Naegele Outdoor Advertising v. Harrelson*, 336 N.C. 66, 442 S.E.2d 32 (1994), our Supreme Court reversed the majority's decision from this Court which had stated that application for permits must be viewed under the facts and laws as they existed at the time of the application, not at the ultimate time of decision by the court. *Naegele*, 112 N.C. App. 98, 101-02, 434 S.E.2d 244, 246 (1993), *rev'd per curium*, 336 N.C. 66, 442 S.E.2d 32 (1994). The Supreme Court reversed this Court's decision for the reasons stated in the dissenting opinion by Judge Greene. 336 N.C. at 66, 442 S.E.2d at 33. Judge Greene's dissent "disagree[d] with the majority's conclusion that [the petitioner's] application must be viewed at the time it was made, without regard to the fact that the Department of Transportation had a subsequent statutory obligation to screen the junkyard." 112 N.C. App. at 102, 434 S.E.2d at 247 (Greene, J., dissenting). *Naegele* rejects the proposition that a court or board need not look at subsequent changes in the law when Board of Adjustment decisions are made.

Courts in other jurisdictions have addressed similar questions. " 'It is well settled that the zoning ordinance in effect at the time the

case is ultimately decided is controlling' . . . . The purpose of this principle is to effectuate the current policy declared by the legislative body." *Dinizo v. Planning Board of the Town of Westfield*, 711 A.2d 425, 428 (N.J. Super. 1998) (citations omitted); *see also MacDonald Advertising Co. v. McIntyre*, 536 N.W.2d 249, 251 (Mich. Ct. App. 1995) ("[T]he general rule is that the law to be applied is that which was in effect at the time of the decision.") (citation omitted); *Enviro-Gro Technologies v. Bockelmann*, 594 A.2d 1190, 1198 (Md. Ct. Spec. App.), *cert. denied*, 599 A.2d 447 (Md. 1991); *Shiloh Gospel Chapel, Inc. v. Roer*, 566 N.Y.S.2d 382, 382 (N.Y. App. Div. 1991) ("[I]t is well-settled that a court will apply the zoning ordinance in existence at the time of its decision.") (citations omitted). "The majority rule . . . is that the zoning law or regulation in effect at the time of the decision of a court is controlling as opposed to that in effect when the proceedings were instituted or when the administrative agency entered its decision upon the application." *McCallum v. Inland Wetlands Com'n of Avon*, 492 A.2d 508 (Conn. 1985) (citing 4 Anderson, *American Law of Zoning* § 25.31), *superceded by statute as stated in McNally v. Zoning Com'n of City of Norwalk*, 621 A.2d 279, 282-83 (Conn. 1993) (noting that a statute specifically changed the common law rule as stated above in Connecticut). Respondents have not directed us to any statute that would prevent the application of such a rule in North Carolina.

Other jurisdictions have recognized exceptions to this "time of decision rule." *Dinizo*, 711 A.2d at 428 (citation omitted) (noting the vested right exception and calling for a reevaluation of the "time of decision" rule); *MacDonald Advertising Co.*, 536 N.W.2d at 252 (noting a bad faith exception but finding insufficient evidence to apply the exception); *Shiloh Gospel Chapel, Inc.*, 566 N.Y.S.2d at 383 (noting a "special facts exception" pursuant to which a former ordinance might still be deemed controlling if there is evidence of bad faith, conspiracy, or undue delay by the board). However, in the case before us there is no evidence that any such circumstances were present to warrant the use of such an exception by this Court.

The New York courts have held that a later act, which covers the entire subject of the earlier act and is clearly intended to set forth exclusive rules, operates as a repeal of an earlier act, wiping it out for all purposes and preventing enforcement thereunder. *See Fleetwood v. Manor, Inc. v. Village of Huntington Bay*, 115 N.Y.S.2d 615 , 618-19 (N.Y. Sup. Ct. 1952); *Inzerilli v. Pitney*, 30 N.Y.S.2d 129, 131-32 (N.Y. Sup. Ct. 1941). However, other states' courts have held if

there is a savings clause in the amending ordinance, the enforcement may continue. *See Town of Ogunquit v. McGarva*, 570 A.2d 320, 321 (Me. 1990); *City of New Orleans v. Leeco, Inc.*, 76 So.2d 387, 390 (La. 1954); *City of Rochester v. Crittenden Park Riding Academy*, 238 N.Y.S. 215, 215 (N.Y. Sup. Ct. 1930).

In light of Judge Greene's opinion in *Naegele*, 112 N.C. App. at 102, 434 S.E.2d at 247 (Greene, J., dissenting), and the rules applied in other types of cases involving decisions by boards of adjustment from other jurisdictions, we hold that the zoning ordinance in effect at the time of the Board of Adjustment's decision is the correct ordinance to apply. The Board of Adjustment should have applied the UDO in the present case and the trial court did not err in applying the UDO.

[3] Respondents next argue that even if the UDO governs the case before us, the trial court erred by finding that the replacement mobile home constituted a nonconforming use under the UDO. Section 1402.1 of the UDO provides that "non-conforming situations that were otherwise lawful on the effective date of this ordinance may be continued." Therefore, the issue is whether the replacement mobile home was a nonconforming use that was otherwise lawful at the effective date of the UDO, which was 1 January 1998. If so, the replacement mobile home could continue as a nonconforming use under the UDO; if not, the replacement mobile home would be subject to section 1210 of the UDO, requiring a conditional use permit.

Respondent argues that the replacement mobile home was neither a nonconforming use, nor was it "otherwise lawful," at the effective date of the UDO. The definition of a nonconforming situation under the UDO is "a situation that occurs when, on the effective date of this Ordinance, an existing lot or structure or use of an existing lot or structure does not conform to one or more of the regulations applicable to the district in which the lot or structure is located." Under the language of the UDO, the replacement mobile home comes within the definition of a nonconforming situation in that it was in place at the effective date of the UDO and did not conform to the regulations applicable to the district in which it was located.

However, a nonconforming use under the UDO can continue only if it was "otherwise lawful on the effective date of the ordinance." Although the Board of Adjustment and the trial court must apply the UDO, the language in sections 107 and 1402 of the UDO mandates that we look at the previous laws and ordinances affecting the property in question to determine whether the nonconforming use under the

UDO was "otherwise lawful" on the UDO's effective date. *See Town of Ogunquit*, 570 A.2d at 321; *City of New Orleans*, 76 So.2d 387 (La. 1954); *City of Rochester*, 238 N.Y.S. at 215. In the case before us, we must therefore reference the CCZO to determine whether the replacement mobile home was "otherwise lawful." If the replacement mobile home violated the terms of the CCZO, it would not be "otherwise lawful" as required by the UDO.

Section 107 of the UDO states that "[i]n particular, a situation that did not constitute a lawful nonconforming situation under the previously adopted Zoning Ordinance does not achieve lawful nonconforming status under [the UDO] merely by repeal of the [CCZO]." In fact, Camden County has previously evinced such a desire to interpret their zoning ordinances to encompass violations of previous ordinances in their new zoning ordinances. In section 1.04 of the CCZO, the ordinance states that "[i]n addition, no land being used in violation of the old Zoning Ordinance shall obtain status as an allowed non-conforming use by virtue of the enactment of this new Zoning Ordinance, but all land in violation of the old Zoning Ordinance shall continue to be in violation of the [CCZO]."

The replacement mobile home was not "otherwise lawful" on the effective date of the UDO. Petitioner originally had a nonconforming manufactured home on the property under the CCZO. However, when he replaced the mobile home in 1995, section 5.02(F) of the CCZO required petitioner to obtain a conditional use permit pursuant to section 8.04 of the CCZO. Petitioner failed to apply at any time for a conditional use permit for the replacement mobile home and was therefore in violation of the CCZO when the UDO was adopted.

In addition, petitioner did not obtain a building permit when he moved the original mobile home off of the property and replaced it. The Board of Adjustment found this to be a violation of the "adopted zoning ordinance." There was no disagreement from petitioner that he needed a building permit to replace the original mobile home on the property, as evidenced by his willingness to pay the fine, obtain the building permit, and thereafter continue with the use of the replacement mobile home.

However, it is not clear whether the Board of Adjustment ruled this failure a violation of the CCZO or the UDO. If it was simply a violation of the UDO's provision on building permits, section 1703, such a violation standing alone would not authorize the imposition of a conditional use permit and the applications of conditions to peti-

tioner's use of the property. However, if the failure to obtain a building permit was a violation of the CCZO, then this would fall under the "otherwise lawful" limitation in section 1402.1 of the UDO, disqualifying the replacement mobile home from remaining as a continuing nonconforming use under the UDO. However, the record does not contain the complete version of the CCZO, and it is unclear what section required petitioner to obtain a building permit to replace the mobile home on the property. While it may be the case that the CCZO required a building permit, the Board of Adjustment's assertion that the replacement mobile home required a building permit, when unsupported by the record cannot stand. Nevertheless, the failure of petitioner to obtain a conditional use permit as required under the CCZO, disqualifies the replacement mobile home as a continuing nonconforming use under section 1401.1 of the UDO.

[4] The proper application of the UDO requires petitioner to seek a conditional use permit for the mobile home on his property. The failure of the Board of Adjustment to do so at the first hearing does not prevent such a requirement at this stage. *City of Winston-Salem v. Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575, *disc. review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980) ("A city cannot be estopped to enforce a zoning ordinance against a violator due to the conduct of a zoning official in encouraging or permitting the violation."). While the Board of Adjustment could not attach conditions to the replacement mobile home if it continued as a nonconforming use, when issuing a conditional use permit, the Board of Adjustment can attach reasonable conditions. A board of adjustment "may impose reasonable and appropriate conditions and safeguards upon [conditional use] permits." N.C. Gen. Stat. § 153A-340(c) (2001).

A reviewing court will normally defer to a board of adjustment so long as a condition is reasonably related to the proposed use, does not conflict with the zoning ordinance, and furthers a legitimate objective of the zoning ordinance. *See Chambers v. Board of Adjustment*, 250 N.C. 194, 195, 108 S.E.2d 211, 213 (1959) (noting that Boards of Adjustment cannot waive requirements under a zoning ordinance); *Bernstein v. Board of App., Village of Matinecock*, 302 N.Y.S.2d 141, 146 (N.Y. Sup. Ct. 1969) ("The conditions imposed cannot go beyond the ordinance, which is the source of the Board's power, [t]hey must be directly related to and incidental to the proposed use of the property, and the conditions stated must be sufficiently clear and definite that the permittee and his neighbors are not left in doubt concerning the extent of the use permitted.")

(citations omitted) (cited in *Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 344 S.E.2d 272 (1986)); *see also* 3 A. Rathkopf & D. Rathkopf, *The Law of Zoning and Planning* § 61.49 (Supp. 2001). Section 1915 of the UDO allows the Board of Adjustment to impose

> such reasonable requirements in addition to those specified in this Ordinance as will ensure that the development in its proposed location: (a) will not endanger public safety; (b) will not endanger the value of adjoining or abutting property; (c) will be in harmony with the area in which it is located; (d) will be in conformity with the land use plan . . . or other plan officially adopted by the Board; and (e) will not exceed the county's ability to provide adequate public facilities . . . .

In this case, the Board of Adjustment imposed several conditions on petitioner's use of the replacement mobile home: (1) that the replacement mobile home satisfy inspection that it is "up to code"; (2) that one individual inhabit the replacement mobile home at all times; (3) that the replacement mobile home not be vacated for more than thirty days, with thirty additional days to find a new resident, for a total of sixty days; (4) that the lot be kept in condition with the standards for that area; and (5) that the replacement mobile home be built after July 1, 1976. After reviewing the UDO and the above conditions, we see no reason to strike any of the conditions as unreasonable or inappropriate. *See* N.C.G.S. § 153A-340(c). These conditions are not in contravention of the UDO, and in fact would further the purposes of the UDO as emphasized in section 1915. Further, all of these conditions relate in some way to the use of the property. We find the imposition of such conditions by the Board of Adjustment appropriate, if attached to a conditional use permit. The decision of the trial court is vacated and this matter is remanded to the trial court for remand to the Camden County Board of Adjustment for further proceedings consistent with this opinion, including the issuance of a conditional use permit to petitioner for the replacement mobile home with any reasonable conditions attached to the conditional use permit.

Vacated and remanded.

Judges HUDSON and BIGGS concur.

WILLIAM SCOTT GILBERT AND WIFE, ANGELA R. GILBERT, PLAINTIFFS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANIES, DEFENDANT

No. COA01-1567

(Filed 31 December 2002)

1. Appeal and Error—appealability—partial summary judgment—certification

Although an appeal from the grant of partial summary judgment is ordinarily an appeal from an interlocutory order, this appeal was properly before the Court of Appeals because the trial court certified this case under N.C.G.S. § 1A-1, Rule 54(b).

2. Insurance—homeowners—loss settlement provision—replacement costs

The trial court erred by awarding plaintiffs the replacement cost value established by an appraisal award rather than the actual cash value for hurricane damages covered by their homeowner insurance policy without requiring plaintiffs to rebuild or repair as set forth in the loss settlement provisions of the pertinent insurance policy because: (1) the trial court improperly found that the guaranteed replacement cost endorsement somehow voided the loss settlement provisions of the policy when the endorsement only applies if the loss exceeds the policy limits of $283,500.00; (2) the applicable provisions of the insurance policy provided that plaintiffs were required to repair or replace the damaged property in order to qualify for replacement cost coverage; and (3) the appraisal procedure is outlined in the policy and there is no language indicating that it is a remedy exclusive of other provisions of the policy.

Judge BRYANT dissenting.

Appeal by defendant from judgment entered 25 July 2001 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 11 September 2002.

Block, Crouch, Keeter & Huffman, L.L.P., by Auley M. Crouch, III, and Christopher K. Behm, for plaintiff appellees.

Cox & Associates by J. Thomas Cox, Jr., for defendant appellant.

McCULLOUGH, Judge.

On 5 September 1996, plaintiff's residence, located at 201 Forest Hills Drive, Wilmington, North Carolina, was severely damaged by Hurricane Fran and its aftermath. Defendant provided insurance coverage pursuant to Homeowners' Insurance Policy Number HP 537794 effective from 15 June 1996 until 15 June 1997. Thus on 5 September plaintiff was fully covered by the aforementioned policy. Once defendant's adjuster and plaintiffs could not reach an agreement on the value of the loss, the policy's appraisal clause was invoked. That provision provided:

> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser . . . . The two appraisers will choose an umpire. . . . The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

As the appraisers could not agree, an umpire was chosen. The umpire issued an award setting the Replacement Cost Value at $270,891.35 and the Actual Cash Value at $230,257.55.

The policy's Loss Settlement provision provided that "[w]e will pay no more than the actual cash value of the damage unless: (a) actual repair or replacement is complete." Shortly thereafter, defendant tendered the balance of the Actual Cash Value paying a total of $230,257.55 to plaintiffs. Defendants contended that to be entitled to the replacement cost value plaintiffs would have to complete the needed repairs.

On 3 August 1999, plaintiffs filed suit alleging breach of contract, negligence, bad faith and unfair or deceptive trade practices. Defendant subsequently moved for summary judgment, and on 25 July 2001 the trial court entered partial summary judgment in favor of plaintiffs, entering the following Conclusions of Law:

> 1. This Court has jurisdiction over the parties and the subject matter of this hearing; namely, whether or not, as a matter of law, the Policy and Guaranteed Replacement Cost Endorsement provided that, where there was an Appraisal Award entered, the

Plaintiffs were entitled to be paid the replacement cost value established by the Appraisal Award without having to first prove to Defendant that the Plaintiffs had actually made the repairs to their Residence.

2. The Appraisal Clause of the Policy was designed to prevent litigation and insure finality in disputes over the amount of the Loss.

3. The determination of the umpire, which was agreed to and accepted unanimously by the appraisers for the parties, was a binding and final determination of the respective rights of the parties as to the amount of the Loss under the Policy and the Guaranteed Replacement Cost Endorsement.

4. In accordance with the Loss Payment clause of the Policy, the Plaintiffs were entitled to receive from Defendant the payment of the $270,891.35 replacement cost value established by the Appraisal Award within sixty (60) days of the date of the filing of the Appraisal Award with Defendant.

5. Plaintiffs are entitled to recover from Defendant, as a matter of law, the difference between the actual cash value previously paid by Defendant ($230,257.55) and the replacement cost value established by the Appraisal Award ($270,891.35); namely, $40,633.80.

6. As a result of the Court's conclusions above, the Court determines that a substantial right of the Defendant will be affected. Therefore, Defendant is entitled to an immediate right of interlocutory appeal pursuant to Rule 54 of the Rules of Civil Procedure as there is no just reason for delay of such appeal.

In its only assignment of error defendant argues that the trial court erred in awarding plaintiffs $40,633.80, the difference between the Actual Cash Value of $230,257.55 and the Replacement Cash Value of $270,891.35, without requiring plaintiffs to rebuild or repair as set forth in the policy.

[1] As this is an Order and Partial Judgment, the threshold question is whether such is appealable. "[A] grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677

(1993). Parties may appeal orders where (1) the denial of an appeal would affect a substantial right, N.C. Gen. Stat. § 1-277 (2001); or (2) in cases involving multiple claims or parties, a final judgment is entered as to one claim or party and the trial court certifies pursuant to Rule 54(b) that there is no just reason for delay. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001). As the trial court did certify that there was no just reason for delay, the order is properly before this Court.

[2] It is well settled in this state that where "contractual appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances." *Enzor v. N.C. Farm Bureau Mut. Ins. Co.*, 123 N.C. App. 544, 545-46, 473 S.E.2d 638, 639 (1996).

In the case *sub judice* the trial court found that the Guaranteed Replacement Cost Endorsement controlled the appraisal, thus entitling plaintiffs to the Replacement Cost Value instead of the Actual Cash Value, both of which were specified in the appraisal award. The trial court evidently found that this clause voided the Loss Settlement provisions of the policy.

Interpreting insurance policies is a matter of law. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). In doing so the courts have several well-settled principles. "[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986).

"As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). The intent may be derived from the language in the policy or contract itself. *Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 69, 544 S.E.2d 609, 612 (2001). If the policy is clear, the courts may not, under the guise of an ambiguity in the policy, rewrite the contract. *Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777.

In this case, the trial court erroneously found that the Guaranteed Replacement Cost Endorsement (HO-500) somehow voided the Loss Settlement provisions of the policy. In this the trial court erred as that endorsement only applies if the loss exceeds the policy limits of $283,500.00.

The policy contains the following language:

> **3. Loss Settlement.** Covered property losses are settled as follows:
>
> * * * *
>
> (4) We will pay no more than the actual cash value of the damage unless:
>
> (a) actual repair or replacement is complete[.]

While there are no North Carolina cases which address whether the insured is entitled to replacement costs without meeting the rebuild or repair clause requirements after an appraisal award, this Court can discern no reason to disregard the plain meaning of the contract provisions quoted above. To do otherwise would allow plaintiffs to reap a windfall profit from a loss. As one commentator has noted:

> "Under the applicable provisions of the insurance policy, Plaintiffs were required to repair or replace the damaged property in order to qualify for replacement cost coverage. This provision operates as a condition precedent to recovery of replacement costs. See generally Koenders, supra, at 848-852. The reason insurers place this provision in insurance policies is to prevent an insured from making a profit from a loss. See Johnny Parker, supra, at 298-99; Koenders, at 829."

Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 Wake Forest L. Rev. 295, 298-99 (1999).

Plaintiffs argue that the case of *N.C. Farm Bureau Mut. Ins. Co. v. Harrell*, 148 N.C. App. 183, 557 S.E.2d 580 (2001), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 606 (2002) supports their case. In this plaintiffs are mistaken.

The facts of *Harrell* distinguish it from the case at bar. In *Harrell*, plaintiff insurance company appealed "from an order denying its motion to vacate an umpire's award and granting [insured's] motion for summary judgment." *Id.* at 183-84, 557 S.E.2d at 580-81. The plaintiff attacked the appraisal that awarded defendant money for damage to farm equipment as well as the equipment itself. Another provision in the insurance policy stated that damaged property paid for or replaced by the insurer became the property of the insurer. *Id.* at 184, 557 S.E.2d at 581. This Court upheld the appraisal award. *Id.* at 187,

557 S.E.2d at 583. Critical differences make the *Harrell* rationale inapplicable to the facts at bar: (1) the different procedural posture of the actions (vacation of a clear appraisal versus declaratory judgment action interpreting appraisal); and (2) the different types of appraisal (appraisal of damaged farm equipment with umpire's accompanying rationale versus appraisal of home damage with umpire's value computations but no explanation). In our view *Harrell* does not control the result here.

The appraisal procedure is outlined in the policy and there is no language indicating that it is a remedy exclusive of other provisions of the policy. Case law from other states supports the continued effect of the policy after resorting to the appraisal remedy. In *Central Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257 (Iowa 1991), the Iowa Supreme Court held that an appraisal agreement contract did not excuse compliance with other requirements of the insurance policy that the appointed appraisers be neutral.

For all the foregoing reasons, the order of the trial court is

Reversed.

Judge TYSON concurs.

Judge BRYANT dissents.

BRYANT, Judge, dissenting.

I disagree with the majority that the "Loss Payment" provision, requiring plaintiffs to first tender proof that repairs had been made prior to receiving the replacement cost value, applied as a condition precedent to modify the appraisal award. Therefore, I respectfully dissent.

In concluding that the trial court erred in granting summary judgment in plaintiffs' favor, the majority opinion first examines the trial court's conclusion that the "Guaranteed Replacement Cost Endorsement" voided the "Loss Settlement" provision. According to the majority, the trial court erred in so concluding because the endorsement only applied if the loss exceeded the policy limits, which is not the case *sub judice*.

I believe that the majority erroneously relies upon this assessment that the endorsement applies only if the loss exceeds the policy

limit. In fact the majority's assessment is not based on the actual content of the endorsement, as the endorsement does not appear in the record on appeal, but rather, is based upon a one-sided interpretation by defendant's own attorney. Furthermore, because it is not in the province of the trial court to recite conclusions of law in ruling on a motion for summary judgment, *see Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 781, 407 S.E.2d 283, 285 (1991), the trial court's conclusions do not dictate the scope of our review. Therefore, the propriety of the trial court's conclusion regarding the endorsement is irrelevant where we find other or alternative grounds upon which to affirm.

I am of the opinion that summary judgment was appropriate, not based upon the replacement endorsement, but upon the binding nature of the appraisal process. As aptly noted by the majority, "an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances." *Enzor v. N.C. Farm Bureau Mut. Ins. Co.*, 123 N.C. App. 544, 545-46, 473 S.E.2d 638, 639 (1996) (citation omitted). Our law governing appraisals, while strict, preserves the purpose of appraisal provisions "to settle the matter in controversy [and] save the expense of litigation." *N.C. Farm Bureau Mut. Ins. Co. v. Harrell*, 148 N.C. App. 183, 187, 557 S.E.2d 580, 582 (2001) (citations and internal quotation marks omitted).

The *Harrell* Court based its holding upon the above-stated, well-established principals of law. Unlike the majority, I find the crux of our holding in *Harrell* indistinguishable from the instant case and applicable for the following reasons.

First, the distinction in procedural posture between the case *sub judice* and that in *Harrell* as noted by the majority appears to be one without a difference.

Second, in the present case, similar to the circumstances in *Harrell*, a provision separate from the appraisal clause stated that the actual cash value would be tendered unless the insured proved that repairs had been completed. However, the policy's appraisal provision, virtually identical to the provision in *Harrell*, stated that where the parties cannot agree, as to the amount of the loss, they would submit to an appraisal. The provision further stated that when at least two of the three (two appraisers and one umpire) agree on an award, their decision "set[s] the amount of loss." Furthermore, the parties agreed that the appraisal would be binding.

If the parties had not submitted to the appraisal process, the "Loss Settlement" provision would have imposed certain conditions on plaintiffs' entitlement to the replacement cost value, including plaintiffs' obligation to prove that the necessary repairs had been completed. Instead, when the parties submitted to the contractual appraisal process, the resulting conclusion to that process "set the amount of loss."

Also, I believe that the majority's reliance on *Central Life Ins. Co. v. Aetna Cas. & Gur. Co.*, 466 N.W.2d 257 (Iowa 1991) is misplaced as that case is wholly distinguishable from the case *sub judice*. In *Central*, the insurance policy's appraisal provision stated that an appraiser was to be "disinterested," while the "Agreement for Appraisal," entered into after the parties elected appraisal and independent of the insurance policy, did not set forth the same appraiser qualifications. *Id.* at 259. Given the plaintiff's subsequent agreement to pay its appraiser a contingency fee based upon the amount of loss assessed, the defendant filed for summary judgment, arguing that such payment rendered the appraiser interested in contravention of the policy's appraisal provision. *Id.* at 259-60. Given these facts, the Iowa Supreme Court concluded that the policy's appraisal provision, requiring appraisers to be disinterested, controlled over the appraisal agreement which did not expressly dictate such qualification. *Id.* at 260-61. If anything, *Central* supports a position opposite that adopted by the majority—that the appraisal process and the corresponding insurance policy provision results in a binding award.

The majority notes that the appraisal provision in the present case does not indicate that a resulting appraisal is the exclusive remedy. I disagree, as the provision expressly states that the appraisal process "set[s] the amount of loss." I would also note the glaring absence in the appraisal provision of a reservation, by defendant, of its rights to modify the appraisal award. *See High Country Arts & Craft Guild v. Hartford Fire Ins. Co.*, 126 F.3d 629, 634 (4th Cir. 1997) (finding that insurer retained its rights to deny a claim, even following an appraisal process, because insurer had inserted language in the insurance policy stating that it retained that right even if an appraisal was conducted). In the absence of such a provision, I cannot agree with the majority that the "Loss Settlement" provision modifies an otherwise binding appraisal.

For the above-stated reasons, I would affirm the trial court's order granting partial summary judgment in favor of plaintiffs.

IN RE: REQUEST FOR DECLARATORY RULING BY THE ENVIRONMENTAL MANAGEMENT COMMISSION FILED BY NORTH CAROLINA HOME BUILDERS ASSOCIATION, NORTH CAROLINA CITIZENS FOR BUSINESS AND INDUSTRY, NORTH CAROLINA AGGREGATES ASSOCIATION, NORTH CAROLINA FARM BUREAU FEDERATION, INC., JAMES H. HOBBS, JR., AND GERALD L. ANDERSON, PETITIONERS V. ENVIRONMENTAL MANAGEMENT COMMISSION, RESPONDENT AND THE NORTH CAROLINA CHAPTER OF THE SIERRA CLUB; THE NORTH CAROLINA COASTAL FEDERATION; THE NORTH CAROLINA ENVIRONMENTAL DEFENSE FUND; THE NUESE RIVER FOUNDATION; RICK DOVE IN HIS CAPACITY AS THE NUESE RIVERKEEPER; DONNA LISENBY IN HER CAPACITY AS THE CATAWBA RIVERKEEPER; TOM MATTISON IN HIS CAPACITY AS THE NEW RIVERKEEPER; AND BOUTEN BALDRIDGE IN HIS CAPACITY AS THE CAPE FEAR RIVERKEEPER, INTERVENORS-RESPONDENTS

No. COA02-99

(Filed 31 December 2002)

1. **Administrative Law—wetland rules—adopted versus proposed rules—republication not required—entry into Administrative Code**

Wetland rules adopted by the Environmental Management Commission did not differ substantially from the previously published proposed rules and thus were not required by N.C.G.S. § 150B-21.2(g) to be republished prior to adoption. Furthermore, entry of the rules into the N.C. Administrative Code constituted conclusive evidence that the rules were adopted in accordance with Administrative Procedure Act requirements.

2. **Waters and Adjoining Lands—Environmental Management Commission—statutory authority to adopt wetland rules**

The Environmental Management Commission (EMC) had statutory authority to adopt and implement wetlands rules because (1) wetlands are an "other body or accumulation of water, whether surface or underground" within the meaning of N.C.G.S. § 143-212(6), and (2) the EMC's definition of wetlands was substantially similar to the definition used by the U.S. Army Corps of Engineers in regulating wetlands pursuant to the federal Clean Water Act.

Appeal by petitioners from order entered 22 October 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 September 2002.

Hunton & Williams, by Charles D. Case, Craig A. Bromby, Christopher G. Browning, Jr., and Jason S. Thomas, for petitioners.

Attorney General Roy Cooper, by Assistant Attorney General Jill B. Hickey, for respondent.

Southern Environmental Law Center, by Donnell Van Noppen, III and Derb S. Carter, Jr., for intervenors-respondents.

BRYANT, Judge.

On 1 December 1994, respondent Environmental Management Commission (EMC) published notice of proposed regulations affecting North Carolina wetlands in the North Carolina Register. The notice stated that the EMC "intends to amend rules cited as 15A NCAC 2B.0101, .0103, .0201-.0202; 2H.0502-.0504, .0507; adopt 2B.0220; 2H.0501, .0506; and repeal 2B.0109." N.C. Reg., Vol. 9, p. 1348 (December 1, 1994). The text of the proposed regulation was also published along with the notice on 1 December 1994.

On 14 March 1996, the EMC adopted the wetlands rules. The wetlands rules are regulations which classify and designate uses of wetlands in the State and set forth the procedure to be used by the EMC to review water quality certifications issued pursuant to Section 404 of the federal Clean Water Act. *See* N.C.G.S. ch. 143, art. 21 (2001). A definition of wetlands was also included in the regulations. The adopted wetlands rules differed, in part, from the proposed regulations as published. These changes, however, were not published prior to their adoption.

On 18 July 1996 and pursuant to N.C.G.S. § 150B-21.8 to -21.14, the Rules Review Commission (RRC) objected to the adoption of the wetland rules on the basis that the EMC lacked statutory authority to adopt the rules, and that the rules were ambiguous. Thereafter, the EMC decided to file the wetlands rules with the Codifier of the Rules, notwithstanding the RRC's objections. The wetlands rules were thereby given an effective date of 1 October 1996.

Procedural history

On 17 August 1999, petitioners filed a petition for declaratory ruling with the EMC pursuant to N.C.G.S. § 150B-4. In said petition, petitioners requested a declaratory ruling that the EMC did not have statutory authority to adopt the wetlands rules, and that the EMC did

not follow procedures for rule-making as specified in the Administrative Procedure Act (APA). The petition was based, in part, upon a ruling by the RRC that the EMC did not have statutory authority to adopt the wetlands rules.

The EMC denied the petition at its 9 September 1999 meeting. Subsequently, by declaratory ruling issued on 4 October 1999, the EMC found that it had statutory authority to adopt the wetlands rules, and that the wetlands rules were adopted in compliance with the requirements of the APA. Petitioners filed a petition for judicial review of the EMC's declaratory ruling.

The petition for judicial review came for hearing at the 6 August 2001 session of Wake County Superior Court with the Honorable Donald W. Stephens presiding. By order filed 22 October 2001, the superior court affirmed the EMC's declaratory ruling and dismissed the petition for judicial review. Petitioners filed its notice of appeal to this Court on 20 November 2001.

Standard of review

Petitioners contend that the superior court made erroneous interpretations of law; therefore, *de novo* review must be applied. *See In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) ("If appellant argues the agency's decision was based on an error of law, then '*de novo*' review is required.") (citation omitted); *Newsome v. N.C. State Bd. of Elections*, 105 N.C. App. 499, 415 S.E.2d 201 (1992).

I.

[1] First, petitioners argue that the superior court erred in determining that the EMC complied with requirements of the APA in adopting the wetlands rules. Specifically, petitioners argue that 15A N.C. Admin. Code 2B .0103(c), 15 N.C. Admin. Code 2H .0506(h)(3), and 15 N.C. Admin. Code 2H .0506(h)(7), were not adopted in compliance with certain APA procedural requirements. Namely that the wetlands rules as adopted differ substantially from the proposed rules as previously published and therefore were required to be republished prior to their adoption. We disagree.

Pursuant to N.C.G.S. § 150B-21.2, procedure for adopting a permanent rule, a rule-making agency must republish a rule it intends to adopt if the text of the rule "differs substantially from the text of a proposed rule published in the North Carolina Register." N.C.G.S. § 150B-21.2(g) (2001). According to N.C.G.S. § 150B-21.2(g):

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on either the notice of rule-making proceedings or the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

The RRC is required to notify the rule-making agency if the Commission determines that any of the agency's rules were not adopted in compliance with APA requirements. In addition, the RRC is required to notify the Codifier of the Rules of any objections it has concerning adoption of the proposed rules. *See* N.C.G.S. § 150B-21.12(d) (2001).

N.C.G.S. § 150B-21.9(a) (2001), provides the standards for RRC review of a proposed rule as follows:

(a) Standards.—The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly. . . .

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article. . . .

The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency. *Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article.*

N.C.G.S. § 150B-21.9(a) (2001) (emphasis added).

In the instant case, the RRC did not object to adoption of the wetlands rules because of procedural flaws in their adoption. Moreover and unlike petitioners' assertion on appeal, the RRC did not object to the rules on the basis that the adopted rules differed substantially from the proposed rules. Rather, the RRC only objected based on the EMC's alleged lack of statutory authority to adopt said rules.[1] N.C.G.S. § 150B-21.9(a), clearly states that "Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article." The rules in dispute were entered in the North Carolina Administrative Code; and therefore, conclusive evidence exists that the rules were adopted in accordance with APA requirements. *See also* N.C.G.S. § 150B-21.12 (setting out procedure for entry of rule in North Carolina Administrative Code despite objection of RRC). Moreover, our review of the record indicates that the challenged rules, as adopted by the EMC, do not differ substantially within the meaning of N.C.G.S. § 150B-21.2(g) from the proposed text of the rules as published in the North Carolina Register on 1 December 1994. Therefore, this assignment of error is overruled.

II.

[2] Second, petitioners argue that the superior court erred in determining that the EMC had statutory authority to enact the wetlands rules. Petitioners assert that the EMC's statutory authority to regulate water quality does not include wetlands. We disagree.

N.C.G.S. § 143-211(a) states:

> It is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources. Furthermore, it is the intent of the General Assembly, within the context of this Article and Articles 21A and 21B of this Chapter, to achieve and to maintain for the citizens of the State a total environment of superior quality.

N.C.G.S § 143-211(a) (2001).

N.C.G.S. § 143-211(c) states:

> Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a

1. The issue of the EMC's statutory authority is addressed in Section II.

> permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

N.C.G.S. § 143-211(c) (2001).

N.C.G.S. § 143-214.1(a)(1) authorizes the EMC to develop and adopt water quality standards for "each of the waters of the State in such a way as to promote the policy and purposes of this Article most effectively." N.C.G.S. § 143-214.1(a)(1) (2001). Moreover, N.C.G.S. § 143-214.1(a)(2) empowers the EMC "to separately identify all such waters as the Commission believes ought to be classified separately in order to promote the policy and purposes of this Article." N.C.G.S. § 143-214.1(a)(2) (2001).

Article 21, Chapter 143 of the North Carolina General Statutes defines waters as,

> any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or *other body or accumulation of water, whether surface or underground,* public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction.

N.C.G.S. § 143-212(6) (2001) (emphasis added).

The EMC defines wetlands in the wetlands rules as follows:

> Wetlands are "waters" as defined by G.S. 143-212(6) and are areas that are inundated or saturated by an accumulation of surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands classified as waters of the state are restricted to waters of the Unites States as defined by 33 CFR 328.3 and 40 CFR 230.3.

15A NCAC 2B.0202(71) (2002).

Petitioners argue that the definition of water specified in N.C.G.S. § 143-212(6) does not include the classification of wetlands; therefore, the EMC does not have statutory authority to implement the wetlands rules. We disagree.

In evaluating the scope of an agency's authority, our courts are to examine the scope of authority our legislators intended to grant to the agency. This evaluation should be based upon " 'the language

of the statute, the spirit of that act, and what the act seeks to accomplish.' " *Comm'r of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980) (citation omitted).

First, the definition of water provided in N.C.G.S. § 143-212(6) is very flexible, and encompasses a catchall provision for "other body or accumulation of water, whether surface or underground." Although the term wetland is not specifically used in the statutory definition of water, arguably wetlands would be included in the catchall provision. *See* COMMITTEE ON CHARACTERIZATION OF WETLANDS, ET AL., WETLANDS: CHARACTERISTICS AND BOUNDARIES 43 (1995) ("The term 'wetland' was not commonly used in the American vernacular until quite recently. It appears to have been adopted as a euphemistic substitute for the term 'swamp.' ") (citation omitted).

Second, the EMC's definition of wetlands is substantially similar to the definition of wetlands as used by United States Army Corps of Engineers. Section 328.1 of 33 CFR, states: "This section defines the term 'waters of the United States' as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act." 33 CFR § 328.1 (2002). Wetlands is defined in 33 CFR § 328.3(b) and 40 CFR § 230.3(t) as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 CFR § 328.3(b) (2002); 40 CFR § 230.3(t) (2002).

The Corps of Engineers has regulated wetlands pursuant to the federal Clean Water Act for more than twenty-five years. Pursuant to Section 404 of the Clean Water Act, the Corps of Engineers has authority to issue regulations relating to the deposit of dredged materials into navigable waters of the United States. 33 U.S.C.A. § 1344 (2001). Currently, the Corps of Engineers regulates the deposit of dredged material into wetlands areas, as wetlands is defined pursuant to 33 CFR § 328.3(b), and 40 CFR § 230.3(t). Permits issued by the Corps of Engineers, as relates to the deposit of dredged materials into wetlands, are commonly referred to as "404 Permits."

Prior to issuing a 404 Permit, the Corps of Engineers must obtain certification from the affected State that the issuance of the 404 Permit will not violate the water quality standards of the State. In North Carolina, such certification is obtained through the EMC.

In the instant case, the definition of water provided in N.C.G.S. § 143-212(6) is sufficiently broad to include the classification of wetlands. The absence of the term wetlands in the definition does not deprive the EMC of statutory authority to classify waters and to adopt standards for wetlands. This assignment of error is overruled, and the order of the superior court is affirmed.

AFFIRMED.

Judges McCULLOUGH and THOMAS concur.

BARBARA PAQUETTE, PLAINTIFF v. COUNTY OF DURHAM, AND DALE GADDIS AND PRISCILLA LEWIS AND BRENDA WATSON, DEFENDANTS

No. COA02-59

(Filed 31 December 2002)

1. Appeal and Error—appealability—denial of judgment on pleadings—sovereign immunity

Although an order denying defendants' motion for judgment on the pleadings is an appeal from an interlocutory order, appeals raising issues of governmental or sovereign immunity affect a substantial right warranting immediate appellate review.

2. Employer and Employee—wrongful discharge—motion to dismiss—sovereign immunity

The trial court did not err by dismissing plaintiff's claim for wrongful discharge against defendant county on the basis of sovereign immunity, because: (1) plaintiff's complaint does not allege defendants waived their sovereign immunity, and our Court of Appeals has consistently disallowed claims based on tort against governmental entities when the complaint failed to allege a waiver of immunity; and (2) a claim for wrongful discharge in violation of public policy is a tort claim.

3. Employer and Employee—employment discrimination—Title VII—exhaustion of administrative remedies

Plaintiff's claim under 42 U.S.C. 2000e-2 for a violation of Title VII prohibiting employment discrimination on the basis of

race, color, religion, sex, or national origin is remanded to the trial court for a determination as to whether administrative remedies were exhausted at the time of the hearing such that plaintiff would have been afforded an opportunity to amend her complaint if necessary.

4. Employer and Employee—claim for unpaid wages—sovereign immunity inapplicable

The trial court erred by dismissing plaintiff's claim for unpaid wages on the basis of sovereign immunity, because the claim is not subject to sovereign immunity or any of the other defenses set forth by defendants and cited in the trial court's order.

5. Immunity—sovereign—wrongful termination—suit in official capacity

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's wrongful termination claims, because: (1) plaintiff did not state whether she was suing defendants in their official or individual capacities; (2) in the absence of a clear statement of defendant's capacity, a plaintiff is deemed to have sued a defendant in his official capacity; and (3) a defendant sued in his official capacity is afforded the same protections as the governmental entity with which he is associated.

Appeal by defendant from order entered 10 October 2001 by Judge Henry V. Barnette, Jr. in Durham County Superior Court. Heard in the Court of Appeals 28 October 2002.

Law Office of Daniel F. Read, by Daniel F. Read and Maria J. Mangano, for plaintiff-appellant.

Office of the County Attorney, by Lowell L. Siler, Deputy County Attorney, for defendant-appellees.

THOMAS, Judge.

Plaintiff, Barbara Paquette, appeals from the trial court's order dismissing her claims for wrongful discharge, violation of Title VII, and unpaid wages.

The dismissal was based on lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, lack of jurisdiction over the person under Rule 12(b)(2), and failure to state a claim upon which relief can be granted under

Rule 12(b)(6). For the reasons herein, we affirm in part and reverse and remand in part.

Defendants are the County of Durham and three of its employees, Dale Gaddis, Priscilla Lewis, and Brenda Watson. From July 1997 until mid-March 1998, plaintiff worked for the County of Durham as a children's librarian/assistant branch librarian at the Standford Warren branch of the county library system. During a transition period between branch managers, plaintiff also performed the duties of that position. Plaintiff primarily worked under the direct supervision of Lewis, although Gaddis serves as Director of the Library for the County of Durham. In February 1998, Watson was hired as branch librarian and plaintiff returned to her primary duty as children's librarian. Plaintiff and Gaddis are Caucasian; both Lewis and Watson are African-Americans.

Plaintiff's work was never formally evaluated or reviewed by defendants. On or about 19 March 1998, Lewis and Watson notified plaintiff that her probationary employment was being terminated because of a "continuing pattern of inappropriate interpersonal interactions with co-workers and supervisors."

Plaintiff alleges defendants were "substantially motivated in terminating [her] by her ethnicity, which is Caucasian." She claims Lewis "treated her with disdain and consistently preferred dealing directly with plaintiff's fellow Afro-American workers who were in fact plaintiff's subordinates." Plaintiff further alleged that when she was the acting branch manager, she did not receive a commensurate increase in pay. She also stated she worked overtime without being compensated.

The trial court concluded plaintiff was a probationary employee and did not have a contractual right to continued employment. It also determined "the claims against the individual defendants would be the same as the claims against the Defendant Durham County since their actions would be those of agents of the Defendant, Durham County." The trial court then dismissed the complaint, stating:

> This Court . . . finds that the doctrine of sovereign immunity applies; the Plaintiff has failed to state a claim upon which relief can be granted as appears on the face of the Complaint; that this matter should be dismissed pursuant to Rule [sic] 12(b)(1)(2) and (6) of the North Carolina Rules of Civil Procedure; and that the Defendant is entitled to judgment as a matter of law.

Plaintiff appeals. By three assignments of error, she contends the trial court erred in dismissing the complaint because her claims for: (1) wrongful discharge in violation of public policy; (2) wrongful termination on account of race; and (3) unpaid back wages, were not barred by the doctrine of sovereign immunity.

[1] We note that an appeal of an order denying defendants' motion for judgment on the pleadings is an interlocutory appeal. However, "while, as a general rule, such orders are not immediately appealable, this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted). Accordingly, plaintiff's appeal is properly before this Court.

[2] Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits. *Messick v. Catawba County, N.C.*, 110 N.C. App. 707, 717, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function. *Id.* A county may waive its sovereign immunity by purchasing liability insurance pursuant to N.C. Gen. Stat. § 153A-435(a) (2001). In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. *Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994). Absent such an allegation, the complaint fails to state a cause of action. *Warren v. Guilford County*, 129 N.C. App. 836, 838, 500 S.E.2d 470, 472, *rev. denied*, 349 N.C. 241, 516 S.E.2d 610 (1998).

Plaintiff's complaint does not allege defendants waived their sovereign immunity. This Court has consistently disallowed claims based on tort against governmental entities when the complaint failed to allege a waiver of immunity. *See Archer v. Rockingham County*, 144 N.C. App. 550, 548 S.E.2d 788 (2001), *rev. denied*, 355 N.C. 210, 559 S.E.2d 796 (2002); *Ingram v. Kerr*, 120 N.C. App. 493, 462 S.E.2d 698 (1995); *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 451 S.E.2d 650, *dismissal all'd, rev. denied*, 339 N.C. 739, 454 S.E.2d 654 (1995); *Mullins by Mullins v. Friend*, 116 N.C. App. 676, 449 S.E.2d 227 (1994). A claim for wrongful discharge in violation of public policy is a tort claim. *See Trexler v. Norfolk Southern R. Co.*, 145 N.C. App. 466, 550 S.E.2d 540 (2001); *Sides v. Duke Univ.*, 74 N.C. App. 331, 328

S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). Accordingly, the trial court did not err in dismissing plaintiff's claims for wrongful discharge against the County of Durham on the basis of sovereign immunity. *See Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000).

[3] Although grounded in tort, a claim for violation of Title VII is not subject to the defense of sovereign immunity. *See Bristow v. Drake Street, Inc.*, 41 F.3d 345 (7th Cir. (Ill.), 1994) (Title VII claim is akin to a tort claim). In *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), our Supreme Court held that sovereign immunity cannot bar liability in federal civil rights actions filed in state courts.

Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (2001). In order to have a viable claim under Title VII, a plaintiff must exhaust available administrative remedies, file a claim with the Equal Employment Opportunity Commission (EEOC) in a timely fashion, obtain a right to sue letter from the EEOC, and bring suit within 90 days of the letter. 42 U.S.C. §§ 2000e-2; 2000e-5; 2000e-5(f)(1) (2001). Here, the record contains no such letter from the EEOC. The claim should be dismissed for lack of subject matter jurisdiction if administrative remedies have not been exhausted. *See Tayn v. Kidde*, 178 F.Supp.2d 557 (M.D.N.C. 2001), *aff'd*, 28 Fed.Appx. 337 (4th Cir. (N.C.), 2002) (unpublished); *Edelman v. Lynchburg College*, 228 F.3d 503 (4th Cir. 2000); *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999). Plaintiff's complaint stated:

> County discriminated against, and then wrongfully terminated, Plaintiff in violation of the provisions of Chapter 42, United States Code, namely Title VII. At such time as Plaintiff has exhausted the administrative remedies provided under the statutes, Plaintiff is entitled to the remedies provided under the statute, including reinstatement or front pay, back pay, and attorney fees.

It is unclear whether the remedies were exhausted. Therefore, we remand this issue to the trial court for a determination as to whether administrative remedies were exhausted at the time of the hearing such that plaintiff would have been afforded an opportunity to amend her complaint, if necessary. *See Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358 (3rd Cir. (N.J.), 1984).

Sovereign immunity is not a valid defense where the governmental entity entered into a valid contract with the plaintiff. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). "[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." *Id.*

[4] Plaintiff's claim for unpaid wages is contractual, rather than tortious, in nature. *See Archer v. Rockingham County*, 144 N.C. App. 550, 548 S.E.2d 788 (2001) (citations omitted). The relationship of employer and employee is essentially contractual in its nature, and should be determined by the rules governing the establishment of contracts, express or implied. *Hollowell v. North Carolina Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934). Since 1976, sovereign immunity has not been recognized as a defense to contract claims. *Herring ex rel. Marshall v. Winston Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 529 S.E.2d 458, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). Therefore, the trial court erred in dismissing plaintiff's claim for unpaid wages, as the claim is not subject to sovereign immunity or any of the other defenses set forth by defendants and cited in the trial court's order.

[5] As to the other defendants, plaintiff did not state whether she was suing Gaddis, Watson and Lewis in their official or individual capacities. The distinction is important because in a suit against a public employee in his official capacity, the law entitles the employee to the same sovereign immunity protection as enjoyed by the governmental entity. *Warren v. Guilford County*, 129 N.C. App. 836, 838, 500 S.E.2d 470, 472, *disc. review denied*, 349 N.C. 241, 516 S.E.2d 610 (1998).

Our Supreme Court has stated that "a pleading should clearly state the capacity in which the defendant is being sued." *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724 (1998). This is because the statement of capacity in the caption, the allegations, and the prayer for relief allow defendants to have an opportunity to prepare for a proper defense and eliminate the unnecessary litigation that arises when parties fail to specify the capacity. *Id.*

In the absence of a clear statement of defendant's capacity, a plaintiff is deemed to have sued a defendant in his official capacity. *Id.*; *Warren v. Guilford County*, 129 N.C. App. 836, 838, 500 S.E.2d 470, 472, *disc. review denied*, 349 N.C. 379, 516 S.E.2d 610 (1998);

Johnson v. York, 134 N.C. App. 332, 517 S.E.2d 670 (1999). As aforementioned, a defendant sued in his official capacity is afforded the same protections as the governmental entity with which he is associated. *See Mullins*, 116 N.C. App. at 680-81, 449 S.E.2d at 230.

Plaintiff has thus failed to state a claim against Gaddis, Watson and Lewis in their official capacities. The trial court correctly based its dismissal of plaintiff's wrongful termination claims on Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Nonetheless, there needs to be a determination as to whether plaintiff had exhausted her administrative remedies under Title VII. Further, her claim for unpaid wages is not subject to the defense of sovereign immunity. We thus remand these issues to the trial court for proceedings consistent with this opinion. We affirm the trial court's dismissal of plaintiff's tort claim.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

Chief Judge EAGLES and Judge TYSON concur.

KAREN MOHR, PLAINTIFF v. JOHN MOHR, DEFENDANT

No. COA02-76

(Filed 31 December 2002)

Child Support, Custody, and Visitation—modification of custody—failure to accept offer of judgment—Rule 68 motion for costs inapplicable

The trial court did not err in a child custody modification case by denying defendant's motion seeking costs under N.C.G.S. § 1A-1, Rule 68 based on plaintiff's failure to accept defendant's offer of judgment, because Rule 68 offers of judgment are inconsistent with our framework for determining child custody under N.C.G.S. Ch. 50 in order to preserve the court's inherent as well as statutory authority to protect the best interests of the child.

Appeal by defendant from order entered 2 October 2001 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 19 September 2002.

East Central Community Legal Services, by Suzanne Chester, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

HUDSON, Judge.

Defendant appeals the denial of his motion seeking costs pursuant to North Carolina Rule of Civil Procedure 68.

Plaintiff and defendant were married on 28 June 1980. Four children were born of the marriage. The parties separated in March, 1999, at which time all four children were minors. After a hearing, Judge Fred G. Morelock awarded sole custody of the children to defendant father, while plaintiff was granted visitation. After the entry of the order, defendant sent one of the children, Michael, to a boarding school in Ohio.

On 9 June 2000, plaintiff filed a "Motion to Modify Custody," in which plaintiff sought sole custody of the minor children. Plaintiff alleged various difficulties in obtaining access to the children and information from defendant about matters including the medical and psychological treatment of the children, and about when Michael would be available to visit. On 12 April 2001, defendant filed and served what he designated an "Offer of Judgment" pursuant to Rule 68 of the North Carolina Rules of Civil Procedure. The purported offer proposed the following:

> That the basic schedule of physical custody as established by the Honorable Fred [G.] Morelock in his January 14, 2000 order *nunc pro tunc* to June 21, 1999 remain in effect.

Plaintiff did not accept defendant's proposal and proceeded to hearing on her Motion to Modify Custody.

At the close of plaintiff's evidence, Judge Alice Stubbs granted defendant's Rule 41(b) motion to dismiss plaintiff's Motion to Modify Custody. At the same time, however, the judge made several modifications to the 14 January 2000 order *nunc pro tunc* to 21 June 1999. Specifically, she granted joint legal custody to the parties and modified the visitation schedule by granting plaintiff three additional weeks of visitation per year, and by enlarging plaintiff's Wednesday night visitation from two to three hours. She ordered defendant to confer and consult with plaintiff prior to making final decisions con-

cerning the education and medical well-being of the minor children, granted plaintiff equal and complete access to all medical and educational records relating to the minor children, and ordered defendant to provide plaintiff's name to the minor children's schools as a person authorized to pick up the children up in case of emergency. The order also provided that Michael shall return to North Carolina in July 2001.

On 31 August 2001, defendant filed a Motion to Tax Costs based upon plaintiff's failure to accept his "Offer of Judgment," contending that "[t]he result achieved by the plaintiff at trial was not more favorable than that made by the defendant in his offer of judgment . . . ." On 2 October 2001, the court denied defendant's Motion to Tax Costs, finding that "as a matter of law . . . Rule 68 of the North Carolina Rules of Civil Procedure is inconsistent with the statutory structure of Chapter 50, that the application of Rule 68 to domestic actions violate[s] North Carolina public policy and discourage[s] the filing of otherwise meritorious motions and complaints under Chapter 50, and thus that Rule 68 is inapplicable to custody proceedings brought under Chapter 50 of the North Carolina General Statutes." The order further noted that "even in the event Rule 68 . . . were to apply to proceedings brought under Chapter 50, that the plaintiff's motion to modify custody . . . was brought in good faith, and that the court did make modifications in the court's previous custody order . . . ."

Defendant first assigns as error the trial court's denial of his motion to tax costs. Defendant argues that the trial court's holding that Rule 68 does not apply to proceedings under Chapter 50 was erroneous as a matter of law because nothing in either Rule 68 or Chapter 50 precludes such application.

Since the question of whether Rule 68 applies to a Chapter 50 custody action is a question of law, we apply a *de novo* standard of review. *See Harbor Motor Co., Inc. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638 (7th Cir. 2001); *Cf. Brewer v. Harris*, 10 N.C. App. 515, 179 S.E.2d 160 (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). For the reasons explained below, we affirm the trial court's ruling.

The pertinent provision of Rule 68 reads as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or

> property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

N.C. R. Civ. P. 68 (2001).

As this is a case of first impression in North Carolina, we have expanded our research to determine how other jurisdictions have approached this issue. Although we would look to federal decisions, the federal courts do not hear domestic relations actions under the domestic relations exception to federal diversity jurisdiction. *See Ankenbrandt v. Richards*, 504 U.S. 689, 119 L.Ed.2d 468 (1992); *see, also, McLaughlin v. Cotner*, 193 F.3d 410 (6th Cir. 1999), *cert denied*, 529 U.S. 1008, 146 L.Ed.2d 226 (2000). However, a review of other state jurisdictions shows a clear trend to hold offers of judgment inapplicable in the context of domestic relations. *See Leeming v. Leeming*, 490 P.2d 342, 344 (Nev. 1971) (holding that Nevada's version of Rule 68, nearly identical to North Carolina's Rule 68, is "inapplicable to divorce proceedings" because they "involve entirely different social considerations than other civil actions," and that "[t]o hold [Rule] 68 applicable to divorce matters would be incompatible with the pattern and policy of our law . . . ."); *In re Marriage of Marshall*, 781 P.2d 177, 181 (Colo. 1989), *cert. denied*, 794 P.2d 1011 (Colo. 1990) (holding in a divorce action very similar to the case here that Rule 68 did not apply to "an action that does not seek money judgment at law."); Fla. Stat. ch. 45.061(4) (2002) (specifically providing that Florida's version of Rule 68 "shall not apply . . . to matters relating to dissolution of marriage, alimony, nonsupport . . . or child custody."); Mass. R. Dom. Rel. P. 68 official commentary (2002) (in deleting Rule 68 from its Rule of Domestic Relations Procedure, the Massachusetts legislature provided that the rule "has been deleted as inappropriate to Domestic Relations practice."); *But see, Criss v. Kunisada*, 968 P.2d 184 (Haw. Ct. App. 1998), *cert. denied*, 953 P.2d 1362 (Haw. 1998) (applying family court version of Rule 68 in a custody action). While we are not asked to decide if Rule 68 applies in any domestic matter,

we do conclude that Rule 68 offers of judgment are inconsistent with our framework for determining child custody under Chapter 50. *See* N.C. Gen. Stat. § 50-13.1 (2001); N.C. Gen. Stat. § 50-11.2 (2001).

Under G.S. § 50-11.2, the trial court has continuing jurisdiction in child custody disputes. N.C. Gen. Stat. § 50-11.2 (2001). The court may modify the custody award at any time upon a showing of a substantial change of circumstances, affecting the welfare of the child. *Id.*; N.C. Gen. Stat. § 50-13.7 (2001). The standard upon which the court initially determines with whom custody should lie is the best interests of the child. N.C. Gen. Stat. § 50-13.2 (2001). A Rule 68 offer of judgment in a child custody action would allow a party to circumvent the court's statutory authority and responsibility to determine custody in the best interests of the child. Rule 68 provides that upon the acceptance of an offer of judgment, "either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the *clerk* shall enter judgment." N.C. R. Civ. P. 68 (2001) (emphasis added). We do not believe that this rule, which allows the clerk to enter judgment, is consistent with the statutory scheme within which the court assigns custody based upon the best interests of the child, and may modify it upon a substantial change in circumstances.

While we acknowledge that public policy favors encouraging the parties to settle domestic actions like other civil actions, *Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995), *reh'g denied*, 342 N.C. 418, 465 S.E.2d 536 (1995), we do not believe that the settlement process triggered by a Rule 68 offer of judgment is consistent with the court's authority to determine and modify custody. Prior decisions indicate that such authority is ongoing in a custody matter even though the parties settle, whether by a private settlement agreement or through mediation under G.S. § 50-13.1. G.S. § 50-13.1 provides for mediation of custody disputes and mandates that any mediated settlement agreement reached "shall be . . . submitted to the court as soon as practicable," and "[u]nless the court finds good reason not to, it shall incorporate the agreement in a court order and it shall become enforceable as a court order." N.C. Gen. Stat. § 50-13.1 (g) (2001).

Further, while it is clear that a husband and wife may bind themselves by a separation agreement, it is equally clear that "no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants." *Baker v. Showalter*, 151 N.C. App. 546, 551, 566 S.E.2d 172, 175 (2002) *(quoting Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963)).

Such separation agreements "are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children." *Hinkle v. Hinkle*, 266 N.C. 189, 195, 146 S.E.2d 73, 77 (1966). This is so because "[t]he welfare of the child is the 'polar star' which guides the court's discretion in custody determinations." *Evans v. Evans*, 138 N.C. App. 135, 141, 530 S.E.2d 576, 580 (2000). Here, we conclude that the trial court properly determined that Rule 68 does not apply to this motion to modify custody, to preserve the court's "inherent as well as statutory authority" to protect the best interests of the children. Therefore we affirm the trial court's ruling.

In light of the foregoing, we decline to address the defendant's remaining assignments of error.

Affirmed.

Judges TIMMONS-GOODSON and CAMPBELL concur.

LESTER McILWAINE, PLAINTIFF v. KENNETH T. WILLIAMS, DEFENDANT

No. COA02-103

(Filed 31 December 2002)

Judgments—default—motion to set aside—premature entry of default

The trial court abused its discretion in a personal injury case arising out of an automobile accident by denying defendant's motion to set aside a default judgment in an action where both parties agree that the entry of default against defendant was premature and therefore invalid, because: (1) the default judgment was predicated entirely on the invalid entry of default; (2) plaintiff did not obtain a judgment against defendant through trial on the matter but instead proceeded against defendant under N.C.G.S. § 1A-1, Rule 55 which required plaintiff to abide by the procedural requirements of obtaining a default judgment under Rule 55 that necessitates a valid entry of default; and (3) the trial court lacked authority to enter default judgment against defendant when jurisdiction over defendant in the instant case was never conclusively established.

Appeal by defendant from order entered 16 October 2001 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 October 2002.

Price Smith Hargett Petho and Anderson, by Douglas A. Petho, for plaintiff appellee.

Golding Holden Pope & Baker L.L.P., by John E. Spainhour, for defendant appellant.

TIMMONS-GOODSON, Judge.

Kenneth T. Williams ("defendant") appeals from an order of the trial court denying his motion to set aside a default judgment entered against him. For the reasons set forth herein, we reverse the order of the trial court.

The pertinent facts of this appeal are as follows: On 23 March 2001, Lester McIlwaine ("plaintiff") filed an unverified complaint against defendant in Mecklenburg County Superior Court seeking unspecified damages for personal injuries he allegedly suffered when defendant's automobile struck plaintiff. Plaintiff served defendant with a civil summons and a copy of the complaint on 4 April 2001. On 4 May 2001, counsel for plaintiff filed an affidavit stating that, "[s]ince the filing of the Complaint and the issuance of the Summons and service of the Summons, the Defendant has not answered, appeared or otherwise [pled] or defended as required by law." The affidavit further averred that, as defendant had failed to respond to the complaint, entry of default should be entered against him. Plaintiff obtained an entry of default against defendant later that same day. On 23 July 2001, the trial court entered a default judgment against defendant in the amount of seventy thousand dollars.

On 17 August 2001, defendant filed an answer to plaintiff's complaint in which he raised the defenses of contributory negligence, unavoidable accident and sudden emergency. On 23 August 2001, defendant filed a motion to set aside the entry of default and default judgment pursuant to Rules 55(d) and 60(b) of the North Carolina Rules of Civil Procedure. As grounds for setting aside the entry of default and default judgment, defendant argued that the entry of default was entered prematurely and was thus invalid. Specifically, defendant contended that the entry of default was entered prior to 5:00 p.m. on 4 May 2001, which was the deadline for defendant to file his answer. Because the entry of default was premature and therefore erroneously entered, the subsequent default judgment was equally

invalid. Thus, argued defendant, the entry of default and resulting default judgment should be set aside.

Defendant's motion to set aside the entry of default and default judgment came before the trial court on 1 October 2001. Upon considering the evidence and arguments by counsel, the trial court found that the entry of default was premature because it was entered prior to the expiration of time granted to defendant to file his answer. The trial court further found, however, that "under Rule 55 . . . an Entry of Default is not a prerequisite to a Default Judgment." Finding that defendant failed to show adequate grounds for mistake, inadvertence, surprise or neglect as required under Rule 60, the trial court concluded that, although defendant was entitled to have the entry of default set aside, there were no grounds upon which to set aside the default judgment. The trial court therefore entered an order granting defendant's motion to set aside the entry of default, but denying the motion to set aside the default judgment. From this order, defendant appeals.

The issue on appeal is whether the trial court erred in denying defendant's motion to set aside the default judgment. Because we conclude that the default judgment was predicated upon an invalid entry of default, we hold that the trial court erred in failing to set aside the default judgment.

Default under Rule 55 of the North Carolina Rules of Civil Procedure is a two-step process requiring (1) the entry of default and (2) the subsequent entry of a default judgment. *See State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264-65, 330 S.E.2d 645, 648 (1985); *see also Strauss v. Hunt*, 140 N.C. App. 345, 348, 536 S.E.2d 636, 638 (2000) (noting that the obtaining of a judgment by default involves a two-step process). When default is entered, the substantive allegations raised by a complaint are no longer at issue because they are deemed admitted. *See Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980); *State Employees' Credit Union, Inc.*, 75 N.C. App. at 265, 330 S.E.2d at 648. Thus, in the instant case, the entry of default conclusively established defendant's liability to plaintiff. *See State Employees' Credit Union, Inc.*, 75 N.C. App. at 265, 330 S.E.2d at 648. The parties agree, however, and the trial court so found, that entry of default against defendant was premature and therefore invalid. The trial court nevertheless concluded that the subsequent default judgment against defendant should not be set aside. This conclusion was error.

The default judgment against defendant stated that the grounds for entering the default were that (1) "Defendant is not under disability and has failed to plead or appear in the time allowed by law" and that (2) "default has been entered." It is uncontroverted that the entry of default was entered prematurely. Once the entry of default was entered, the substantive allegations within the complaint were deemed admitted. Thus, defendant did not receive the full time period allowed by law to defend himself in this action. The first ground justifying the default judgment is baseless, as the opportunity for defendant to plead or otherwise appear was cut short by the premature entry of default. The second ground justifying the default judgment was that default had been entered. As the entry of default was erroneous, however, it cannot support the default judgment. Because the default judgment was predicated entirely on the invalid entry of default, the default judgment cannot stand and must be vacated. The trial court therefore erred in concluding that the default judgment should not be set aside.

Plaintiff argues that the trial court was correct in declining to set aside the default judgment because "an entry of default by the clerk is not a prerequisite to obtaining judgment against a non-appearing defendant." *Love v. Insurance Co. and Insurance Co. v. Moore*, 45 N.C. App. 444, 447, 263 S.E.2d 337, 339, *disc. review denied*, 300 N.C. 198, 269 S.E.2d 617 (1980). In *Love*, rather than following the procedures set forth under Rule 55, the plaintiff proceeded directly to trial against the non-appearing defendant. On appeal, the defendant argued that the judgment obtained against it was void by reason of the plaintiff's failure to comply with Rule 55. This Court rejected the defendant's argument, stating that the plaintiff "had the option to bypass entry of default and proceed to trial." *Id.* at 447, 263 S.E.2d at 339. In reaching its decision, the *Love* Court relied upon *Whitaker v. Whitaker*, 16 N.C. App. 432, 192 S.E.2d 80 (1972), in which the Court held that the plaintiff did not have to proceed under Rule 55, but could obtain a valid judgment against the non-appearing defendant through a regularly scheduled trial of the matter. *Id.* at 434, 192 S.E.2d at 81. Because the plaintiff did not proceed under Rule 55, but rather procured judgment against the defendant through a trial, the Court held that the requirements of Rule 55 had "no application" to the case. *Id.*

In the case at bar, plaintiff maintains that *Love* and *Whitaker* support his contention that the default judgment entered against defendant was validly entered, despite the invalid entry of default. We do not

agree. Unlike the plaintiffs in *Love* and *Whitaker*, plaintiff did not obtain a judgment against defendant through trial of the matter, but instead proceeded against defendant under Rule 55. As such, plaintiff was bound to abide by the procedural requirements of obtaining a default judgment under Rule 55, which first necessitates a valid entry of default. *See Hill v. Hill*, 11 N.C. App. 1, 10-11, 180 S.E.2d 424, 430 (affirming the trial court's order vacating the default judgment against the defendant where entry of default was improper), *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971); *see also G & M Sales v. Brown*, 64 N.C. App. 592, 593, 307 S.E.2d 593, 594 (1983) (holding that, where entry of default and a default judgment were premature and therefore entered without authority, such entry and judgment were "nullities" and could not be enforced).

"For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2001). Under Rule 60(b), a judgment may be set aside where "a prior judgment upon which it is based has been reversed or otherwise vacated." N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) (2001). Here, the default judgment was entirely predicated upon an invalid entry of default that was vacated by the trial court. Under these facts, the invalid entry of default rendered the subsequent default judgment equally invalid. The trial court therefore abused its discretion in denying defendant's motion to set aside the default judgment.

We further note that "personal jurisdiction over a nonappearing defendant for the purpose of the entry of a judgment by default is not presumed by the service of summons and an unverified complaint but must be proven and appear of record as required by G.S. 1-75.11." *Hill*, 11 N.C. App. at 8-9, 180 S.E.2d at 429. In the present case, plaintiff's complaint was unverified. Although plaintiff filed an affidavit in connection with the case, the affidavit sets forth no grounds for jurisdiction over defendant. Under Rule 60(b)(4), a defendant "may be relieved from a final judgment, including a default judgment, if the judgment is void." *Gibby v. Lindsey*, 149 N.C. App. 470, 473, 560 S.E.2d 589, 591 (2002); N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). A judgment is void where the trial court lacks jurisdiction over the parties. *See Barton v. Sutton*, 152 N.C. App. 706, 708, 568 S.E.2d 264, 265-66 (2002). Because jurisdiction over defendant in the instant case was never conclusively established, the trial court lacked authority to enter the default judgment against him. The trial court therefore abused its discretion in failing to set aside the default judgment.

In conclusion, we hold that the trial court erred in denying defendant's motion to set aside the default judgment. In light of our holding, we need not address defendant's remaining assignments of error. The order of the trial court is hereby

Reversed and remanded.

Judges HUDSON and CAMPBELL concur.

AUBRA DAVIS, AND BILLIE FAYE DAVIS, PLAINTIFFS v. JOHN M. BALSER, DEFENDANT

No. COA02-101

(Filed 31 December 2002)

Motor Vehicles—motion for new trial—judgment notwithstanding verdict—jury instructions—no contact rule—doctrine of insulating negligence

The trial court did not err in a negligence action arising out of an automobile accident by denying plaintiff's motion for a new trial and motion for judgment notwithstanding the verdict even though the trial court should have included the "no contact rule" jury instruction under N.C.P.I.-Civil 102.24 in the jury charge as requested by plaintiff and the trial court included the doctrine of insulating negligence jury instruction under N.C.P.I.-Civil 102.65 because: (1) taken in the context of the jury charge as a whole, the jury charge was sufficient enough for the jury to understand that it could find defendant's negligence to be a proximate cause of plaintiff's injuries despite there having been no contact between plaintiff's and defendant's vehicles; (2) the trial court properly instructed on the doctrine of insulating negligence based upon evidence of an independent intervening act that would insulate any negligence of defendant's; and (3) the absence of the "no contact" instruction was not likely to mislead the jury.

Appeal by plaintiffs from judgment entered 30 October 2001 by Judge David Q. LeBarre in Chatham County Superior Court. Heard in the Court of Appeals 10 October 2002.

W. Darrell Whitley, for plaintiff-appellants.

Burton & Sue, L.L.P., by Walter K. Burton and James D. Secor, III, for defendant-appellee.

CAMPBELL, Judge.

Plaintiff, Aubra Davis[1] ("Davis") appeals from an order denying plaintiff's motion for new trial and motion for judgment notwithstanding the verdict ("JNOV"). On appeal plaintiff assigns error to: (1) the trial court's denial of plaintiff's motion to include within the jury charge North Carolina Pattern Jury Instruction ("NCPI") 102.24,[2] the "No Contact" rule; and (2) the trial court's denial of plaintiff's objection to including within the jury charge NCPI 102.65, "Insulating Negligence." We find no error in the trial court's rulings. We affirm.

On 1 April 1999, Davis, employed by BI Transportation in Burlington, was driving a tractor-trailer southbound on North Carolina Highway 87. Davis testified that as he crossed a bridge, he saw "[t]wo pickup trucks coming northbound [towards him]." The lead truck was "a dark color and the one behind it was . . . silver[.]" It was later determined that the lead truck was driven by Lucio Perez ("Perez") and the rear truck was driven by defendant, John Balser ("Balser"). No vehicles were traveling southbound in front of Davis. As Davis crossed the bridge, he "observed the two pickup trucks coming north and . . . the [Balser] truck pulled out into . . . the southbound lane . . . and started to pass [the Perez] truck." Davis testified, "as [Balser] got up kind of in the front . . . I thought he cleared [the dark colored truck] but . . . they got together somehow." When Balser merged back into the northbound lane, the "Perez car went . . . across the . . . center line right in [the] path of [Davis'] truck." Davis struck the passenger side of Perez's truck. In response to questioning as to why he did not apply his brakes at any time before Perez came into his lane, Davis testified, "I didn't think I had to because I thought [Balser] had plenty of room to get in." Balser, who was on the way to

1. This case involves two plaintiffs, Aubra Davis and his wife, Billie Faye Davis. Both plaintiffs appealed the judgment of the trial court. However, since the Billie Faye Davis appeal depends on the decision regarding the Aubra Davis appeal and in his brief plaintiff only refers to a singular plaintiff, we will refer to plaintiff, Aubra Davis, only.

2. We cite N.C.P.I.—Civil 102.24, which is the 1993 and most updated version of the "No Contact" rule. In his brief plaintiff cites 102.21, which was the 1973 version of the rule. Since this trial occurred in 2001, 102.24 is the applicable rule.

the hospital to see his wife who had been taken into emergency surgery, testified that he had been following Perez at 40 miles per hour for "[a]bout four or five miles." The speed limit was 50 miles per hour. Balser testified that he did not see a tractor-trailer traveling towards him when he first pulled into the southbound lane to pass Perez. Balser testified, "I pulled out around him and started to pass him, and I got just about by him and I looked over and made sure I cleared him and he was pulling back up beside of me again." Balser did not feel as though he had time to decrease his speed and resume his position behind Perez because "the tractor-trailer was already coming" and Balser may have collided with it. When Balser tried to merge back into the northbound lane, he felt a "bump" on some part of his truck. Immediately after Balser was re-established in the northbound lane, the accident occurred between Perez and Davis. Perez and his passenger died as a result of the accident. Davis sustained injuries. Balser did not come into contact with Davis' tractor-trailer and was not injured.

Plaintiff filed a written request to include NCPI 102.24, the "No Contact" rule, and a written objection to the inclusion of NCPI 102.65, "Insulating Negligence," within the jury charge. The trial court denied plaintiff's request and overruled his objection. The issue of defendant's negligence was submitted to the jury. The jury returned a verdict finding defendant not negligent. The trial court then denied plaintiff's motion for new trial and motion for JNOV.

Standard of Review

In reviewing a trial court's ruling on requests for jury instructions, we are "required to consider and review [the] jury instructions in their entirety." *Estate of Hendrickson ex rel. Hendrickson v. Genesis*, 151 N.C. App. 139, 150, 565 S.E.2d 254, 262 (2002) (citation omitted). The burden is on the party assigning error to show "that the jury was misled or that the verdict was affected by an omitted instruction." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (citation omitted). "The charge will be held to be sufficient if 'it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]' " *Id.* (citation omitted). After reviewing the jury instructions in their entirety, we find that the instructions were sufficient and not likely to mislead the jury.

NCPI 102.24—"The No Contact Rule"

NCPI 102.24 states:

> If the negligence of the operator of a vehicle proximately causes the operator of another vehicle to lose control of or to drive his vehicle in such a way as to result in [injury][damage] to another, the first operator may be held liable for such [injury][damage]. It is not necessary that the first operator's vehicle actually come in contact with another [person][vehicle].

N.C.P.I.—Civil 102.24 (1993). Plaintiff argues that this instruction should have been included in the jury charge. We agree that this instruction would have been appropriate, but, in the context of the jury charge as a whole, we conclude that the absence of this instruction was not likely to mislead the jury. In order for the trial court's denial of plaintiff's request to constitute reversible error, plaintiff would have to show that the jury was misled as to whether or not it could find defendant to be a proximate cause of plaintiff's injuries. Regarding the issue of whether defendant was negligent, the court instructed the jury as follows:

> [T]he first issue is, was the plaintiff, Aubra Davis, injured by the negligence of the defendant, John M. Balser? On this issue, the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's injury.
>
> . . .
>
> The plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the injury. Proximate cause is the cause in which a natural and continuous sequence produces a person's injury. It is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result. There may be more than one proximate cause of an injury; therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the injury. The plaintiff must prove by the greater weight of the evidence only that the defendant's negligence was a proximate cause . . . Thus, if the negligent acts or omissions of the operators of two vehicles concur to produce the injury complained of, the conduct of each operator is a proximate cause. . . .

The jury charge survives appellate review in that, taken in context of the entire charge, it was sufficient enough for the jury to understand that it could find defendant to be a proximate cause of plaintiff's injuries, despite there having been no contact between the plaintiff's and defendant's vehicles.

NCPI 102.65—"Insulating Negligence"

As to the doctrine of insulating negligence, the judge instructed the jury:

> The motor vehicle law provides that an operator of a vehicle about to be overtaken and passed by another vehicle approaching from the rear shall give way to the right, in favor of the overtaking vehicle, on suitable and audible signals being given by the operator of the overtaking vehicle. In any event, the operator of the overtaken vehicle shall not increase the speed of the vehicle until completely passed by the overtaking vehicle. A violation of this law is negligence. You will consider this matter only if you find the defendant, Balser, was negligent. If you do so find, such negligence would be insulated and the defendant would not be liable to the plaintiff if the negligence of Perez was such as to right [(break)] the causal connection between Bals[e]r's negligence and the plaintiff's injury and thus become, as between the negligence of the two, the sole proximate cause. . . .

See N.C.P.I.—Civil 102.65 (1985). The propriety of the instruction depends upon whether there is evidence of an independent, intervening act on the part of Perez that would insulate any negligence of Balser's. After a careful review of the record, we find that there is ample evidence from which the jury could have determined that Perez's actions constituted an intervening act, which insulated defendant, causing defendant not to be a proximate cause of plaintiff's injuries. The evidence shows that as Balser was attempting to pass, Perez increased his speed and did not yield to Balser as required by law. The jury could have decided that Perez's act constituted a separate and intervening act, which insulated any negligence on Balser's part.

We find no error in the trial court's rulings.

No error.

Judges TIMMONS-GOODSON and HUDSON concur.

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, AND RUSSELL ANDERSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. NORTH CAROLINA DIVISION OF MOTOR VEHICLES, DEFENDANT

No. COA02-9

(Filed 31 December 2002)

Parties; Pleadings—motion to amend complaint—adding Commissioner of Motor Vehicles in official capacity—fee for handicapped parking placards

The trial court did not abuse its discretion in an action challenging defendant Division of Motor Vehicle's (DMV) fee for handicapped parking placards as being an unlawful surcharge in violation of the Americans with Disabilities Act (ADA) under 42 U.S.C. § 12101 by denying plaintiffs' motion to amend their complaint to add the Commissioner of Motor Vehicles in her official capacity, and did not err by dismissing the action.

Appeal by plaintiffs from judgment entered 14 June 2001 by Judge Donald W. Stephens and filed 19 June 2001 in Wake County Superior Court. Heard in the Court of Appeals 9 October 2002.

Patterson, Harkavy & Lawrence, LLP, by Melinda Lawrence and Burton Craige; Peterson & Meyers, P.A., by Stephen R. Senn, and Antonello & Fegers, P.A., by Robert Joseph Antonello, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorneys General James Peeler Smith and Hal F. Askins, for the State.

WALKER, Judge.

This action challenges defendant's fee for handicapped parking placards as being an unlawful surcharge in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (1990). Plaintiffs originally filed suit in federal court on 7 August 1996. The U.S. District Court dismissed the action, and the Fourth Circuit Court of Appeals affirmed the dismissal. On 12 March 1999, while awaiting the Supreme Court's ruling on their motion for *certiorari*, plaintiffs filed the present action.

On 11 May 2001, after the pending cases were determined, plaintiffs moved to amend their complaint to add as a defendant Janice Faulkner, in her official capacity as Commissioner of the North

Carolina Division of Motor Vehicles (DMV). Specifically, plaintiffs alleged they were suing Faulkner in her official capacity and the trial court had jurisdiction over state entities, such as Commissioner of the DMV. Plaintiffs sought a declaratory judgment that the ADA prohibits the DMV and Faulkner from requiring payment for placards necessary for the use of special parking places set aside for disabled persons.

On 21 April 1999, defendant moved to dismiss the action for lack of subject matter and personal jurisdiction, to abate the action or to stay the action pending the outcome of plaintiffs' federal action against defendant. On 9 December 1999, the trial court ordered the action stayed pending completion of plaintiffs' federal action against defendant and the U.S. Supreme Court decision in *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636 (1999) (holding Congress' attempted authorization of private actions against states in state courts without their consent was an unconstitutional abrogation of state sovereign immunity). All motions were heard, and on 14 June 2001, the trial court denied plaintiffs' motion to amend their complaint and allowed defendant's motion to dismiss, finding and concluding in part:

> 10. The Fourth Circuit's holding that § 35-103(f) does not abrogate the State's immunity is determinative of that issue with respect to the present action . . . .
>
> 11. Sovereign immunity of the State protects the State from suit in its own courts absent valid Congressional abrogation or consent by the State to suit. *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L. Ed. 2d 636 (1999).
>
> 12. This Court has jurisdiction to hear this action only if the General Assembly has acted to waive the State's immunity from suit brought under the ADA. The General Assembly has not so acted.
>
> 13. Because the General Assembly has not waived the State's immunity from suit under the ADA, this Court lacks jurisdiction to hear the above-captioned action.
>
> 14. The action must, therefore, be dismissed unless plaintiffs are allowed to amend their complaint to name the Commissioner of Motor Vehicles in her official capacity pursuant to the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L. Ed. 714 (1908), a legal fiction which permits State officials to be

sued in their official capacity for prospective injunctive or declaratory relief to enforce federal rights.

15. The ADA does not allow suits against individuals. *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Allsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (*en banc*) ("That term [public entity], as it is defined within the statute, does not include individuals"), *cert. dismissed*, 529 U.S. 1001, 120 S.Ct. 1265, 146 L. Ed. 2d 215 (2000); *see also Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, —— U.S. ——, 121 S.Ct. 1188, 149 L. Ed. 2d 104 (2000). Thus, only public entities may be sued under the ADA. The Director of DMV in her official capacity is not a "public entity.["] *See* 42 U.S.C. § 12132.

16. Leave to file an amended complaint should not be allowed when the proposed amended complaint would still fail to state a cause of action and amendment would consequently be futile. The Court, therefore, in its discretion denies plaintiffs' Motion for Leave to File an Amended Complaint.

17. The Court further concludes that the $5.00 fee does not violate § 35-130(f) or the ADA.

Plaintiffs appeal alleging they can maintain an *Ex Parte Young* action for prospective injunctive relief against Faulkner in her official capacity under Title II of the ADA and that their proposed amended complaint properly states a claim for relief.

Pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure, a party may amend its pleadings once without leave of the court if amended prior to the time a responsive pleading is served. N.C. Gen. Stat. § 1A-1, Rule 15(a) (2001). Thereafter, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.*

A motion to amend is left to the sound discretion of the trial court, and a denial of such motion is reviewable only upon a clear showing of abuse of discretion. *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000); *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 282, 408 S.E.2d 885, 887 (1991). The trial court's ruling "is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not

have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Although the trial court is not required to make specific findings to support its denial of a motion to amend, reasons that would justify a denial include: undue delay, bad faith, undue prejudice, futility of amendment and repeated failure to cure defects through previous amendments. *Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 430, 391 S.E.2d 211, 216 (1990). Where a trial court fails to state specific reasons for denial of a motion to amend or where the trial court cites reasons that are inconsistent or incomplete, this Court may examine any apparent reasons for such a denial. *See City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 347-48, 451 S.E.2d 358, 364 (1994); *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). Defendant contends the trial court correctly denied plaintiffs' motion to amend and allowed defendant's motion to dismiss for lack of jurisdiction.

Without addressing all of the findings of the trial court's order denying plaintiffs' motion to amend, we find support for the trial court's denial of the motion to amend. Allowing plaintiffs' motion would significantly alter the legal issues presented. *See Outer Banks Contractors, Inc. v. Daniels & Daniels Constr., Inc.*, 111 N.C. App. 725, 729, 433 S.E.2d 759, 762 (1993). The issue currently presented by plaintiffs' complaint is whether the state is protected from suit by sovereign immunity. Specifically, plaintiffs' complaint alleges "[t]he DMV has no immunity from a suit in state court to enforce the provisions of the ADA." However, if plaintiffs' motion to amend is granted, they seek to add Faulkner as a defendant in order to meet jurisdictional requirements. Thus, the additional issue would be presented: whether, under *Ex Parte Young*, plaintiffs are entitled to prospective injunctive relief against DMV through Faulkner serving in her official capacity as Commissioner of the DMV.

Furthermore, even though the present action was stayed pending the outcome of plaintiffs' federal action against defendant, from the date of the *Alden* decision, plaintiffs were aware that the likelihood of a successful state action would require the addition of an *Ex Parte Young* claim. *See Alden*, 527 U.S. 706, 144 L. Ed. 2d 636. Although *Alden* was decided on 23 June 1999, plaintiffs waited almost two years, until 11 May 2001, to move to amend their complaint in accordance with the ruling in that case.

We find no evidence that the trial court abused its discretion in denying plaintiffs' motion to amend their complaint. Since plaintiffs' objection to the trial court's dismissal was premised on the theory that the trial court would have jurisdiction with the addition of Faulkner as a defendant and since we are affirming the trial court's denial of the motion to amend, the trial court's dismissal of the action is also affirmed.

Affirmed.

Judges THOMAS and BIGGS concur.

IN THE MATTER OF THE WILL OF GLADYS BAARS CAMPBELL

No. COA01-1223

(Filed 31 December 2002)

1. Wills— caveat—partial summary judgment authorized

Partial summary judgment is authorized in caveat proceedings on issues other than the validity of the will, including undue influence.

2. Fiduciaries— university procurement of bequest—relationship open, fair, and honest

Campbell University carried its burden in a caveat proceeding of proving that its fiduciary relationship with the decedent was open, fair, and honest where undue influence in obtaining a bequest was alleged.

3. Wills— undue influence—insufficient evidence

The caveators to a will failed to carry their burden of showing undue influence by Campbell University where they did not show that the decedent was susceptible to undue influence when she executed her will and codicil.

4. Wills— caveat—will and codicil duly executed—peremptory instruction

The trial court did not err in a caveat proceeding by instructing the jury that the will and codicil were duly executed.

Appeal by caveators Fred Baars, Carole Baars, Sue Baars Smith and Emerson Campbell from order and judgment entered 25 April 2001 by Judge John R. Jolly, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 5 June 2002.

Johnson and Johnson, P.A., by Sandra L. Johnson and Rebecca J. Davidson for propounder appellee.

Everett & Everett by Robinson O. Everett; Everett, Gaskins, Hancock & Stevens by Hugh Stevens; and Newsom, Graham, Hedrick & Kennon, P.A., by Josiah S. Murray, III, for caveator appellants.

McCULLOUGH, Judge.

This case arises out of a challenge to the will and codicil of Mrs. Gladys Baars Campbell who, at the time of her death on 16 May 1996, was a widow with no children. Caveators Fred Baars, Carole Baars, and Sue Baars Smith are siblings, and the nephew and nieces of Mrs. Campbell. Caveator Emerson Campbell is Mrs. Campbell's brother-in-law. The facts leading to this appeal are as follows: Mrs. Campbell was born in 1906 in Duplin County, North Carolina, and attended both Buies Creek Academy (which later became Campbell University), and a nursing school in Charlotte, North Carolina. Mrs. Campbell devoted her entire working career to nursing. Mrs. Campbell and her first husband, Albert Ezell, lived in North Carolina for several years, but later moved to Florida, where Mrs. Campbell resided for approximately fifty years. During their marriage, Mrs. Campbell was the primary breadwinner; she managed her own money and planned for her financial security. Mrs. Campbell continued working as a nurse after Mr. Ezell died in 1971. She met and married Harold Campbell several years later.

During Mrs. Campbell's marriage to Harold Campbell, the couple lived primarily in Florida, but also spent part of each year in Pennsylvania, where Mr. Campbell's family was located. On trips between Pennsylvania and Florida, Mr. and Mrs. Campbell often stopped in North Carolina to visit Mrs. Campbell's siblings, nieces and nephews, and their families. The Baars caveators did not visit, call, or write to Mrs. Campbell while she was married to Mr. Campbell, nor did they contact her when Mr. Campbell died. Emerson Campbell kept in touch with his brother and sister-in-law and visited at least once a year until Harold Campbell passed away in April 1984.

Mrs. Campbell asked her niece, Ruth Meissner, to accompany her to Pennsylvania for Mr. Campbell's funeral in April 1984. Mrs. Campbell was particularly close to Mrs. Meissner, and stated to others that Mrs. Meissner was the only one of her nieces or nephews that cared about her and tried to find out what she needed. Mrs. Meissner later accompanied Mrs. Campbell on another trip to Pennsylvania, so that Mrs. Campbell could handle the business and personal matters relating to Mr. Campbell's death on her own.

On 6 June 1984, a few months after her husband's death, Mrs. Campbell executed a will in Florida which gave most of her estate to two charities, her brother-in-law Emerson, and a number of her nieces and nephews. The named executors were Ruth Meissner and

Mrs. Campbell's Florida attorney. In an effort to better manage her money, Mrs. Campbell executed a Revocable Assets Management Trust in 1985 and named both herself and Florida National Bank as trustees. The beneficiaries of the trust were the same as those mentioned in her 1984 will, as well as one more niece; however, Mrs. Campbell did change what each would receive.

In April 1986, Mrs. Campbell contacted her nephew Davis Bulluck to come to Miami and help her resolve a matter with her bankers, whom she suspected had misplaced some of her money. After Mr. Bulluck reviewed and organized her records, he agreed with Mrs. Campbell that the bank had misplaced several thousand dollars. During his review of Mrs. Campbell's financial records, Mr. Bulluck saw a copy of his aunt's will and encouraged her to move her money into more lucrative accounts. Mrs. Campbell sent her nephew a $3,000.00 check to thank him for his assistance.

In December 1986, Mrs. Campbell donated $10,000.00 to the scholarship fund at Campbell University, located in Buies Creek, North Carolina. This event marked the first contact between Mrs. Campbell and the University since she attended Buies Creek Academy (the University's predecessor) in the 1920s. Apparently, Mrs. Campbell's name appeared on Campbell University's mailing list because she attended Buies Creek Academy. Shortly after her donation was received, Mrs. Campbell received a phone call from Mr. Frank Upchurch, the University's Vice President of Advancement. During her dealings with Campbell University, Mrs. Campbell became friends with Mr. Upchurch. As part of his duties, Mr. Upchurch contacted contributors, thanked them for their support, and kept them informed of happenings at the University. Mr. Upchurch called Mrs. Campbell periodically and sent her publications about the University and about charitable contribution opportunities.

The following April, Mrs. Campbell established a scholarship trust agreement in her name and gave a $30,000.00 phonathon pledge and gift to the University. Within the month, Mr. Upchurch flew to Miami to meet Mrs. Campbell in person and spent a few hours with her. It was during this visit that Mrs. Campbell first told Mr. Upchurch that she was thinking of moving to North Carolina. They saw each other again in June 1987, when Mrs. Campbell visited the University during a stay in North Carolina.

Over time, Mr. Upchurch kept in frequent contact with Mrs. Campbell. In October 1987, Mr. Upchurch and his wife took Mrs.

Campbell and her niece Ruth Meissner on a two-day sightseeing trip to the Outer Banks, just after Mrs. Campbell and her niece attended Homecoming at the University. Mrs. Campbell told Mr. Upchurch that she was seriously contemplating a move to North Carolina, and the two discussed possible arrangements with the University for Mrs. Campbell's home and long-term care. Mr. Upchurch also answered Mrs. Campbell's questions regarding revocable trusts and other estate planning documents. Between 1986 and 1988, officials from the University (primarily Mr. Upchurch) called Mrs. Campbell and gave her small gifts, honors, and awards, thereby creating what Mr. Upchurch described as a "continuing cultivation of relationship."

Mrs. Campbell had been contemplating a move to North Carolina since approximately 1986. After her husband's death, she no longer had family in Florida, and she also became dissatisfied with the changes occurring in her neighborhood. Her family members in North Carolina had been urging her to move back to the state since 1984. Some family members, including Mrs. Campbell's sister Ruth Bulluck and her niece Ruth Meissner, asked Mrs. Campbell to live with them. Mrs. Campbell refused and expressed her desire to live on her own and not be a burden to anyone. Mrs. Campbell flew to North Carolina, rented a car, and looked at properties on her own. On another occasion, she and Ruth Meissner drove around Fayetteville, Dunn, and surrounding areas to look for suitable property. Mrs. Campbell also considered moving to the family farm in Duplin County, but ultimately decided against it. After weighing all the factors, Mrs. Campbell chose to live on property adjacent to Campbell University. However, she remained in Miami until July 1988, where she wrapped up her affairs, handled the sale of her Miami home, and prepared for her move to North Carolina.

In January 1988, Mrs. Campbell told Mr. Upchurch of her finalized plans to move to Buies Creek, as well as her opinions regarding arrangements between herself and Campbell University. Mrs. Campbell also told Mr. Upchurch she wanted to visit an attorney to prepare necessary estate planning documents. Mr. Upchurch informed her there were several attorneys in the nearby cities of Lillington and Dunn, including William A. Johnson, a general practitioner in Lillington. Campbell University was one of Mr. Johnson's regular clients. Though Mr. Johnson served as "General Counsel" for the University, he was paid for his work on a case-by-case basis, rather than a retainer system. Mrs. Campbell asked Mr. Upchurch to make an appointment for her to see Mr. Johnson, which he did. On

4 January 1988, Mr. Upchurch sent Mr. Johnson a memo explaining the types of agreements Mrs. Campbell was interested in and asking Mr. Johnson to prepare proposed documents for the University to discuss with Mrs. Campbell. Mr. Upchurch's memo also informed Mr. Johnson that Mrs. Campbell was planning to make a will, and that "Campbell University will draft a Will for Mrs. Campbell upon her directions."

Mrs. Campbell visited North Carolina for nearly two weeks in January 1988. During that time, she stayed with relatives, but made trips to Campbell University and made decisions pertaining to the construction and location of her house. University employees drove Mrs. Campbell around during this time. Mrs. Campbell also met with Mr. Johnson to redraft her will and make other arrangements with the University. She asked Mr. Upchurch to accompany her to the meeting and asked him to stay with her during the actual discussion. During the meeting, both Mr. Upchurch and Mr. Johnson apprised Mrs. Campbell of Mr. Johnson's ties to the University. Mrs. Campbell indicated she understood, and proceeded to use Mr. Johnson as her attorney. Mrs. Campbell gave Mr. Johnson a typed list which described how she wanted her property to be divided upon her death. Mr. Johnson also discussed lapsed bequests and inheritance tax issues. Mrs. Campbell did not consult with Mr. Johnson regarding how to dispose of her property and did not ask him to provide any estate planning service beyond the drafting of the will. Mr. Johnson, Mr. Upchurch, and Mrs. Campbell agreed that Mr. Johnson would bill the University for his services.

Thereafter, Mr. Johnson drafted the will in accordance with Mrs. Campbell's instructions. Mrs. Campbell reviewed the document, but made no changes. The will contained bequests to several nieces and nephews, two sisters, and bequests of $25,000.00 to each of two charities. It also included a bequest of $100,000.00 to a trust for Mrs. Campbell's sister, Marie Baars. Campbell University was named as the residual beneficiary and executor. On 25 January 1988, Mr. Upchurch drove Mrs. Campbell to a bank in Lillington to execute her will. Mrs. Campbell and her witnesses appeared before a notary and made the will self-proving. The total value of the estate disposed of by the will was less than $350,000.00. The remainder of Mrs. Campbell's assets (about $1,000,000.00) was governed by the terms of the Florida trust she had created in 1985.

When Mrs. Campbell returned to Miami in late January 1988, she took with her a number of house plans, as well as drafts of the pro-

posed contracts with the University. A few days later, she contacted Mr. Upchurch and told him she wanted to revoke the Florida trust. Mr. Upchurch discussed the matter with Mr. Johnson, who advised him to prepare a revocation letter for Mrs. Campbell. Mr. Upchurch subsequently took the letter to Florida, where Mrs. Campbell reviewed it, signed it before a notary, and mailed it to her Florida trust officer, Mr. Dave Couch. Mr. Couch contacted Mr. Upchurch for information regarding the relationship between Mrs. Campbell and the University. On 17 February 1988, Mr. Upchurch sent Mr. Couch a letter describing two University trusts into which the Florida trust assets would be transferred, if Mrs. Campbell approved. On 29 February 1988, the trust officer wrote a letter revoking the trust and sent the letter to Mrs. Campbell for her signature.

Within the next several months, Mrs. Campbell executed a number of documents. Each document was prepared by Mr. Johnson and executed by Dr. Norman A. Wiggins, the President of Campbell University. On 10 March 1988, Mrs. Campbell executed a Contract and Agreement, in which she agreed to move to Buies Creek, North Carolina, buy or build a home at her own expense, provide for her own living expenses, and pay her nursing home expenses (should they arise). Campbell University agreed to provide her with live-in care at its own expense. On the same date, Mrs. Campbell also executed a Charitable Remainder Annuity Trust Agreement. Under the Agreement, Mrs. Campbell made a deposit of $350,000.00 and the University agreed to pay her $28,000.00 per year in twelve equal monthly installments, beginning 1 May 1988. Upon her death, the remainder of the money was to go to the University for its general purposes. Mrs. Campbell also executed a Revocable Asset Management Trust Agreement on 1 April 1988 and made an initial deposit of over $638,000.00. Mrs. Campbell agreed to allow the University to invest the funds, and the University agreed to provide Mrs. Campbell with quarterly reports, pay all interest and/or principal to her upon her request, and allow the funds to be used to supplement the estate to satisfy specific bequests under Mrs. Campbell's will. Any funds remaining at Mrs. Campbell's death were to go to the University for its general purposes.

Mrs. Campbell spent the spring and early summer of 1988 taking care of her affairs in Miami. In July 1988, officials from Campbell University drove a University-owned truck to Florida, packed Mrs. Campbell's belongings, and settled her into an apartment near the campus while her house was being built in the Keith Hills

Subdivision. The title work associated with Mrs. Campbell's land purchase was done by Mr. Johnson.

On 7 April 1989, Mrs. Campbell executed a power of attorney in favor of Mr. Upchurch and, in the alternative, Dr. Wiggins. Mr. Johnson again handled the preparation of the document. Upon the death of her sister Marie Baars in 1989, Mrs. Campbell was nominated by her relatives (including the caveators in the present action and her other heirs) to serve as executrix of her sister's estate. She did so without incident. On 11 January 1990, Mrs. Campbell executed a codicil to her 1988 will, in which the $100,000.00 originally intended for Marie was instead given to the building fund for the University's School of Law. The codicil expressly ratified and affirmed all other provisions of her 1988 will. Mrs. Campbell executed the codicil in Mr. Johnson's office, and she and her witnesses also took steps to make it self-proving. In return, the University agreed to have a portrait of Mrs. Campbell painted and hung in the law school; a floor in that building was also named for her first husband, Albert Ezell. The University held a banquet and dinner in Mrs. Campbell's honor in July 1990, during which her portrait was unveiled. Several family members attended the banquet, including three of the caveators.

Mrs. Campbell lived in her home in the Keith Hills Subdivision for the next several years. She remained active, alert, and independent through the early 1990s. On 28 November 1990, Mrs. Campbell executed a Deed Reserving a Life Estate for her home; the document deeded the house to Campbell University. In 1993, Mrs. Campbell gave the University a gift of approximately $180,000.00. The power of attorney in favor of Dr. Wiggins was activated on 30 June 1993.

As Mrs. Campbell grew older, University employees increasingly assisted her with her finances, transportation, and daily living needs. Around 1993, Mrs. Campbell began exhibiting some short-term memory loss. Some of Mrs. Campbell's relatives noticed the change, though they disagreed as to the cause of the problem. During a March 1994 visit to the Geriatric Clinic at Duke University, Mrs. Campbell was diagnosed with Alzheimer's Disease; the doctors estimated that she could have suffered from the disease for approximately five years. The doctors also stated that it was necessary for Mrs. Campbell to have someone with her 24 hours a day. In keeping with the previously executed Contract and Agreement, Campbell University maintained a staff of people in Mrs. Campbell's home around the clock. Mrs. Campbell was upset by the constant companionship and informed the University of her unhappiness. Ultimately, however, she

acquiesced and accepted, to an extent, the 24-hour-a-day care provided by her companions. Though Mrs. Campbell's family knew University companions were tending to her around the clock, they were not notified that Mrs. Campbell had been diagnosed with Alzheimer's Disease until sometime after her visit to the Geriatric Clinic in March of 1994.

Mrs. Campbell became noticeably weaker from 1994 to 1996. Her appearance became more unkempt, and she resisted suggestions from her companions and family members to buy new clothing and practice good hygiene. The University companions had some success with Mrs. Campbell, but she continued to argue each time these subjects were broached. During these years, caveators Fred and Carole Baars began inquiring about their aunt's health and financial well-being. They were told by University officials that Mrs. Campbell was being cared for to the best of their ability. In May 1996, Mrs. Campbell fell and broke her hip and was taken to a local hospital. She subsequently died in the hospital on 16 May 1996.

Upon Mrs. Campbell's death, Dr. Wiggins presented her 1988 will and the 1990 codicil to the probate court. The Harnett County Clerk of Superior Court issued Letters Testamentary which appointed Dr. Wiggins, in his capacity as President and Chief Executive Officer of Campbell University, as the executor of Mrs. Campbell's estate. Soon thereafter, Dr. Wiggins took the "Oath of Executor" and has served in that capacity up to the present time.

Caveators filed a *caveat* to Mrs. Campbell's will on 16 May 1999. During discovery, they learned for the first time about some of the documents which Mrs. Campbell had signed and the extent to which Campbell University benefitted from her will and codicil. After discovering this information, caveators filed a civil complaint in Harnett County on 15 June 2000. The complaint alleged that defendants Campbell University, Inc., Norman A. Wiggins (individually and in his capacity as executor of Mrs. Campbell's estate), and William A. Johnson unduly influenced Mrs. Campbell and breached their fiduciary duty to her while acquiring *inter vivos* transfers of her assets in favor of Campbell University.

Defendants Johnson, Wiggins, and Campbell University filed answers which contained both responses to the allegations of the complaint and motions to dismiss. On 7 November 2000, the Harnett County Superior Court filed two orders which dismissed the complaint against defendants Wiggins and Campbell University with prej-

udice, and dismissed the complaint against defendant Johnson with prejudice in its entirety. The dismissals were based upon the statutes of limitations, lack of subject matter jurisdiction, a noncognizable cause of action, and a failure by Fred and Carole Baars to allege misconduct on Wiggins' part in his role as Mrs. Campbell's attorney-in-fact. When Fred and Carole Baars appealed to this Court, we affirmed the trial court's dismissal of their complaint. *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 558 S.E.2d 871 (2002). The Baars' Petition for Rehearing was denied by this Court, and the North Carolina Supreme Court later denied the Baars' Petition for Discretionary Review. *Baars v. Campbell Univ., Inc.*, 355 N.C. 490, 563 S.E.2d 563 (2002).

Caveators pursued their caveat proceeding in Harnett County Superior Court. The parties employed a number of discovery devices, including interrogatories and depositions. On 15 March 2001, Campbell University (the propounder) moved for partial summary judgment on the issue of undue influence as to the will and the codicil. Attached to the motion were a number of supporting affidavits from Campbell University employees and Mrs. Campbell's family members. On 18 April 2001, caveators filed a response in opposition to the University's motion for summary judgment and included supporting affidavits from each caveator, as well as two expert witnesses. Mr. John Huggard, an expert witness on estate planning, opined that the documents comprising Mrs. Campbell's estate plan were not in her best interests and were improperly procured by Campbell University. Mr. Bradley Bodager, an expert on the principles and standards of fundraising, believed Campbell University's actions constituted overreaching and were questionable.

On 24 April 2001, the trial court granted the motion for partial summary judgment and dismissed the *caveat*. Later the same day, the trial court conducted a jury trial to determine whether the documents offered by Campbell University were the valid will and codicil of Mrs. Campbell. As part of its instructions, the trial court instructed the jury that the will and codicil were "executed according to the requirements of law[.]" The jury found that the will and codicil were valid and belonged to Mrs. Campbell. On 25 April 2001, the trial court entered a judgment ordering that the documents be probated in solemn form. Caveators appealed from both the summary judgment order dated 24 April 2001 and the judgment dated 25 April 2001.

On appeal, caveators argue that the trial court committed reversible error by (I) entering summary judgment against them on

the issue of undue influence by the propounder, Campbell University; and (II) instructing the jury that the will and codicil were validly executed. For the reasons set forth herein, we disagree with caveators' arguments and uphold both the order and the judgment of the trial court.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). "Where a motion for summary judgment is supported by proof which would require a directed verdict in [the movant's] favor at trial he is entitled to summary judgment unless the opposing party comes forward to show a triable issue of material fact." *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526, *disc. review denied*, 290 N.C. 308, 225 S.E.2d 832 (1976). Summary judgment should be entered cautiously. *Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980). However, if the party with the burden of proof cannot prove the existence of each essential element of its claim or cannot produce evidence to support each essential element, summary judgment is warranted. *See Development Corp. v. James*, 300 N.C. 631, 638, 268 S.E.2d 205, 210 (1980). "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

[1] Caveators first argue that partial summary judgment is not authorized in caveat proceedings because the filing of a *caveat* necessitates a probate proceeding in solemn form with a jury trial. Caveators note such a proceeding is *in rem* and believe the Rules of Civil Procedure provide no authority for a judge, rather than a jury, to determine that the will is valid. While it is true that the issue of *devisavit vel non* (a determination of whether the will is valid) must be tried by a jury, *In re Will of Roediger*, 209 N.C. 470, 476, 184 S.E. 74, 77 (1936), it does not follow that partial summary judgment as to other issues (such as undue influence) is prohibited. Our Court has previously upheld grants of partial summary judgment or directed verdict on the issue of undue influence. *See In re Estate of Whitaker*, 144 N.C. App. 295, 547 S.E.2d 853, *disc. review denied*, 354 N.C. 218, 555 S.E.2d 278 (2001); and *In re Will of Sechrest*, 140 N.C. App. 464, 537 S.E.2d 511 (2000), *disc. review denied*, 353 N.C. 375, 547 S.E.2d

16 (2001). Having determined that partial summary judgment is authorized in *caveat* proceedings, we turn to the substantive arguments presented by the parties.

"The purpose of a caveat is to determine whether the paper-writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded." *In re Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5, *cert. denied*, 276 N.C. 575 (1970). "The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form." *Id.* A direct attack by *caveat* has been held a complete and adequate remedy at law, such that a plaintiff is not entitled to equitable relief. *Johnson v. Stevenson*, 269 N.C. 200, 204, 152 S.E.2d 214, 217 (1967). We further note that "[a]n attack on the validity of a will most commonly deals with issues involving undue influence and testamentary capacity." *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 72, 407 S.E.2d 607, 609 (1991).

Fiduciary Relationship

[2] By filing a *caveat* to Mrs. Campbell's will and codicil, caveators undertook the burden of proving that undue influence was exerted upon Mrs. Campbell by the propounders. Caveators maintain the University (and its General Counsel, Mr. Johnson) had a fiduciary duty toward Mrs. Campbell which began when she executed the will Mr. Johnson prepared for her. Because of the fiduciary relationship, caveators argue that the University bore the burden of proving, by the greater weight of the evidence, that the transaction was open, fair and honest. Caveators' filing of the caveat and their allegation of a fiduciary relationship result in the following burdens upon the parties:

> In a proceeding to caveat a will, the caveators are required to handle the laboring oar on the issue of undue influence. . . . True, in certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation of itself, and without more, raises a presumption of fraud or undue influence, as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted. . . .
>
> . . . It is sufficient to rebut a presumption by evidence of equal weight rather than by a preponderance of the evidence, where

> the burden of the issue is on the opposite party. . . . Strictly speaking, the burden of the issue, as distinguished from the duty to go forward with evidence, does not shift from one side to the other, for the burden of proof continues to rest upon the party who alleges facts necessary to enable him to prevail in the cause. It is required of him who thus asserts such facts to establish them before he can become entitled to a verdict in his favor; and, as to these matters, he constantly has the burden of the issue, whatever may be the intervening effect of different kinds of evidence or of evidence possessing under the law varying degrees of probative force.

In re Will of Atkinson, 225 N.C. 526, 530-31, 35 S.E.2d 638, 640-41 (1945) (citations omitted). Stated another way,

> "The burden of the issue—that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden of duty of going forward and producing evidence—never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced."

Winslow v. Hardwood Co., 147 N.C. 275, 277, 60 S.E. 1130, 1131 (1908) (quoting 1 Elliott on Evidence, 139).

> The law is well settled that in certain known and definite "fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted." *Lee v. Pearce*, 68 N.C., 76. Among these, are, . . . (2) attorney and client, in respect of the matter wherein the relationship exists . . . .

> "When one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest." *Smith v. Moore* (7th syllabus), 149 N.C., 185, 62 S.E., 892 [1908].

McNeill v. McNeill, 223 N.C. 178, 181, 25 S.E.2d 615, 616-17 (1943); *see also In re Will of Amelia Everett*, 153 N.C. 83, 68 S.E. 924 (1910).

The University has admitted that it had a fiduciary responsibility to Mrs. Campbell as of 10 March 1988, a date that fell after the execution of the will, but before the execution of the codicil. The University also admitted that Mr. Johnson had a fiduciary relationship with Mrs. Campbell with respect to the drafting of her will. However, the University denied that it had a fiduciary relationship with Mrs. Campbell as of 25 January 1988 (the date the will was executed).

Even if we agree that a fiduciary relationship between Mrs. Campbell and the University existed as of the date her will was executed—25 January 1988—we believe the University has offered sufficient evidence to rebut the presumption of undue influence and has shown that the transaction was open, fair, and honest. Mrs. Campbell freely discussed her estate planning concerns with Mr. Upchurch and inquired about possible arrangements between herself and the University. Though Mr. Johnson served as General Counsel for Campbell University at the time he drafted Mrs. Campbell's will and codicil, his relationship to the University was fully explained to Mrs. Campbell by both Mr. Upchurch and Mr. Johnson. Mrs. Campbell indicated she understood, but chose to use Mr. Johnson as her attorney. Mr. Upchurch's involvement in the meeting between Mrs. Campbell and Mr. Johnson was expressly requested by Mrs. Campbell. Mrs. Campbell asked Mr. Johnson to prepare all the documents she eventually signed, and he did so at her request. Though the University paid Mr. Johnson for drafting Mrs. Campbell's will, Mrs. Campbell was aware of the arrangement and agreed to it. Before going to the meeting with Mr. Johnson in January 1988, Mrs. Campbell considered bequests she wanted to make and gave Mr. Johnson a list of her decisions. Even though the list was probably typed by someone in the Advancement Office at Campbell University, it represented Mrs. Campbell's wishes for the distribution of her estate upon her death.

Finally, though caveators seek to cast doubt upon the quality of advice and representation given to Mrs. Campbell by Mr. Johnson and the University, we do not believe these arguments are persuasive. Mr. Johnson drafted Mrs. Campbell's will based on his discussions with her and the list of bequests she wished to make. Caveators also point to the changes between Mrs. Campbell's 1984 and 1988 wills and have speculated as to why Mrs. Campbell changed or eliminated bequests from her earlier will. However, the University has come forward with sufficient evidence showing that Mrs. Campbell was aware of Mr. Johnson's relationship with the University; that she nonetheless wanted to use him as her attorney, and did so; and that her wishes were reflected in the will and all the other estate planning documents prepared for her by Mr. Johnson.

Based upon the record, we hold the University carried its burden of proving that its fiduciary relationship with Mrs. Campbell was open, fair, and honest. We therefore turn to the central issue presented by this appeal; namely, whether Mrs. Campbell was unduly influenced by the propounder.

Undue Influence

[3] To prevent partial summary judgment against them on the issue of undue influence, caveators had to prove the existence of "(1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence." *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (quoting *Griffin v. Baucom*, 74 N.C. App. 282, 286, 328 S.E.2d 38, 41, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 481 (1985)), *disc. review denied*, 348 N.C. 693, 511 S.E.2d 645 (1998). Caveators assert that they have proven the four elements of undue influence. We recognize that

> [b]ecause the existence of undue influence is usually difficult to prove, our courts have recognized that it must usually be proved by evidence of a combination of surrounding facts, circumstances and inferences from which a jury could find that the person's act was not the product of his own free and unconstrained will, but instead was the result of an overpowering influence over him by another.

Dunn, 129 N.C. App. at 328, 500 S.E.2d at 104. *See also In the Matter of the Will of Everhart*, 88 N.C. App. 572, 574, 364 S.E.2d 173, 174, *disc. review denied*, 322 N.C. 112, 367 S.E.2d 910 (1988). The influ-

ence exerted upon Mrs. Campbell had to be "of a kind which operates on the mind of the testator at the very time the will is made, and causes its execution." *In re Will of Thompson*, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958). Moreover, caveators had to prove that each time an instrument was executed, *undue* influence was exerted upon Mrs. Campbell. For influence to be undue,

> "there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing [her] to make a will which [she] otherwise would not have made. (citations omitted)."

In re Will of Prince, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713-14 (1993) (quoting *In re Will of Kemp*, 234 N.C. 495, 498, 67 S.E.2d 672, 674 (1951)). Undue influence has also been described as

> "a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force. To constitute such undue influence, it is not necessary that there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is a fraudulent influence in the eye of the law."

In re Will of Harris, 218 N.C. 459, 461, 11 S.E.2d 310, 311 (1940) (citations omitted) (quoting *In re Will of Turnage*, 208 N.C. 130, 179 S.E. 332 (1935)).

Our Supreme Court has identified seven factors that are probative on the issue of undue influence:

1. Old age and physical and mental weakness of the person executing the instrument.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the instrument is different and revokes a prior instrument.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

Hardee v. Hardee, 309 N.C. 753, 756-57, 309 S.E.2d 243, 245 (1983); *see also In re Andrews*, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980). "[T]he caveator need not prove the existence of every factor. However, the caveator must present sufficient evidence to make out a *prima facie case*." *In re Estate of Forrest*, 66 N.C. App. 222, 225, 311 S.E.2d 341, 343, *aff'd*, 311 N.C. 298, 316 S.E.2d 55 (1984).

As to the first factor, caveators point to the fact that Mrs. Campbell was 81 years old when she signed her will, and 83 years old when she signed the codicil. They also argue that she may have been suffering from Alzheimer's Disease when she executed those documents. According to caveators, Mrs. Campbell was lonely and vulnerable in Florida when she first met Campbell University employees and lacked the ability to handle and understand complicated legal and financial documents. Caveators also believe Mrs. Campbell could have been easily influenced and felt overwhelmed by her financial situation, as evidenced by her 1986 call to her nephew Davis Bulluck for assistance with her finances.

With regard to the second factor, caveators point to the frequent association and supervision of Mrs. Campbell by agents of the University. Caveators trace the association from Mrs. Campbell's January 1988 visit to North Carolina, through her move to Buies Creek in July 1988, and onward until her death on 16 May 1996. They further believe that Mrs. Campbell was in the company of Mr. Upchurch "at every critical step of the way[.]"

With regard to factor three, caveators argue that, even though they were able to visit Mrs. Campbell in her home in Buies Creek, there was "almost always" a Campbell University representative present during the visits. For this proposition, caveators rely on testimony from Mrs. Campbell's relatives.

As to factors four and five, caveators point to the differences between Mrs. Campbell's 1984 and 1988 wills. They also note that the 1988 will was made in favor of one with no blood ties to Mrs. Campbell, *i.e.*, the University.

As to factor six, caveators maintain the 1988 will and codicil effectively disinherited the natural objects of Mrs. Campbell's bounty—namely, blood relatives and relatives by marriage. They argue there was no change in any of their relationships with Mrs. Campbell between 1984 and 1988; thus, they believe the only explanation for the differences in the two wills was undue influence exerted by the University upon Mrs. Campbell. Caveators also point to the affidavits of Emerson Campbell and his wife Edith and a letter written by one of Mrs. Campbell's sisters; these individuals believed Mrs. Campbell did not understand the legal effects of the documents she signed, particularly with regard to ownership of her home in the Keith Hills Subdivision.

Lastly, with regard to factor seven, caveators argue the 1988 will was procured by Campbell University, the primary beneficiary. In sum, caveators believe their evidence would permit a jury to infer that the will and the other documents signed by Mrs. Campbell were not the result of her free will, but rather the intent of Campbell University. Thus, they believe summary judgment was precluded as a matter of law.

While caveators have made the arguments set forth above, we do not believe they have carried their burden of proving undue influence. Specifically, caveators have failed to show that Mrs. Campbell was susceptible to undue influence when she executed her will in 1988 and her codicil in 1990. Our case law has noted that the mental condition of a testator at the time he or she makes a will or codicil is " 'perhaps, the strongest factor leading to the answer to the [fraud and undue influence] issue.' " *In re Will of Ricks*, 292 N.C. 28, 37-38, 231 S.E.2d 856, 863 (1977) (quoting *Goins v. McLoud*, 231 N.C. 655, 658, 58 S.E.2d 634, 637 (1950)). Without evidence that the testator is susceptible to fraud or undue influence, evidence of undue influence itself is often too tenuous for consideration. *Id.* at 37, 231 S.E.2d at 863.

The evidence of record indicates that Mrs. Campbell possessed a sharp mind, a quick wit, and a good sense of humor. She was physically healthy through the late 1980s and early 1990s, as evidenced by the fact that she traveled great distances on her own and managed her own business, personal, and financial affairs. Mrs. Campbell was opinionated and made her wishes known to those with whom she dealt. She was quite active and many people had the opportunity to see her. Those that did see her described her as "spunky," "sharp," "mentally alert," "intelligent," "competent," "prudent," "strong-

willed," and "level-headed." Mrs. Campbell deliberated for some time over her move to North Carolina and considered several possible relocation sites before settling down in Buies Creek. Even though several close relatives asked her to move in with them, Mrs. Campbell refused and expressed her desire to live on her own and remain independent as long as she could. Her close family relatives, including Mrs. Meissner and Mr. Bulluck, knew some of the details of Mrs. Campbell's dealings with Campbell University, but trusted her to make her own decisions and expressed no concern regarding the agreements Mrs. Campbell was contemplating.

Mrs. Campbell had a lifetime of dealing with complex financial issues. She was the primary breadwinner during her first marriage to Albert Ezell and dealt with business and personal matters after the death of her second husband, Harold Campbell. Even though she called her nephew Davis Bulluck for assistance in 1986, he ultimately concurred with her belief that her bank was withholding money it owed to her. Mrs. Campbell also served as executrix of her sister Marie Baars' estate after Marie died in 1989; none of the caveators ever objected to her handling of Marie's estate. Significantly, this date occurred over a year after Mrs. Campbell executed her will.

Though caveators argue Mrs. Campbell was in the custody of and subject to the "constant" association of representatives from Campbell University for a number of years, this argument does not reflect the entire scenario then taking place. The record and affidavits indicate Mrs. Campbell made three visits to the University between June 1987 and January 1988, and that Mr. Upchurch visited her in Miami in April 1987. Mrs. Campbell made an additional visit with Mrs. Meissner to the University for Homecoming in October 1987; a few days later, Mrs. Campbell, Mrs. Meissner, and Mr. and Mrs. Upchurch went to the Outer Banks for a short visit.

Mrs. Campbell spent the remainder of her time from 1986-1988 in Miami, where she continued to manage her affairs and conduct her life as she saw fit. During 1988, Mrs. Campbell made one trip in January to execute her will and moved to Buies Creek for good in July. Between January and July 1988, Mr. Upchurch visited Miami for one day and later made a brief unofficial visit with his wife while they were vacationing in Florida. Once Mrs. Campbell moved to North Carolina, University employees checked on her and drove her around as needed. However, part-time companions were not employed until after the codicil was executed in early 1990, and full-time companions did not begin staying with Mrs. Campbell until March 1994. Thus, it

appears Mrs. Campbell was not under anyone's custody or supervision when she executed her will and codicil. We also discern no instances in which Mrs. Campbell's family was prevented from seeing her and communicating with her. In fact, when Mrs. Campbell moved to Buies Creek, caveators had opportunities to see her and did so on numerous occasions.

We also note that caveators had little to do with Mrs. Campbell over the years, especially while she lived in Florida. Mrs. Campbell told others that only Mrs. Meissner cared about her and tried to find out if she needed anything; she did not say the same about any of the caveators. Though Emerson Campbell and his wife kept in touch with Mrs. Campbell around once a year, they did not visit her for many years after Harold Campbell died; moreover, the main purpose of their one visit to North Carolina was to retrieve a china cabinet Mrs. Campbell agreed to give them. Over time, they assumed she was dead, while she was in fact alive and living in North Carolina. When Mrs. Campbell moved to Buies Creek, caveators had opportunities to see her; the fact that they did not see her more frequently was not the University's doing.

We believe caveators failed to present specific facts showing that Mrs. Campbell's will and codicil were executed solely as a result of fraudulent and overpowering influence by Campbell University that controlled Mrs. Campbell at the time she executed the documents. *See Whitaker*, 144 N.C. App. at 299-302, 547 S.E.2d at 857-59. Upon review, caveators' evidence appears to be comprised of conclusions rather than statements of fact. As such, they do not assist caveators in carrying their considerable burden.

We note that mere opportunity to exert undue influence does not prove its existence; rather, the effects must be evident in the documents. The University argues, and we agree, that caveators' evidence of procurement was not sufficient to establish undue influence and did not preclude summary judgment on that issue. While we appreciate the difficulties inherent in undue influence cases, we are guided by past decisions of this Court where stronger evidence than that presented by caveators was still deemed insufficient to prove undue influence. *See In re Will of Prince*, 109 N.C. App. 58, 425 S.E.2d 711; and *In re Will of Sechrest*, 140 N.C. App. 464, 537 S.E.2d 511.

Before meeting with Mr. Johnson, Mrs. Campbell made a list of bequests she wanted to make to two charities and a number of her relatives. Mr. Johnson formalized her wishes into the 1988 will. When

Mrs. Campbell's sister Marie died in 1989, Mrs. Campbell considered what to do with the money she had set aside for Marie and ultimately decided to execute a codicil bequeathing the money to the University's Law School Building Fund.

Mrs. Campbell had an absolute right to disinherit anyone she chose. *In re Will of Edgerton*, 29 N.C. App. at 63, 223 S.E.2d at 527; *Kidder v. Bailey*, 187 N.C. 505, 507, 122 S.E.2d 22, 23 (1924). Moreover, a will is not void if it has been obtained by fair argument or persuasion, even if an unequal disposition of the testator's property is the end result. *See In re Will of Franks*, 231 N.C. 252, 260, 56 S.E.2d 668, 675 (1949), *reh'g denied*, 231 N.C. 736, 57 S.E.2d 315 (1950). "It is not necessary that the testator should be able to dispose of his property with judgment and discretion—wisely or unwisely, for he may do with his own as he pleases; but it is enough if he understands the nature and effect of his act and knows what he is about." *In re Craven*, 169 N.C. 561, 567, 86 S.E.2d 587, 591 (1915). Caveators cannot prove undue influence, so long as Mrs. Campbell understood the nature and effect of her acts and what she was about to do when she executed her will and codicil.

The fact that Mrs. Campbell's 1984 and 1988 wills were different does not, without more, show that the 1988 will was the product of undue influence. Likewise, the facts that the 1988 will benefits one with whom Mrs. Campbell had no blood ties (*i.e.*, the University) cannot alone show undue influence. Given Mrs. Campbell's relationship with her relatives and the fact that they were not the direct sort of "natural objects of her bounty," we cannot say the will and codicil were unnatural or irrational.

When Mrs. Campbell executed her 1984 will, she had only been widowed for two months and her husband's estate had not been administered. She made bequests to two charities, her brother-in-law, and several relatives. By 1988, she was not particularly close to any of her nieces and nephews, except Mrs. Meissner. Despite this fact, all individual bequests in her 1988 will were to blood relatives and included her sisters, nieces and nephews. The 1984 will did not provide for all her blood relatives. While she had a warm relationship with her brother-in-law Emerson Campbell and his wife during Harold Campbell's lifetime, she saw less of Emerson and Edith Campbell after Harold's death, and he was not a blood relative. The evidence indicates Mrs. Campbell was especially fond of her sister Marie and was concerned about her well-being. Her concern over Marie was evidenced by the fact that the 1984 will gave her $5,000.00, while the

1988 will increased the bequest to $100,000.00. Indeed, all the individual beneficiaries in the 1988 will were blood relatives.

Mrs. Campbell's interest in charity was evident in both her 1984 and her 1988 wills. Mrs. Campbell was impressed by the University and believed it "was really a good place and doing really good things." Mrs. Campbell appreciated the University's acknowledgment of her gifts and contrasted that response to those of her relatives, who were more distant in their communications with her. Mrs. Campbell confided to some people that her relatives were not very interested in her life and that she had negotiated a good arrangement with Campbell University for her care. She stated that she wanted the University to have what she had, and her 1988 will and codicil reflected that testamentary intent. We hold caveators have failed to carry their burden of showing undue influence upon Mrs. Campbell by Campbell University. Accordingly, caveators' first assignment of error is overruled.

Peremptory Jury Instruction

[4] By their second assignment of error, caveators argue the trial court erred by instructing the jury that the will and codicil were duly executed. Again, we disagree.

At trial, the propounder called all the witnesses to Mrs. Campbell's will and codicil, as well as the notaries who took down the acknowledgments. Although the trial took place a decade after the execution of the documents, the witnesses presented uncontroverted testimony that all statutes governing the execution of wills and codicils were complied with by Mrs. Campbell and her witnesses. Both the will and the codicil were self-proving. Caveators presented no contrary evidence to the jury.

We have carefully reviewed the record and conclude the trial court properly instructed the jury on this issue, as competent, uncontroverted evidence of proper execution of both documents was presented. *See* N.C. Gen. Stat. §§ 31-3.3 and 31-11.6 (2001). This assignment of error is therefore overruled.

Upon thoughtful review of the record and the arguments presented by the parties, we conclude the trial court did not err in granting partial summary judgment on the issue of undue influence and did not err in its instruction to the jury regarding the execution of the will and the codicil. The trial court's order granting partial summary judgment for Campbell University on the issue of undue influ-

ence is affirmed. We discern no error in the trial court's instruction to the jury and in the jury's verdict finding the proffered will and codicil to be the valid will and codicil of Gladys Baars Campbell.

As to order entered 24 April 2001—affirmed.

As to judgment entered 25 April 2001—no error.

Judges WALKER and BRYANT concur.

ALGIE D. TOOMER, JR., PLAINTIFF v. GARLAND GARRETT, JOHN DOE #1, JOHN DOE #2, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, STATE OF NORTH CAROLINA, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANTS

No. COA01-1385

(Filed 31 December 2002)

1. **Constitutional Law— substantive due process—release of personnel file**

The trial court erred by granting defendant's motion to dismiss for failure to state a claim where plaintiff was a state employee who alleged that his substantive due process rights and his right to privacy under the federal and state constitutions were violated by the release of his entire personnel file, including his social security number, his medical diagnosis, the names and addresses of family members, and his personal financial data. Plaintiff alleged an intentional and unjustified disclosure which, if proven, offends a sense of justice and which overcomes the high level of deference accorded to governmental action on rational basis review.

2. **Civil Rights— § 1983 claim—money damages—state not a person**

The trial court did not err by dismissing plaintiff's 42 USC § 1983 claim for money damages against a state and state officials arising from the release of a state employee's personnel file. The State and its officials acting in their official capacities are not considered persons under section 1983 for the recovery of monetary damages.

3. Civil Rights— § 1983 claim—injunctive relief against state—state as person

The trial court erred by dismissing a 42 U.S.C. § 1983 claim for injunctive relief against the State and its officials arising from the release of a personnel file. The State and its officials acting in their official capacities are considered persons under section 1983 for injunctive relief.

4. Immunity— qualified—considered on 12(b)(6) motion

The trial court erred in a 42 U.S.C § 1983 action by refusing to consider qualified immunity on a motion to dismiss for failure to state a claim on the reasoning that qualified immunity must be pleaded as a defense. However, the trial court properly ruled that it could not consider defendants' affidavits on the subject.

5. Immunity— qualified—clearly established right

Two state officials sued under 42 U.S.C § 1983 for releasing a state employee's personnel file were not entitled to a dismissal for failure to state a claim based upon qualified immunity. Qualified immunity requires a determination of whether the right in issue was clearly established at the time it was allegedly violated; the right to be free of arbitrary, abusive, and illegitimate government action such as is described in this complaint is a clearly established right of which any person in an official position would have been aware.

6. Constitutional Law— procedural due process—release of personnel file

A former state employee failed to state a claim for violation of his procedural due process rights in an action arising from the release of his personnel file where plaintiff did not allege that the information was released in connection with a demotion or dismissal; any expectation plaintiff may have had in the continued confidentiality of his personnel file was not the kind of "monetizable" property interest generally protected by procedural due process; and plaintiff made no argument that the North Carolina Constitution provides greater due process protection for his interest than the federal constitution.

7. Constitutional Law— equal protection—release of personnel file—class of one

Plaintiff, a former state employee, successfully stated a 42 U.S.C § 1983 claim for violation of the Equal Protection Clause

under the class of one theory arising from the release of his personnel file while the files of others similarly situated were not released. Plaintiff succeeded in alleging that there is no rational basis for defendants' actions.

8. Constitutional Law— First Amendment—grievance filed against state—retaliation

A former state employee did not satisfy the first element of a 42 U.S.C § 1983 First Amendment retaliation claim where he asserted that his personnel file was disclosed to the media and public in retaliation for a successful employment grievance he had filed against the State. The contention that the right to file employment grievances against the State is protected under the right to petition for redress of grievances has not been adopted by the North Carolina courts or the Fourth Circuit.

9. Privacy— intrusion into seclusion—statement of claim

A former state employee successfully stated a claim for intrusion into seclusion where the action rose from the release of his personnel file. Intrusion into seclusion is defined as an intentional intrusion highly offensive to a reasonable person; the unauthorized examination of the contents of one's personnel file, especially when the file includes sensitive information such as medical diagnosis and financial information, would be highly offensive.

10. Jurisdiction— subject matter—sovereign immunity

Although matters outside the pleadings may be considered in evaluating an assertion of lack of subject matter jurisdiction, it has not been decided whether sovereign immunity is an issue of subject matter jurisdiction.

11. Privacy— invasion by State—sovereign immunity

A claim for tortious invasion of privacy against State agencies and defendants in their official capacities was properly dismissed where there was not an allegation of waiver of sovereign immunity that would subject defendants to this suit.

12. Privacy— release of personnel file—retaliatory and malicious—official capacity immunity

State officials were not entitled to dismissal of a tortious invasion of privacy claim on the basis of official capacity immunity where plaintiff's complaint contained multiple allega-

tions that the release of his personnel file was done outside the scope of authority, maliciously, in bad faith, and for retaliatory reasons.

13. Contracts— settlement agreement—action for breach—statement of claim

Plaintiff successfully stated a claim for breach of contract even though he may be entitled to only nominal damages or injunctive relief where he alleged the existence of a settlement contract with the State, that the agreement provided that files pertaining to plaintiff's employment discrimination charge would be maintained separately from his personnel file, and that defendants included the contract in his personnel file.

14. Immunity— sovereign—breach of contract and malicious conduct claims

Claims of breach of contract and malicious and unauthorized conduct by state officials precluded dismissal on sovereign immunity and official immunity grounds.

15. Negligence— release of personnel file—statement of claim

Plaintiff, a former state employee, adequately stated a claim for relief for gross negligence arising from the release of his personnel file where there were allegations that there was a duty to keep the file confidential and that the release of the file was a proximate cause of plaintiff being harassed by third parties.

16. Immunity— sovereign—allegations of gross negligence and malice

A gross negligence claim against the State and other defendants in their official capacities was properly dismissed where plaintiff did not sufficiently allege waiver of sovereign immunity; however, plaintiff sufficiently alleged malice and abuse of authority that some of the defendants were not entitled to dismissal of the claim on the basis of official immunity.

17. Conspiracy— civil—release of personnel file

The trial court erred by dismissing a civil conspiracy claim arising from the release of a personnel file for failure to state a claim where plaintiff alleged that several individuals acted in concert to injure plaintiff and that defendants wantonly or intentionally schemed to retaliate against plaintiff by committing the unlawful acts alleged.

18. Immunity— sovereign—not alleged—corrupt conduct

The State and other defendants were entitled to dismissal of a civil conspiracy claim arising from the release of a personnel file where plaintiff did not allege waiver of sovereign immunity; however, individual defendants against whom plaintiff alleged malicious and corrupt conduct will not be protected by official immunity.

Appeal by plaintiff from order entered 23 April 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 17 September 2002.

The McGuinness Law Firm, by J. Michael McGuinness; and Richard C. Hendrix, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Tiare B. Smiley, Assistant Attorney General Neil Dalton, Assistant Attorney General Sarah Ann Lannom, for the State.

Moss, Mason & Hill, by William L. Hill, on behalf of Southern States and North Carolina Police Benevolent Associations, amicus curiae.

MARTIN, Judge.

Plaintiff, a former state government employee, filed this action alleging multiple state and federal claims arising from the alleged disclosure and dissemination of the contents of his state personnel file in and after April 1997. His complaint includes claims for violations of equal protection of the laws and substantive and procedural due process under the U.S. and North Carolina Constitutions, violation of his right to petition the government for redress of grievances under the First Amendment, and common law tortious invasion of privacy, gross negligence, civil conspiracy, and breach of contract.

In summary, plaintiff alleged that he had been a State employee since September 1986 and that his employment relationship was governed, in part, by the provisions of Chapter 126 of the North Carolina General Statutes. During his employment, initially with the Department of Correction, plaintiff asserted a claim against the Department for employment discrimination. The claim was settled in 1991; plaintiff and the Department of Correction (NCDOC) entered into a negotiated settlement agreement, which provided, *inter alia*,

that all files relating to the employment discrimination claim would "be maintained in an area separate and apart from" plaintiff's personnel file. Plaintiff alleged that he was subsequently employed by the Department of Transportation (NCDOT). In 1996, plaintiff asserted an employment claim against NCDOT; that claim was settled by agreement dated 20 February 1997.

Plaintiff alleged that in April 1997, defendant Garrett, who was Secretary of NCDOT and was named in both his official and individual capacities, and Does #1 and #2, whose names are unknown to plaintiff, released plaintiff's personnel records to various news media and to the public after having been warned by NCDOT's personnel officers that such release would be unlawful. Plaintiff alleged that defendants allowed false information to be inserted into the records, kept his records separate from those of other state employees so as to facilitate access to them, and allowed unauthorized persons to go through the records, copy them, and disseminate the contents through the media and the Internet. He alleged that the information made available by defendants included his photograph and home address; his Social Security number; his personnel history, including that which was made confidential by the 1991 settlement agreement; his medical history; his educational history and testing data; his credit history; his retirement data and financial information; the names and addresses of his family members; and other confidential, personal and private information. Plaintiff also alleged that copies of his confidential personnel records with the NCDOC were provided to the Associated Press in January 1998 and published in the Fayetteville Observer Times.

Plaintiff alleged that such actions were undertaken by defendants as part of an intentional scheme of conduct to harass, intimidate, retaliate against, and damage him due to his having engaged in constitutionally protected activities in connection with his assertion of employment discrimination claims against the NCDOC and NCDOT. Plaintiff alleged defendants' conduct was malicious, undertaken in bad faith and for discriminatory reasons, and so exceeded their authority as to amount to a waiver of "any possible state law immunity."

As a result of defendants' actions, plaintiff alleged that he has been harassed and intimidated; that as a former law enforcement officer, he has been endangered by the dissemination of personal information about himself and his family members; that he has been subjected to public humiliation and ridicule; and that he has been

effectively blacklisted from future government or law enforcement employment. He sought compensatory and punitive damages, declaratory and injunctive relief, and costs and attorneys' fees.

Defendants moved to dismiss the complaint pursuant to G.S. § 1A-1, Rule 12(b) for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim for which relief may be granted. The trial court entered an order dismissing all of plaintiff's claims for failure to state a claim upon which relief may be granted, and some of his claims against certain defendants for lack of jurisdiction. Plaintiff appeals from the order of dismissal; defendants cross-assign as error the trial court's failure to dismiss the complaint on additional grounds.

Plaintiff asserts that the trial court erred in (1) dismissing his complaint for failure to state a claim upon which relief may be granted and (2) dismissing his federal constitutional claims against the State, NCDOT, NCDOC, and individual defendants in their official capacities for lack of jurisdiction. We affirm in part, reverse in part and remand this case to the trial division for further proceedings.

The question before a court considering a motion to dismiss for failure to state a claim is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory. *See Block v. County of Person*, 141 N.C. App. 273, 540 S.E.2d 415 (2000). A complaint may be dismissed pursuant to Rule 12(b)(6) where "(1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim." *Governors Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 253, 567 S.E.2d 781, 790 (2002). "In reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial." *Brandis v. Lightmotive Fatman, Inc.*, 115 N.C. App. 59, 62, 443 S.E.2d 887, 888 (1994).

I. Substantive Due Process

[1] Plaintiff alleges that defendants violated his substantive due process rights and right to privacy under both the federal and state constitutions. U.S. Const. amend. XIV, § 1; N.C. Const., Art. I., §§ 1, 19,

35, 36. The Fourteenth Amendment provides that government shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Suit for relief from federal constitutional violations is authorized under 42 U.S.C. § 1983, which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., 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 . . . .

In general, substantive due process protects the public from government action that unreasonably deprives them of a liberty or property interest. *See Huntington Properties, L.L.C. v. Currituck Co.*, — N.C. App. —, —, 569 S.E.2d 695, 703 (2002). If that liberty or property interest is a fundamental right under the Constitution, the government action may be subjected to strict scrutiny. *Id.* However, where the interest is not fundamental, the government action need only have a rational relation to a legitimate governmental objective to pass constitutional muster. *Id.* This legitimate governmental objective need not be the actual objective of the state actors. *Id.*

In terms of fundamental rights, one's privacy interest in the information contained in personnel files does not fall under the recognized fundamental right to privacy with respect to personal and family decision making. *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). Plaintiff argues alternatively that the information he alleges defendants disclosed is covered by that strain of the right to privacy that protects against disclosure of highly personal information. *See Whalen v. Roe*, 429 U.S. 589, 51 L. Ed. 2d 64 (1977). *See also Ferguson v. City of Charleston*, 186 F.3d 469, 482-83 (4th Cir. 1999), *overruled on other grounds*, 532 U.S. 67, 149 L. Ed. 2d 205 (2001) (declining to decide whether medical information protected by right to privacy where disclosure necessary to serve compelling state interest); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) (certain financial information protected by right to privacy); *ACT-UP Triangle v. Commission for Health Services of the State of N.C.*, 345 N.C. 699, 483 S.E.2d 388 (1997) (declining to decide whether medical information protected by right to privacy where necessary to serve compelling interest and chances of unauthorized disclosure low under established protocols).

However, we need not determine whether the alleged conduct violated a fundamental right. The Fourteenth Amendment also protects against arbitrary government action that is so egregious that it "shocks the conscience" or offends a "sense of justice." *U.S. v. Salerno*, 481 U.S. 739, 746, 95 L. Ed. 2d 697, 708 (1987); *County of Sacramento v. Lewis*, 523 U.S. 833, 140 L. Ed. 2d 1043 (1998); *State v. Guice*, 141 N.C. App. 177, 541 S.E.2d 474 (2000). Where an executive act is at issue, as in the instant case:

> the issue of fatal arbitrariness should be addressed as a "threshold question," asking whether the challenged conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999) (citations omitted). Whether an executive action shocks the conscience is generally judged by historical standards in similar situations, as well as indications of whether the act was intentional or merely negligent. *See id.* The complaint in the present case contains multiple allegations that defendants acted with a high level of culpability, including deliberate indifference, malice, willfulness, and retaliation. "While intentional conduct is that 'most likely' to meet the test, that alone will not suffice; the conduct must be 'intended to injure in some way unjustifiable by any government interest.' " *Id.* (quoting *Lewis*, *supra*). This issue essentially merges with the rational basis review to be accorded any privacy interest not considered fundamental. *See Huntington Properties*, *supra*.

In terms of justification, defendants argue such disclosure serves the "important public policy" of "providing broad access to all public records." Defendants cite statutes relating to access to public records, referring to them as an "embodiment" of this policy. *See* N.C. Gen. Stat. §§ 126-23, 132-1.3, 132-6 (2002). They also assert that the release of plaintiff's records was authorized under G.S. § 126-24.

G.S. § 126-22 declares that:

> Personnel files of State employees, former State employees, or applicants for State employment shall not be subject to inspection and examination as authorized by G.S. 132-6 [public records act]. For purposes of this Article, a personnel file consists of any information gathered by the department . . . which employs an individual, previously employed an individual, or considered an individual's application for employment, or by the office of

> State Personnel, and which information relates to the individual's application, selection or nonselection, promotions, demotions, transfers, leave, salary, suspension, performance evaluation forms, disciplinary actions, and termination of employment wherever located and in whatever form.

G.S. § 126-23 excepts certain information regarding name, age, hire date, position, and salary from the provisions of G.S. § 126-22 without limitation. Limited exceptions to G.S. § 126-22 are set out in G.S. § 126-24, which allows inspection of an employee's personnel file by (1) the employee, (2) his or her supervisor, (3) members of the General Assembly, (4) parties holding court orders, and (5) federal or state government officials or department heads under certain circumstances. G.S. § 126-24 also provides that:

> Notwithstanding any other provision of this Chapter, any department head may, in his discretion, inform any person . . . of any promotion, demotion, suspension, reinstatement, transfer, separation, dismissal, employment or nonemployment of any applicant, employee or former employee employed by or assigned to his department or whose personnel file is maintained in his department and the reasons therefor and may allow the personnel file of such person or any portion thereof to be inspected and examined by any person . . . when such department head shall determine that the release of such information or the inspection and examination of such file or portion thereof is essential to maintaining the integrity of such department or to maintaining the level or quality of services provided by such department; provided that prior to releasing such information . . ., such department head shall prepare a memorandum setting forth the circumstances [he] deems to require such disclosure and the information to be disclosed. The memorandum shall be retained in the files of said department head and shall be a public record.

It is conceivable that, where an employee settles an employment grievance with the State, a department head might need to disclose some information from the employee's personnel file to maintain the integrity of the department. However, even despite the statutory basis, it is difficult to conceive of a rational relation between defending the propriety of a grievance settlement and disclosing the employee's social security number, medical diagnoses, family member names and addresses, and personal financial data, all of which plaintiff alleges were disclosed. The facts as alleged by plaintiff in the

present case do not indicate any special features of plaintiff's settlement or situation that would require a wholesale public disclosure of his file under the statutory exception. Moreover, plaintiff alleges in his complaint that the disclosure was wholly unjustified. For purposes of the Rule 12(b)(6) motion, plaintiff has overcome the high level of deference accorded to governmental action on rational basis review.

Thus, plaintiff has alleged an intentional and unjustified disclosure of the entire contents of his personnel file in a context which, if proven, offends a sense of justice. We note that our courts have held that the level of substantive due process protection provided by the North Carolina Constitution is at least as broad as that of the United States Constitution. *See Guice*, 141 N.C. App. 177, 541 S.E.2d 474. Therefore, because we hold here that plaintiff states a claim for violation of his substantive due process rights under the federal constitution, he states one for a violation of his rights under the North Carolina Constitution as well.

[2] Next, plaintiff asserts the trial court also erred in dismissing his § 1983 claim for violation of his rights to substantive due process under the federal constitution against the State of North Carolina, NCDOC, NCDOT, and individual defendants in their official capacities for lack of subject matter or personal jurisdiction. N.C.R. Civ. P. 12(b)(1), (b)(2) (2002). Plaintiff also assigned error to the trial court's dismissal of his state substantive due process claim against all but individual defendants in their official capacities. However, due to plaintiff's failure to discuss this assignment of error in his primary brief, we deem it abandoned. N.C.R. App. P. 28(b)(6) (2002).

Evaluation of the applicability of § 1983 claims to the State or state officials is generally bifurcated according to the kind of relief requested. *See Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). Here, plaintiff requests both monetary damages and injunctive relief. Following U.S. Supreme Court precedent, the courts of this State have held that the State and state officials acting in their official capacities are not "persons" within the meaning of § 1983 for purposes of recovering money damages. *See Hawkins v. State*, 117 N.C. App. 615, 624, 453 S.E.2d 233, 238 (1995). Therefore, the trial court did not err in granting defendants' motion to dismiss plaintiff's claim for money damages.

[3] However, where a plaintiff seeks injunctive relief against the State and its officials, state officials acting in their official capacities

are considered "persons" under § 1983. *See Corum*, 330 N.C. at 771, 413 S.E.2d at 282-83. Because plaintiff's complaint included a prayer for injunctive relief and the trial court granted the dismissal of "all claims brought under § 1983," we must assume that the trial court's dismissal included plaintiff's claim for injunctive relief. Dismissal of this claim was error. Plaintiff stated a claim for violation of his rights to substantive due process under the federal constitution and individual defendants in their official capacities are not immune from suit for injunctive relief on this claim.

[4] In their cross-assignment of error, defendants Garrett and Does #1 and #2 argue that the trial court erred in denying their motion to dismiss this § 1983 claim against them in their individual capacities on the grounds of qualified immunity. In contrast to the State and officials sued in their official capacities, public officials sued in their individual capacities for violations of § 1983 may be held liable for monetary damages. *See Corum*, 330 N.C. at 772, 413 S.E.2d at 283. As a defense, such defendants may under certain circumstances raise the doctrine of qualified immunity as a bar to both suit and liability. *See id.* at 772-73, 413 S.E.2d at 284. The defense of qualified immunity shields government officials from personal liability under § 1983 " 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Andrews v. Crump*, 144 N.C. App. 68, 75-76, 547 S.E.2d 117, 122, *disc. review denied*, 354 N.C. 215, 553 S.E.2d 907 (2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982)).

In its order, the trial court held that qualified immunity "is not a basis for a Rule 12(b) dismissal," but rather "must be pleaded as a defense," and thus also refused to consider defendants' supporting affidavits. However, while qualified immunity certainly must be pleaded in a defendant's answer, it may also be raised in a motion to dismiss under Rule 12(b) made prior to any responsive pleading. *See Behrens v. Pelletier*, 516 U.S. 299, 133 L. Ed. 2d 773 (1996); *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997); *McWaters v. Rick*, 195 F.Supp.2d 781 (E.D.Va. 2002); *Block*, 141 N.C. App. 273, 540 S.E.2d 415; *Hawkins*, 117 N.C. App. 615, 453 S.E.2d 233. When raised by motion, qualified immunity is generally raised on a Rule 12(b)(6) motion to dismiss. *See, e.g., Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 402 S.E.2d 862 (1991). It follows that on a motion to dismiss on grounds of qualified immunity, the trial court may look only to the allegations of the complaint to

determine whether qualified immunity is established. *Behrens, supra*; *McWaters, supra*. Thus, the trial court erred in holding that it could not evaluate the issue of qualified immunity at this stage, but it properly refused to consider defendants' affidavits on the subject.

[5] The qualified immunity inquiry requires a determination of whether the right at issue was clearly established at the time it was allegedly violated. *See Andrews, supra*. We have determined that plaintiff has alleged an intentional and arbitrary deprivation of his privacy interests by defendants' disclosure of the information contained in his personnel files that is not related to any legitimate government objective. Arbitrary acts that have an abusive purpose and lack legitimate justification violate due process. *See Lewis*, 523 U.S. 833, 140 L. Ed. 2d 1043. The statutory scheme set out in Chapter 126 of the General Statutes for the protection of the confidentiality of state personnel records would also indicate that disclosures of employees' private information should not be done lightly. *See* N.C. Gen. Stat. §§ 126-22, 126-23, 126-24, 126-27. The right to be free of arbitrary, abusive, and illegitimate government action, such as that described in the complaint, is a clearly established right of which a reasonable person in defendant Garrett's or any other official position would have been aware. Therefore, at this stage of the proceedings, defendants Garrett and Does #1 and #2 are not entitled to dismissal of plaintiff's § 1983 claim for violation of his federal substantive due process rights on the basis of qualified immunity.

II. Procedural Due Process

[6] Plaintiff next contends that the trial court erred in dismissing his claim for violation of his federal and state procedural due process rights. Both the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution provide protection against deprivation of liberty or property interests secured by the Bill of Rights or created by state law without adequate procedure, such as notice and an opportunity to be heard. *See Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405 (1976); *Wuchte v. McNeil*, 130 N.C. App. 738, 505 S.E.2d 142 (1998); *Howell v. Carolina Beach*, 106 N.C. App. 410, 417 S.E.2d 277 (1992). Decisions as to the scope of procedural due process provided by the federal constitution are highly persuasive with respect to that afforded under our state constitution. *See State v. Young*, 140 N.C. App. 1, 535 S.E.2d 380 (2000).

Plaintiff first alleges defendants inserted "false and stigmatic information" into his personnel file, the dissemination of which has

deprived him of occupational liberty. "[I]njury to reputation by itself [is] not a 'liberty' interest protected under the Fourteenth Amendment." *Siegert v. Gilley*, 500 U.S. 226, 233, 114 L. Ed. 2d 277, 288 (1991). Therefore, in order for false charges made by a state employer to constitute violation of due process, a plaintiff must sufficiently allege:

> 1) that the charges made by Defendants were false; 2) that the charges were made public; 3) that the charges were made in the course of discharge or serious demotion; and 4) that the "charges against [her] . . . 'might seriously damage [her] standing and associations in [her] community' or otherwise 'imposed on [her] a stigma or other disability that foreclosed [her] freedom to take advantage of other employment opportunities.' "

Shelton-Riek v. Story, 75 F.Supp.2d 480, 487 (M.D.N.C. 1999) (citing *Stone v. Univ. of Md. Medical Sys. Corp.*, 855 F.2d 167, 173 n.5 (4th Cir. 1988) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 573-75, 33 L. Ed. 2d 548, 558-59 (1972))). Although plaintiff alleged facts that might satisfy the first, second, and fourth elements, the complaint contains no allegation that the release of information from plaintiff's file, true or false, was done in connection with any employment action, much less a dismissal or demotion. In fact, plaintiff does not indicate in his complaint that he ever left or was discharged from state employment.

Plaintiff next makes a general argument that he was not provided with due process with regard to the disclosure of information contained in his personnel file. In support of his argument, plaintiff cites cases which involve a state employee's property interest in his or her employment. These cases are not pertinent where plaintiff's personnel file or certain of its contents, rather than the employment itself, are at issue. Moreover, "[i]n order to constitute a property right for purposes of due process, one must have a current valid expectation, based on the government's implied promise to continue this entitlement, in an important, personal, monetizable interest." 16B Am. Jur. 2d, Const. Law § 585 (2002) (citations omitted). Under G.S. § 126-22, plaintiff may have a legitimate expectation of continued confidentiality for his state personnel file, but it is not the kind of "monetizable" property interest generally protected by procedural due process.

Plaintiff makes no argument that the North Carolina Constitution provides greater due process protection for his interest in the confidentiality of his state personnel file than the federal constitution.

Because plaintiff has not alleged a deprivation of a liberty or property interest protected by procedural due process, the trial court did not err in dismissing his claims for violation of his rights to procedural due process under the U.S. and North Carolina Constitutions for failure to state a claim upon which relief may be granted.

Because we find that plaintiff failed to state a claim for violation of his procedural due process rights, we need not address plaintiff's assignment of error with respect to the trial court's dismissal of his federal procedural due process claim pursuant to Rule 12(b)(1) and (b)(2) or individual defendants' cross-assignment of error asserting qualified immunity with respect to those claims.

III. Equal Protection

[7] Plaintiff also asserts the trial court erred in dismissing his claim for violation of his rights under the federal and state constitutions to equal protection of the law. *See* U.S. Const. amend. XIV, § 1; N.C. Const. Art. I, § 19. Under the Fourteenth Amendment, no state may deny a person equal protection of the laws, either on the face of a statute or policy or in its application. *See Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220 (1886). The equal protection principle "requires that all persons similarly situated be treated alike." *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). The Supreme Court of North Carolina has held that the guarantee of equal protection provided in the Fourteenth Amendment to the Federal Constitution has been expressly incorporated in Article I, Section 19 of the N.C. Constitution, and thus the same analysis may be applied to both. *See id.; S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971); *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Generally, equal protection doctrine is applied in situations involving discrimination on the basis of group classification or interference with the exercise of some fundamental right. *See, e.g., Dept. of Transportation v. Rowe*, 353 N.C. 671, 549 S.E.2d 203 (2001), *cert. denied*, 534 U.S. 1130, 151 L. Ed. 2d 972 (2002). Plaintiff does not allege that he was discriminated against because he is a member of a particular group, but rather that defendants "singled out Plaintiff for adverse discriminatory treatment."

Plaintiff cites *Village of Willowbrook v. Olech*, 528 U.S. 562, 145 L. Ed. 2d 1060 (2000). In *Olech*, the plaintiffs were refused a connection to the village water supply unless they granted the village a 33-foot easement. They refused, pointing to the fact that other prop-

erty owners making the same request had been asked to grant only a 15-foot easement. The plaintiffs sued the village for violation of equal protection, alleging, *inter alia*, that the condition imposed by the village was (1) irrational and arbitrary, (2) "motivated by ill will resulting from the Olechs' previous filing of an unrelated, successful lawsuit against the Village," and (3) based on an intentional or reckless disregard for plaintiffs' rights. *Id.* at 563, 145 L. Ed. 2d at 1063. After the trial court granted the Village's motion to dismiss under Rule 12(b)(6), the Seventh Circuit reversed, holding that where government action reflects a "spiteful effort to 'get' " a plaintiff and there is no relation to any legitimate state objective, a plaintiff states a valid claim for violation of equal protection. *See Olech v. Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998).

On review, the Supreme Court held that equal protection claims may be brought by " 'a class of one.' " *Olech*, 528 U.S. at 564, 145 L. Ed. 2d at 1063 (citation omitted). According to the Court, the Olechs had managed to state a claim by alleging that the Village intentionally imposed upon them different requirements than had been required of other similarly situated villagers and asserting that "the Village's demand was 'irrational and wholly arbitrary.' " *Id.* at 565, 145 L. Ed. 2d at 1063. The Court indicated that allegations as to the defendants' "subjective motivation" were not essential to this theory. *Id.*

In the present case, plaintiff has alleged that under color of state law defendants released his confidential personnel file to the media, and thus the public, while the files of other similarly situated employees were not released. In his complaint, he alleges that the action by defendants was "arbitrary" and "capricious," as well as "intentional" and "willful," and "wholly without justification in fact or in law." As discussed above, plaintiff has succeeded in alleging that there is no rational basis for defendants' actions with respect to his file. Thus, under *Olech*, taking plaintiff's allegations to be true, as we must at this stage, plaintiff has successfully stated a § 1983 claim for violation of the Equal Protection Clause under the "class of one" theory. *See also In re Application of Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970) (voiding county commissioners' refusal to grant permit where applicant met all requirements and commission could show no rational basis for refusal); *Bizzell v. Goldsboro*, 192 N.C. 348, 135 S.E. 50 (1926) (ordinance vesting arbitrary discretion in town officials held unconstitutional); *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000) (trial court erred in granting summary judgment for mu-

nicipality on equal protection claim based on arbitrary and capricious action by city that did not survive "rational basis" standard of review).

We hold that plaintiff has stated a claim for a violation of his right to equal protection of the laws and the trial court erred in dismissing plaintiff's claims for equal protection under the federal and state constitutions. We also agree with plaintiff that the trial court erred in dismissing his § 1983 claim against individual defendants in their official capacities with respect to plaintiff's prayer for injunctive relief. In addition, we reject the assertion of qualified immunity by defendants Garrett and Does #1 and #2 for this claim. We have determined that plaintiff stated a claim for violation of his federal equal protection rights based on arbitrary government action. As explained recently in *Hyatt v. Town of Lake Lure*, 225 F.Supp.2d 647, 664 (W.D.N.C. 2002) (quoting *McWaters*, 195 F.Supp.2d at 806, and citing *Olech, supra*) "the right 'to be free of arbitrary and discriminatory application of law' is not a new one." The right allegedly violated by defendants Garrett and Does #1 and #2 is a clearly established one of which a reasonable public official would have known. *Andrews, supra.* At this stage in the proceedings, individual defendants are not entitled to dismissal of plaintiff's § 1983 equal protection claim for monetary damages based on qualified immunity.

IV. First Amendment

[8] Next, plaintiff contends defendants violated his First Amendment right to petition the government for redress of grievances. He argues that defendants disclosed information in his personnel file to the media and public in retaliation for the successful employment grievances he filed against the State. Under § 1983, retaliation by a public official for the exercise of a constitutional right is actionable, even if the official's action would not have been improper if done for different reasons. *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471 (1977). In order to prove a claim for retaliation, a plaintiff must establish the following elements:

> (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998).

Plaintiff asserts the right to file employment grievances against the State is protected under the Petition Clause of the First Amendment of the United States Constitution. As authority for this assertion, plaintiff cites *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082, 130 L. Ed. 2d 638 (1995), which holds that public employees who file genuine lawsuits or grievances against their government employer are protected against retaliation under the Petition Clause even if the subject matter of the petition is purely private. Plaintiff neglects to point out, however, that only the Third Circuit has adopted this view of the Petition Clause and public employment-related grievances. Most federal circuits have either not addressed the issue or have refused to diverge from Supreme Court precedent requiring that a public employee's speech touch on a matter of public concern to invoke the protection of the First Amendment. *See Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997). It appears that neither North Carolina courts, nor the Fourth Circuit, have adopted the *San Filippo* rule and we decline to do so here. *See Corum*, 330 N.C. at 775, 413 S.E.2d at 285 (public employee's right to speak freely without retaliation limited to matters of public concern). Because plaintiff has failed to satisfy the first element of a § 1983 First Amendment retaliation claim, we need not address the other elements. This assignment of error is overruled.

Because we hold that plaintiff failed to state a claim for violation of his First Amendment rights, we need not address plaintiff's assignment of error with respect to the trial court's dismissal of this claim under Rule 12(b)(1) and (b)(2) and individual defendants' cross-assignment of error asserting qualified immunity.

V. Tortious Invasion of Privacy

[9] In his complaint, plaintiff sought to allege claims for five different types of common law tortious invasion of privacy, some of which have been rejected by the North Carolina Supreme Court. On appeal, plaintiff addresses only the claim of intrusion into seclusion and thus abandons the other four claims. N.C.R. App. P. 28(a) (2002).

The tort of invasion of privacy by intrusion into seclusion has been recognized in North Carolina and is defined as the intentional intrusion " 'physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person.' " *Miller v. Brooks*, 123 N.C. App. 20, 26-27, 472 S.E.2d 350, 354 (1996) (citation omitted), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997). The kinds of

intrusions that have been recognized under this tort include "physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." *Hall v. Post*, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823 (1987), *reversed on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988). Plaintiff alleges that defendants intentionally obtained information from his state personnel file and gave it to unauthorized individuals. He also alleges that they intentionally used their authority to allow unauthorized persons to examine plaintiff's file. The unauthorized examination of the contents of one's personnel file, especially where it includes sensitive information such as medical diagnoses and financial information, like the unauthorized opening and perusal of one's mail, would be highly offensive to a reasonable person. Therefore, the trial court erred in dismissing plaintiff's claim for intrusion into seclusion for failure to state a claim upon which relief may be granted.

[10] In their second cross-assignment of error, defendants contend that the trial court erred in failing to dismiss plaintiff's common law claims pursuant to their Rule 12(b)(1) and 12(b)(2) motions on the grounds of sovereign and official immunity. Generally, courts may consider matters outside the pleadings in evaluating an assertion of lack of subject matter jurisdiction under Rule 12(b)(1). *See Sperry Corp. v. Patterson*, 73 N.C. App. 123, 127, 325 S.E.2d 642, 646 (1985). However, our Supreme Court has declined to decide whether sovereign immunity is an issue of subject matter jurisdiction or personal jurisdiction. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). Moreover, defendants do not contend in their argument for immunity to plaintiff's state law claims that the trial court should have considered matters outside the complaint. Therefore, we will confine our analysis to the allegations in the complaint.

[11] Sovereign immunity shields the State, its agencies, and officials sued in their official capacities from suit on state law claims unless the State consents to suit or waives its right to sovereign immunity. *See Vest v. Easley*, 145 N.C. App. 70, 549 S.E.2d 568 (2001). The State may waive its immunity through various means, including the purchase of liability insurance, the Tort Claims Act, and breach of a valid contract to which it is a party. *See EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 108 N.C. App. 24, 27, 422 S.E.2d 338, 340-41 (1992), *overruled on other grounds*, *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). Plaintiff's complaint contains no allegation of

waiver of sovereign immunity that would subject the State, NCDOT, NCDOC, or individual defendants in their official capacities to suit on a claim for tortious invasion of privacy and this claim was properly dismissed.

[12] Official capacity immunity is a derivative of sovereign immunity that protects public officials sued in their individual capacities. *See Epps v. Duke University, Inc.*, 122 N.C. App. 198, 468 S.E.2d 846, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996).

> The essence of the doctrine of public official immunity is that public officials engaged in the performance of their governmental duties involving the exercise of judgment and discretion, and acting within the scope of their authority, may not be held liable for such actions, in the absence of malice or corruption.

Price v. Davis, 132 N.C. App. 556, 562, 512 S.E.2d 783, 787 (1999). A public official holds a position created by our State Constitution or the General Statutes and exercises some degree of sovereign power and discretion, as compared with public employees who perform only ministerial duties. *See Block*, 141 N.C. App. 273, 540 S.E.2d 415. Defendant Garrett was the Secretary of the NCDOT during the events in question; he clearly falls into the category of public official. *See* N.C. Gen. Stat. § 143A-9 (2002). Plaintiff's complaint contains multiple allegations that defendant Garrett's actions in releasing and permitting access to plaintiff's file were done outside the scope of authority, maliciously, in bad faith, and for retaliatory reasons. The facts alleged concerning the time frame between his settlement and the release of his file, the scope of information released, and defendant Garrett's release of the file despite warnings that such action would be illegal tend to support plaintiff's claims of malice and bad faith. Therefore, at this stage, individual defendants are not entitled to dismissal of plaintiff's claim for tortious invasion of privacy on the basis of official capacity immunity.

VI. Breach of Contract

[13] Plaintiff asserts the trial court erred in dismissing his claim for breach of contract. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Plaintiff alleges the existence of a settlement contract with the NCDOC, and attaches a copy of the contract to the complaint. The attached copy of the contract contains this provision:

> All files, both official and unofficial being retained with Respondent and pertaining to the referenced charge of employment discrimination, will be maintained in an area separate and apart from Charging Party's personnel file.

Plaintiff also alleges that the contract was breached by defendants by their inclusion of the contract in plaintiff's personnel file. Taken as true, plaintiff has stated a claim for breach of contract, even though he may be entitled only to claim nominal damages or injunctive relief for the breach. Therefore, the trial court erred in dismissing plaintiff's claim for breach of contract pursuant to defendant's 12(b)(6) motion.

[14] With regard to defendants' assertions of sovereign immunity, we note that the complaint alleges the existence and breach of a contract between plaintiff and NCDOC. Therefore, on the face of the complaint, plaintiff has sufficiently alleged waiver of sovereign immunity and plaintiff's contract claim may not be dismissed on that basis. *See EEE-ZZZ Lay Drain Co.*, 108 N.C. App. 24, 422 S.E.2d 338. Likewise, plaintiff's allegations of malicious and unauthorized conduct by defendants Garrett and Does #1 and #2 preclude dismissal of plaintiff's contract claim against them in their individual capacities on the basis of official immunity.

VII. Gross Negligence

[15] Plaintiff also asserts the trial court erred in dismissing his claim against defendants for gross negligence. Gross negligence has been defined as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988). Plaintiff alleged in his complaint that defendants' conduct was willful, wanton, and done with "deliberate indifference" to his rights.

Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages. *See, e.g., Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 562 S.E.2d 887 (2002). Plaintiff alleged in his complaint that defendants disclosed his confidential personnel file without authority or justification. He also alleged that his employment relationship with defendants was governed by Chapter 126 of the General Statutes. Under various provisions of Chapter 126, personnel files are to be kept confidential and only accessed by certain individuals under

certain conditions. N.C. Gen. Stat. §§ 126-22, 126-24. The statute also provides for criminal penalties for permitting unauthorized access to the records. N.C. Gen. Stat. § 126-27. Allegations regarding defendant Garrett's position at NCDOT and the scope of his authorization under Chapter 126 to release plaintiff's records suffice as allegations that he owed plaintiff a duty to keep the information in his file confidential. Plaintiff also alleged that defendants' conduct proximately caused him to be harassed by third parties. Therefore, we hold that plaintiff adequately stated a claim for relief based on defendant's gross negligence.

[16] In their cross-assignment of error, defendants argue that they are entitled to dismissal of plaintiff's gross negligence claim on the basis of sovereign immunity. Because plaintiff did not sufficiently allege waiver of sovereign immunity by the State, NCDOT, NCDOC, or individual defendants in their official capacities, the claim of gross negligence was properly dismissed with regard to these defendants. *See EEE-ZZZ Lay Drain Co., supra.* However, because plaintiff did sufficiently allege malice and abuse of authority, defendants Garrett and Does #1 and #2 are not entitled to dismissal of the gross negligence claim on the basis of official immunity at this stage. *See Price*, 132 N.C. App. 556, 512 S.E.2d 783.

VIII. Civil Conspiracy

[17] Plaintiff assigns error to the trial court's dismissal of his claim for civil conspiracy for failure to state a claim for relief. There is no independent cause of action for civil conspiracy. *See Shope v. Boyer*, 268 N.C. 401, 150 S.E.2d 771 (1966). Only where there is an underlying claim for unlawful conduct can a plaintiff state a claim for civil conspiracy by also alleging the agreement of two or more parties to carry out the conduct and injury resulting from that agreement. *See Muse v. Morrison*, 234 N.C. 195, 66 S.E.2d 783 (1951). Plaintiff alleged that defendant Garrett and as yet unknown John Doe defendants acted "in concert" to injure plaintiff and that defendants wantonly or intentionally schemed to retaliate against him by committing the unlawful acts alleged. We hold these allegations sufficient to allege that defendants conspired to commit unlawful acts and to injure plaintiff. Therefore, the trial court erred in dismissing this claim pursuant to defendants' motion.

[18] Lastly, defendants argue that plaintiff's claim for civil conspiracy should have been dismissed on the basis of sovereign and official immunity. Due to plaintiff's failure to allege waiver of sovereign

immunity on the part of the State, NCDOT, NCDOC, and individual defendants in their official capacities, we agree that these defendants are entitled to dismissal of this claim. *See EEE-ZZZ Lay Drain Co., supra.* Official immunity will not protect defendants Garrett and Does #1 and #2 from suit for civil conspiracy in their individual capacities at this stage given plaintiff's allegations of malicious and corrupt conduct. *See Price, supra.*

Conclusion

In summary, we hold plaintiff's complaint was sufficient to state (1) § 1983 claims for federal substantive due process and equal protection violations for injunctive relief against individual defendants in their official capacities and for damages in their individual capacities; (2) state substantive due process and equal protection claims for injunctive relief against individual defendants in their official capacities; (3) a breach of contract claim against the State, NCDOC, and individual defendants in their official and individual capacities; and (4) common law claims for tortious invasion of privacy, gross negligence, and civil conspiracy against individual defendants in their individual capacities. Insofar as the order appealed from dismisses those claims, it is reversed; otherwise, the order is affirmed.

Affirmed in part, reversed in part, and remanded.

Chief Judge EAGLES and Judge THOMAS concur.

RONALD H. SACK, PETITIONER-APPELLEE v. NORTH CAROLINA STATE UNIVERSITY; MARYE ANNE FOX, CHANCELLOR; UNIVERSITY OF NORTH CAROLINA; RESPONDENTS-APPELLANTS

No. COA02-39

(Filed 31 December 2002)

1. Appeal and Error— appealability—interlocutory order—certiorari granted

A superior court order remanding a university grievance to a university committee was interlocutory, but was treated as a petition for a writ of certiorari and heard in the interests of justice because there was merit in some of the substantive arguments.

2. Administrative Law— judicial review—standard

When reviewing a university grievance procedure, the superior court correctly chose to apply de novo review for the evidentiary issues, the proper burden of proof, and the failure to reach an issue, but a challenge to a finding of fact should have been reviewed by the whole record standard. Remand was not necessary, however, because the entire record was before the appellate court.

3. Administrative Law— university grievance procedures—followed properly

The superior court erred in an action arising from a university grievance procedure by concluding that the university grievance committee did not perform its official duties properly where the court did not specify the official duties the committee had neglected and no basis for the court's conclusion could be discerned from the issues presented by the petitioner to the trial court.

4. Constitutional Law— due process—discretionary salary increase—no property right

A professor who did not receive a raise was not denied due process because he had no property right in the discretionary salary increase.

5. Administrative Law— university grievance—issue not raised in grievance proceeding—not before superior court

The superior court erred by reaching the issue of age discrimination when reviewing a university grievance procedure where the issue was never presented at the grievance hearing and thus was not properly before the trial court on appeal.

Appeal by respondents from order entered 1 October 2001 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 October 2002.

Capitol District Law Offices, by Reagan H. Weaver and Robert J. Harris, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for respondents-appellants.

BIGGS, Judge.

Respondents (N.C. State University; Marye Anne Fox, Chancellor of N.C. State University; University of North Carolina) appeal from an order vacating their dismissal of petitioner's grievance. For the reasons that follow, we reverse.

This appeal arises from a grievance filed by petitioner challenging a decision not to recommend him for a discretionary salary increase. The evidence in the record tended to show the following: Petitioner was employed by North Carolina State University (the university) as a history professor in 1971, and was tenured in 1974. In 1996, 'academic enhancement' funds were made available to the university for discretionary pay raises to 50% of the history faculty. "The purpose of the academic enhancement funds was to reward highly productive faculty who [were] likely to receive counter offers elsewhere, [and] who could not be easily replaced because of the talents they had." Dean Zahn, the Dean of the College of Humanities and Social Sciences, asked Dr. Riddle, the chair of the history department, to identify the top 50% of the history faculty. Dr. Riddle was directed to consider several objective and subjective factors in making this determination, including: the number and quality of recent publications; service to the university and the community; special talents brought to the department; level of scholarship; likelihood of receiving an offer from another university; and the need to remedy existing salary inequities among history faculty. Dr. Riddle submitted his recommendations to Dean Zahn, who made the final decisions and awarded the discretionary salary enhancements. Petitioner was not among those recommended by Dr. Riddle.

In December, 1996, petitioner filed a grievance against Dr. Riddle, and requested a hearing before the university faculty grievance committee. He alleged that Dr. Riddle had (1) treated him unfairly "for personal reasons" with regards to scheduling of classes and had (2) "deliberately overlooked" him when making his recommendations regarding the discretionary salary enhancements, "again for purely personal reasons." Petitioner was granted a hearing, and on 29 December 1997, the committee submitted its report and recommendation to Chancellor Monteith, then Chancellor of the university. The committee "was unanimous in concluding that [petitioner] was treated fairly" with regard to both the scheduling of classes and the determination of who Dr. Riddle would recommend for a salary enhancement. The committee acknowledged that it had spoken by telephone with Dean Zahn to clarify the time period during which fac-

ulty publications were evaluated. The committee also offered an opinion that "perhaps if Dr. Riddle had been more forthright" with petitioner, "the issue of salary enhancement would have been resolved and would have not resulted in a grievance."

In June, 1998, Chancellor Monteith "accepted the committee's finding on [the] issue" of class schedules. With regards to the issue of salary enhancement, Chancellor Monteith noted that the committee's *ex parte* phone conversation with Dean Zahn violated the university's grievance procedure, which requires that all decisions of the committee "shall be based solely on material presented in the hearings." To correct this error, Chancellor Monteith remanded the grievance "for the limited purpose of receiving Dean Zahn's testimony on the record and providing each party the opportunity to cross-examine." Petitioner then wrote to university administrators asking whether he would be permitted to offer evidence to rebut Dean Zahn's testimony, and was informed that "the committee may entertain a request . . . to present rebuttal to any relevant testimony that Dean Zahn may present regarding the issue of how enhancement monies were allocated."

The committee conducted its remand hearing in December, 1998, and submitted an addendum to its earlier report in May, 1999. The committee again concluded that petitioner "was treated fairly and properly with regard to the manner by which he was evaluated in 1996 for a salary enhancement." The committee also repeated its concerns about "the manner by which Dr. Riddle dealt with [petitioner] concerning this issue."

In July, 1999, Chancellor Fox, who had succeeded Chancellor Monteith, wrote to the committee, petitioner, and Dr. Riddle, stating her intention to accept the committee's recommendation that "no remedial action [was] required" on either of petitioner's grievances. Before finalizing her decision, Chancellor Fox requested that the committee prepare a memo clarifying why it had neither permitted petitioner to present certain rebuttal testimony on the issue of faculty scheduling of classes, nor considered certain documents submitted by petitioner at the remand hearing. Petitioner had proffered documents to show that, although Dr. Riddle testified that he evaluated faculty publications for the previous 2 years, he had recommended certain faculty members for enhancement money whose publication records would not, standing alone, have qualified them unless Dr. Riddle had included their publications for the previous 3 years.

The committee responded that it excluded the testimony regarding rescheduling of classes, because the proposed witness "was not involved in the decision making process . . . [and] was not privy to [petitioner's] interactions with Dr. Riddle" regarding scheduling issues. The committee further explained that it excluded petitioner's proffered documentation as "irrelevant and immaterial" to its resolution of either of the issues it considered dispositive: whether petitioner had shown by a preponderance of the evidence "that Dr. Riddle acted out of deliberate, personal malice," or whether Dr. Riddle's recommendations "evidence[d] unfairness to [petitioner]." The committee made findings of fact that Dr. Riddle was directed to "give very heavy weight" to "the question of whether a given faculty member was both likely to be lured away by another university and was worth retaining." Therefore, the committee determined that Dr. Riddle's review of the number of publications of each faculty member, whether for two or three years, would not necessarily be "the final word on even his initial recommendation to the Dean." The committee also found that the Provost's guidelines "require[d] that Dr. Riddle exercise reasonable judgment" and make a "broader assessment" of an individual faculty members "overall likelihood of being made an offer worth countering." Finally, the committee noted that it had evaluated whether Dr. Riddle's recommendations to Dean Zahn "reflected a reasonable determination of [petitioner's] relative value to his department[,]" and "agreed unanimously and without reservation, that Dr. Riddle's recommendation was indeed reflective of a reasonable determination." On 17 December 1999, Chancellor Fox issued her final decision accepting the committee's conclusions.

Petitioner then appealed to the President of the University of North Carolina. He reiterated his original complaints, and added new allegations of age discrimination, breach of contract, and violation of his due process rights. President Broad found no evidence that "the process or decisions reached in [petitioner's] appeal were wrongly made or otherwise in error" and, accordingly, found "no basis for reversing or otherwise modifying" Chancellor Fox's decision. President Broad declined to address petitioner's age discrimination and breach of contract allegations, as these were not raised before the committee. Thereafter, petitioner appealed to the UNC Board of Governors, who referred the matter to their Committee on University Grievance. That committee found "no compelling basis . . . for disturbing the president's decision" and recommended that the board sustain the president's decision and dismiss petitioner's appeal.

The Board of Governors approved the recommendation on 10 November 2000.

From the decision of the Board of Governors, petitioner on 15 December 2000 appealed to the superior court for review. Petitioner's appeal was heard in superior court on 7 June 2001. On 1 October 2001, the trial court issued an order vacating the Board of Governors decision upholding Chancellor Fox's dismissal of petitioner's grievance. The court remanded petitioner's grievance "to the Grievance Committee" with instructions directing the committee to list all history faculty publications between specific starting and ending dates, and to assign "points" for publications of various types, according to the system that Dr. Riddle testified he used. The committee was ordered to prepare "a master list of all the faculty members . . . in rank order" and "determine the position occupied by the Petitioner" according to the "point" system for the quantity of publications during the specified time period. If petitioner was in the top half of this list, the court ordered that "[petitioner's] name and position in the ranking will be submitted to the Chancellor with a recommendation that he was not treated fairly." Conversely, if petitioner was not in the top 50%, the court ordered that "[petitioner's] grievance will be recommended for dismissal[.]" The court also ordered that "the Grievance Committee shall not consider the age of any faculty member, or any other factor" besides the publications each faculty member had during the specified time period, and directed the committee to take testimony and rebuttal evidence on the issue of whether respondent had any "legitimate business reason" for considering the age of faculty members. Finally, the trial court ordered that "[t]he Chancellor shall accept the recommendations of the Grievance Committee . . . and shall issue her determination of Petitioner's grievance." From this order, respondents appeal.

Preliminarily, we address petitioner's appellate motions to dismiss respondents' appeal, and to strike portions of respondents' reply brief. In his motion to dismiss, petitioner argues that, because the trial court remanded to the committee rather than reversing the Board of Governors, respondents' appeal should be dismissed as interlocutory. Petitioner correctly asserts that the trial court's order was interlocutory. *See Heritage Pointe Bldrs. v. N. C. Licensing Bd. of General Contractors*, 120 N.C. App. 502, 504, 462 S.E.2d 696, 697-98 (1995), *disc. review denied* , 342 N.C. 655, 467 S.E.2d 712 (1996) (where trial court "vacated the Board's decision and remanded

the case for a rehearing, consistent with its order . . . the order requires further action to settle the controversy, [and] it is interlocutory"). This Court has generally held that an order "remanding an action to an agency for hearing . . . is not immediately appealable because avoidance of a hearing does not affect a substantial right." *Byers v. N. C. Savings Institutions Division*, 123 N.C. App. 689, 693, 474 S.E.2d 404, 407 (1996). However, in the case *sub judice*, we find merit in certain of respondents' substantive arguments. Therefore, in the interests of justice and pursuant to our authority under N.C.R. App. P. 21, we elect to treat respondents' appeal as a petition for writ of *certiorari*. *See* N.C. R. App. P. 21 (2001)(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[.]"). *See also Tastee Freez Cafeteria v. Watson*, 64 N.C. App. 562, 564, 307 S.E.2d 800, 802 (1983) (granting immediate review where trial court "exceeded its scope of review by [remanding for] further findings without first determining whether the [agency's] findings were sufficient to support [its] conclusion").

Petitioner also filed a motion to strike portions of respondents' reply brief. We conclude that respondents' reply brief comports with the requirements of N.C.R. App. P. 28(h), and, accordingly, deny petitioner's motion.

Standard of Review

[1] The trial court's order was entered pursuant to petitioner's appeal from a final agency decision, in this case the decision by the Board of Governors denying further review of his grievance against Dr. Riddle. Judicial review of a final agency decision is governed by N.C.G.S. § 150B-51(b) (2001):

> [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case . . . for further proceedings. It may also reverse or modify the agency's decision . . . [if] substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious, or an abuse of discretion.

The standard of review applied by the superior court reviewing a final agency decision is determined by the type of error asserted; errors of law are reviewed *de novo*, while the whole record test is applied to allegations that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994). "De novo review requires a court to consider the question anew, as if the agency has not addressed it." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001).

When it applies the whole record test, "the reviewing court [must] examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). Substantial evidence is " 'more than a scintilla' and is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 483, 548 S.E.2d 793, 796 (2001) (quoting *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)). The whole record test "does not permit the court 'to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo,' " *N.C. Dept. of Correction v. McNeely*, 135 N.C. App. 587, 592, 521 S.E.2d 730, 733 (1999) (quoting *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)), but "merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Dept. of Correction v. Gibson*, 58 N.C. App. 241, 257, 293 S.E.2d 664, 674 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E.2d 78 (1983). Thus, if the agency's findings are supported by substantial evidence, they must be upheld. *Id.*

On appeal, this Court must determine whether the trial court committed any error of law, and our review of the trial court's order generally involves "(1) determining whether the trial court exercised

the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19. Thus, in its order regarding an agency decision, the trial court should state the standard of review it applied to resolve each issue. *Deep River Citizens' Coalition v. North Carolina Dept. of Environment and Natural Resources*, 149 N.C. App. 211, 215, 560 S.E.2d 814, 817 (2002) (citation omitted). However, if necessary, "this Court's duty to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the [agency] and the superior court without (1) examining the scope of review utilized by the superior court [or] (2) remanding the case if the standard of review employed by the superior court cannot be ascertained," provided that this Court can "determine whether: (1) the [b]oard committed any errors in law; (2) the [b]oard followed lawful procedure; (3) the petitioner was afforded appropriate due process; (4) the [b]oard's decision was supported by competent evidence in the whole record; and (5) . . . the [b]oard's decision was arbitrary and capricious." *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment* (I), — N.C. App. —, 567 S.E.2d 440 (2002) (quoting *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment* (II), 146 N.C. App. 388, 390, 392, 552 S.E.2d 265, 267 (2001), (Greene, J., dissenting), *rev'd per dissent*, 355 N.C. 269, 559 S.E.2d 547 (2002)).

In the case *sub judice*, petitioner, in his appeal to superior court, argued that the committee erred by (1) excluding testimony by petitioner's rebuttal witness on the issue of Dr. Riddle's scheduling of classes; (2) excluding petitioner's proffered documentary rebuttal evidence on the issue of whether Dr. Riddle had recommended certain faculty members whose publications during the previous two years would not have been enough to place them in the top 50%; (3) requiring petitioner to show by the preponderance of the evidence that Dr. Riddle had acted out of personal malice; (4) failing to "note the use of an impermissible criterion that influenced Riddles's selection process; to wit, age bias"; and, (5) finding that petitioner had been treated fairly by Dr. Riddle with regards to his recommendations to Dean Zahn regarding salary enhancement. Petitioner also added a generalized allegation that his "substantial rights" were violated because respondent's actions were "in violation of constitutional provisions, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence . . . in view of the entire record as submitted, and arbitrary or capricious." However, petitioner did not associate this broad statement with any specific finding or decision by respondent.

[2] In its order, the trial court concluded that "a *de novo* review is appropriate for its consideration of each of Petitioner's assignments of error, because the [c]ourt views each of Petitioner's assignments of error as alleging errors of law." This conclusion was correct as regards the evidentiary issues, the proper burden of proof, and the committee's failure to reach the issue of age bias. However, petitioner's challenge to the committee's finding of fact, that Dr. Riddle had treated petitioner fairly in making his recommendations to Dean Zahn, requires application of the whole record standard.

Although the trial court erred by failing to conduct whole record review of this issue, "[w]e do not believe a remand is necessary, however, because the central issue presented . . . is whether there was competent, material, and substantial evidence to support [the committee's] decision . . . and the entire record of the hearing is before us." *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002) (reviewing issue despite trial court's failure to properly delineate the standard of review it employed).

I.

[3] Respondents argue that the trial court erred by "ignoring and misinterpreting" "agency regulations bearing on the faculty grievance proceedings." We agree.

We first review the relevant agency regulations. Under N.C.G.S. § 116-11(2) (2001) the UNC Board of Governors is "responsible for the general . . . control, supervision, management and governance of . . . the constituent institutions[, and f]or this purpose . . . may adopt such policies and regulations as it may deem wise." Accordingly, the Board of Governors has directed that the Chancellor of each constituent institution "shall provide for the establishment of a faculty grievance committee" (Board of Governors Code § 607) and has authorized the various Boards of Trustees to "adopt personnel policies not otherwise prescribed by state law[.]" (Board of Governors Code, Appendix 1). NCSU regulations governing its grievance procedures are found in its Faculty Handbook, § 24.01, Grievance Procedure for Faculty, and in its NCSU Grievance Committee Manual. Under the university's grievance procedures, the trial court's review of the Board of Governors' decision not to hear petitioner's appeal was the fourth level of appeal by petitioner from Dr. Riddle's determination that petitioner should not be recommended for a discretionary pay raise. The earlier stages of the university's grievance process are summarized below:

1. The grievance committee conducts a hearing to determine whether the petitioner has shown by a preponderance of the evidence that "a decision which has adversely affected a [grievant's] professional or academic capacity, has been reached improperly or unfairly." The committee "has no power to reverse an administrative decision but can only recommend a reassessment of that decision[.]"

2. Based upon a review of the complete record of the committee, the Chancellor makes the decision whether to accept the committee's recommendation.

3. The President of UNC reviews the Chancellor's decision to determine whether "the process in reaching [the] decision[] was correctly followed and that the final conclusion reached had an evidentiary basis in the record."

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

NCSU Grievance Manual, III.A.; NCSU Grievance Procedure, 24.01.10 and 13; Board of Governors, "Appellate Review Policies and Procedures." Before conducting a hearing, the grievance committee must ascertain whether the alleged grievance meets its jurisdictional requirements. The committee may conduct a hearing only if the petitioner asserts that an administrative decision was reached improperly or unfairly, as those terms are defined by the university:

> Improperly means in violation of a specific university rule, regulation, policy, or practice pertaining to the employment relationship between the grievant and the university. Unfairly means in an arbitrary or capricious manner or in an unlawfully discriminatory manner.

NCSU Grievance Procedure, 24.01.2.1. Moreover, the grievance procedure "cannot be used for . . . discretionary actions, such as salary adjustments . . . except to determine (1) whether the discretionary action was made in accordance with relevant university rules, regulations, policies, practices, procedures, or criteria; and (2) whether the action constitutes a clear abuse of discretion." NCSU Grievance Procedure, 2401.2.2.b. Thus, "if the grievance contains allegations that are not grievable, those allegations must be dismissed." NCSU Grievance Manual, IV.A.2.a. Further, the "grievant bears the burden of establishing the jurisdictional grounds . . . and the burden of proving

by a preponderance of the evidence [the] grounds for the grievance." NCSU Grievance Manual, III.A; IV.I.2.

In the case *sub judice*, petitioner alleges neither a violation of "a specific university rule, regulation, policy, or practice," nor that he was the victim of discrimination. Rather, his grievance alleged that Dr. Riddle's decisions regarding scheduling of petitioner's classes for Spring, 1996, and his recommendations to Dean Zahn for salary enhancement both were unfairly based on "purely personal reasons." Petitioner's allegations, if proven, could constitute "a clear abuse of discretion" and, thus, the committee properly granted petitioner a hearing.

In its order the trial court concluded that the committee "did not properly perform its official duties." The court did not specify which "official duty" the committee had neglected. We have, therefore, reviewed each of the issues raised by petitioner in his appeal to superior court, to determine whether the resolution of these issues provides support for the trial court's conclusion.

In his appeal to superior court, petitioner excepted to the committee's findings that he was "treated fairly with regard to the salary enhancement issue." We disagree with petitioner.

The committee is the only fact-finding body in the grievance procedure; it is charged with "resolving conflicting testimony," and must "evaluate the evidence and determine the truth of material evidence." NCSU Grievance Manual, IV.D.2. In the case before us, the committee's report to the Chancellor stated that the committee "was unanimous in concluding that [petitioner] was treated fairly." After remanding to take Dean Zahn's testimony on the record, the committee prepared an addendum to their report, stating that "[o]nce again, the [c]ommittee concludes that [petitioner] was treated fairly and properly with regard to the manner by which he was evaluated in 1996 for a salary enhancement." Finally, in its memorandum to Chancellor Fox clarifying certain evidentiary rulings, the committee "agreed unanimously and without reservation, that Dr. Riddle's recommendation was indeed reflective of a reasonable determination." We conclude that the committee's findings of fact in this regard were supported by substantial evidence in view of the whole record.

At the hearing, Dr. Riddle testified that he had not based his recommendations to Dean Zahn on personal animus, and had weighed many factors. The testimony of other university professors and

administrators tended to show that Dr. Riddle was directed to employ multiple criteria in his determinations, and that he was generally fair in making administrative decisions. Petitioner's testimony indicated that Dr. Riddle's recommendations were to be based on the number of publications for the previous three years, and that if factors other than the number of publications were excluded, he might have been in the top 50%. The committee was thus required to resolve conflicting testimony. "An appellate court may not . . . disturb an agency's assessment of the credibility of the witnesses and the weight and sufficiency to be given to the testimony, . . . and may not override decisions within the agency's discretion if made in good faith and in accordance with the law." *Teague v. Western Carolina University*, 108 N.C. App. 689, 692, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993) (citing *Jarrett v. N.C. Dep't of Cultural Resources*, 101 N.C. App. 475, 479, 400 S.E.2d 66, 68 (1991)). Further, the university has expressly admonished the committee to "understand the limits of their role. A Committee does not replace management[,] . . . [and] may not support a grievance where reasonable persons could have differed and improper factors and improper procedures were not involved." We conclude that the committee's finding that petitioner had been treated fairly was supported by substantial competent evidence, and must be upheld.

Petitioner also argued on appeal to superior court that the committee erred by requiring him to prove deliberate personal malice. Two issues are presented: the appropriate burden of proof, and the committee's use of the term "deliberate personal malice." Regarding the burden of proof, university regulations are clear that petitioner had the burden of proving his allegations by a preponderance of the evidence. NCSU Grievance Manual, III.A; IV.I.2. In the instant case, therefore, petitioner had the burden to prove his allegations that Dr. Riddle had "unfairly treated" him with regards to scheduling; that "this unfair treatment was deliberate"; and that Dr. Riddle "deliberately overlooked [him] when recommending faculty for [salary] increases, again for purely personal reasons." Regarding the committee's use of the term "personal malice," we note that the Code of the Board of Governors, applicable to its constituent institutions, *see* N.C.G.S. § 116-11(2) and (14), and N.C.G.S. § 116-34, defines "personal malice" as "dislike, animosity, [or] ill-will . . . based on personal characteristics, [or] traits . . . of an individual that are not relevant to valid University decision-making." Board of Governors, "Appellate Review" III-I-15. Petitioner's assertions that Dr. Riddle, *e.g.*, "deliberately over-

looked [him] when recommending faculty for increases, again for purely personal reasons" would appear to fall within the Board of Governors definition of "personal malice," as the term is used in university proceedings. Moreover, although the committee used the term "personal malice" in a memorandum clarifying one of its evidentiary rulings, the committee's written submissions to university administrators all stated affirmatively that Dr. Riddle's recommendation was reflective of a reasonable determination, and that petitioner was treated fairly. We hold that the committee did not err by requiring petitioner to prove his allegations by the preponderance of the evidence, and that petitioner was not subjected to a heightened standard by the committee's reference to petitioner's specific allegations, that Dr. Riddle's scheduling and salary enhancement decisions were based on "purely personal reasons," by the more general term "personal malice."

Petitioner's appeal to superior court also challenged two of the committee's evidentiary rulings. We first note that the committee is authorized to "exercise complete control" over the hearing, including the determination of "whether information or testimony is material and relevant to the issues involved in the grievance." It "may rule that certain presentations not be considered[,]" and in so doing, the committee is "not bound by strict rules of legal evidence" although its rulings must be "[c]onsistent with the principles of impartiality and equity[.]" NCSU Grievance Procedures, § 24.01.8.

In the present case, the committee excluded certain testimony regarding scheduling of classes, on the basis that the witness "was not involved in the decision making process . . . [and] was not privy to [petitioner's] interactions with Dr. Riddle" regarding scheduling issues. We conclude that this determination was within the scope of the committee's authority, and was not error.

The committee also excluded documents offered by petitioner in rebuttal to Dean Zahn's testimony. These documents were intended to show that Dr. Riddle had recommended certain faculty to Dean Zahn despite the fact that the number of publications by these faculty in the past two years would not, standing alone, have placed them in the top 50%. In excluding this evidence, the committee rejected petitioner's basic premise—that Dr. Riddle's recommendations for salary increases were supposed to be based primarily upon how many publications each faculty member had within a certain time period, so that evidence that in several cases Dr. Riddle's recommendations did

not correspond to the faculty member's rank according to number of publications would tend to show unfairness on Dr. Riddle's part. Instead, the committee, as fact-finder, determined that Dr. Riddle was directed to base his recommendations largely on a subjective assessment of many factors, in order to determine whether a faculty member was likely to receive an competitive offer from another institution, and on Dr. Riddle's evaluation of the faculty member's "relative value to his department." The committee concluded that, even assuming Dr. Riddle made an "inadvertent error" in his tabulation of the number of publications for the two or three previous years, this "would not, without more evidence, have established deliberate personal malice." The committee found that there was no other evidence that Dr. Riddle acted for personal reasons, and that "Dr. Riddle's recommendation reflected a reasonable determination of [petitioner's] relative value to his department." The committee therefore excluded petitioner's proffered "rebuttal evidence" on the basis that it was "irrelevant and unnecessary" to their determination of whether Dr. Riddle's failure to recommend petitioner for a raise was "deliberately" based upon "purely personal reasons" as alleged by petitioner. We hold that the committee's decision not to consider petitioner's rebuttal evidence was within its authority, and was not inconsistent with the "principles of impartiality and equity" that the university requires the committee to apply.

For the reasons discussed above, we are unable to discern any basis in the issues presented by petitioner to the trial court, for the trial court's conclusion that the committee "did not properly perform its official duties." Accordingly, respondents' assignment of error that the trial court erred in interpreting relevant agency regulations is upheld.

II.

[4] Respondents also argue that the trial court erred by concluding that petitioner was denied due process because petitioner's grievance "implicates no interest protected by due process rights." Specifically, respondents contend that the discretionary salary enhancement did not give rise to any property right of petitioner's invoking his right to due process. We agree.

"In analyzing a due process claim, we [must] first . . . determine whether a constitutionally protected property interest exists. To demonstrate a property interest under the Fourteenth Amendment, a party must show more than a mere expectation; he must have a legit-

imate claim of entitlement." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994) (citing *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed.2d 548 (1972)). A 'legitimate claim of entitlement' requires "more than a 'unilateral expectation' of a property interest[.]" *Chapman v. Byrd*, 124 N.C. App. 13, 18, 475 S.E.2d 734, 738 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 50 (1997) (quoting *Roth*, 408 U.S. 564, 577, 33 L. Ed.2d 548, 561 (1972)).

Although North Carolina appellate courts have not addressed this issue in the context of a discretionary salary increase, appellate cases from other jurisdictions have held there is no property interest in discretionary decisions about employment. *See, e.g., Leventhal v. Knapek*, 266 F. 3d 64, 67 (2nd Cir. (N.Y.) 2001) ("discretionary salary increase was not a form of property protected by the Constitution against deprivation without due process of law"); *Temple v. Inhabitants of City of Belfast*, 30 F. Supp.2d 60, 67 FN5 (D. Me. 1998) (no property interest in raise absent evidence of entitlement, *e.g.*, "facts indicating that such raises were provided for by statute, regulation, rule, or contractual provision"); *Day v. Board of Regents of University of Nebraska*, 911 F. Supp. 1228, 1241 (D. Neb. 1995), *aff'd*, 83 F.3d 1040 (8th Cir. (Neb.) 1996) (no property interest in salary raise where plaintiff "claims that he has not received salary increases which he believes his academic record merits, [but] he has offered no evidence of any statute, regulation, rule, or contractual provision [that] would entitle him to receive any raise, let alone one of a specific amount").

In the case *sub judice*, petitioner does not cite any statute or university regulation that would entitle him to be recommended for the salary enhancement. Moreover, as discussed above, the committee found that Dr. Riddle was directed to base his recommendations on an array of factors, both objective and subjective. These findings of fact establish that an individual faculty member could have no more than a unilateral expectation that he or she would be recommended by Dr. Riddle. We hold that petitioner's Due Process rights were not implicated in Dr. Riddle's recommendations to Dean Zahn, and that the trial court erred by concluding that petitioner had a contractual right to be recommended for a raise, or that his Due Process rights were violated.

III.

[5] Finally, respondents argue that the trial court erred in reaching the issue of age discrimination. Again, we agree.

The trial court concluded that "the Board of Trustees, the Dean, and Dr. Riddle were all influenced illegally by age bias[,]" and that the committee "ignored substantial evidence of age discrimination." University regulations strictly limit a grievance committee to consideration of issues alleged in petitioner's grievance letter, or which the committee has unanimously consented to consider by later amendment of the grievance. NCSU Grievance Procedure, 3.1.1; 8.1.11.

In the instant case, it is undisputed that petitioner did not raise the issue of age discrimination in his request for a grievance hearing, did not request an amendment of his grievance, and did not even raise the issue at the hearing. Therefore, this issue was never presented at petitioner's grievance hearing, and thus was not properly before the trial court on appeal. *See Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 224, 488 S.E.2d 845, 852, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997) ("superior court in its posture of an appellate court, . . . may not consider a matter not addressed by the [agency]") (citation omitted). Therefore, the trial court erred by addressing the issue on appeal.

For the reasons discussed above, we conclude that the trial court's order, reversing respondents' decision dismissing petitioner's grievance, was erroneous and must be

Reversed.

Judges WALKER and THOMAS concur.

STATE OF NORTH CAROLINA v. JAMES BEN SMITH

No. COA01-1360

(Filed 31 December 2002)

1. Criminal Law— change of counsel—continuance—denied—no abuse of discretion

The trial court did not abuse its discretion or deny defendant his right to effective assistance of counsel by denying defendant's motion for a continuance twenty-one days after his second counsel was replaced (and a motion by the third to withdraw was denied) in a prosecution for robbery, assault, firearms offenses, and drug offenses.

2. Criminal Law— defendant in jail uniform—not plain error

There was no plain error where a trial began while defendant was still in his jail uniform. Defendant was given the opportunity to change into a suit during the morning break and he did not show that a different result would have been obtained if the jury had not seen him in prison attire.

3. Evidence— convictions more than ten years old—absence of findings—harmless error

The trial court in a prosecution for robbery, assault, firearms offenses, and drug offenses erred by permitting the State to cross-examine defendant about convictions more than ten years old without making findings of specific facts and circumstances to support a determination that the evidence was more probative than prejudicial. However, the error was harmless where defendant opened the door to impeachment of his character by testifying that he played major roles in law enforcement in the 1980s, and the evidence of the convictions was appropriate to rebut defendant's questionable character evidence that arose from events during the same time period.

4. Criminal Law— admonishment by judge—defendant speaking directly to jury

Defendant was not denied due process where he replied to the first question on direct examination by asking the jury whether they could hear him and the judge told defendant not to speak to the jury directly. The jury could not reasonably have inferred that the trial judge intimated an opinion about defendant's credibility.

5. Assault— lesser included offenses—instructions

The trial court did not err by not giving instructions on the lesser-included offenses of felony assault inflicting serious injury and misdemeanor assault inflicting serious injury in a prosecution for assault with a deadly weapon inflicting serious injury arising from an alleged pistol whipping.

6. Drugs— fatal variance—identity of person to whom drugs sold

There was a fatal variance between an indictment for sale of a controlled substance and the evidence where the indictment alleged the sale of marijuana to Berger; the evidence indicated that Berger's companion, Chadwell, went into the building to buy

the marijuana; and there was no testimony that defendant knew that Chadwell was acting on Berger's behalf. An indictment for the sale of a controlled substance must accurately name the person to whom defendant sold; however, the State is at liberty to obtain another bill of indictment.

7. Firearms and Other Weapons— possession by felon—building not used as home

The trial court did not err by refusing to dismiss a charge of possession of a firearm by a felon under the "home" exception; there was substantial evidence to a permit a reasonable juror to conclude that the premises did not constitute defendant's home.

8. Sentencing— prior record level—sufficiency of evidence

The trial court erred by sentencing based on a prior record level worksheet submitted by the district attorney without further documentation or stipulation by defendant.

Appeal by defendant from judgment dated 12 March 2001 by Judge Benjamin G. Alford in Superior Court, Lenoir County. Heard in the Court of Appeals 8 October 2002.

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

Adrian M. Lapas, for defendant-appellant.

McGEE, Judge.

James Ben Smith (defendant) was arrested on 2 July 2000 and counsel was appointed to represent him on 3 July 2000. Defendant's counsel withdrew on 5 July 2000 due to an ethical conflict and James S. Perry (Perry) was appointed to represent defendant. Defendant was indicted on 11 December 2000 for armed robbery, assault with a deadly weapon inflicting serious injury, three counts of possession with intent to sell and deliver a controlled substance, sale of a controlled substance, keeping and maintaining a building for the use of controlled substances, and possession of a firearm by a convicted felon.

Perry appeared in court on 9 February 2001 and asked to withdraw as defendant's counsel because he believed defendant intended to file a malpractice action against him. Perry was allowed to withdraw and Nick Harvey (Harvey) was appointed to represent defend-

ant. Defendant's trial was continued to the 5 March 2001 session of superior court. Harvey and defendant appeared in court on 5 March 2001 and Harvey moved to continue the case and to withdraw as counsel. The trial court denied both motions.

The evidence presented at trial tended to show that Bill Berger (Berger) and Cheree Chadwell (Chadwell) visited defendant's unlicensed bar in Pink Hill, North Carolina on 2 July 2000 "to get some weed." Defendant's premises consisted of a cinder block building containing a couple of sofas, a big screen television, a bar, and two pool tables. The building did not contain a bedroom, bed, shower facilities, or any clothing belonging to defendant.

Berger waited in the car while Chadwell entered the building and asked if anyone had any "reefer." Defendant went into the bathroom and retrieved a bag of marijuana that he sold to Chadwell. After completing the transaction, Chadwell asked defendant if Berger could come inside and defendant said yes. Chadwell went to the door and allowed Berger to enter the premises.

A few minutes after Chadwell entered, Anna Higuera (Higuera), defendant's daughter, entered the building. When she saw Berger, Higuera told defendant that there might be trouble because of a previous confrontation between her and Berger. Higuera told defendant that Berger had threatened "to rip my face off" during an argument over a dog she had given Berger. Defendant approached Berger and asked him about his threats to Higuera. Berger made a snide retort to defendant and defendant backhanded him several times. Defendant picked up a pistol, pointed it at Berger, and hit him in the head with the barrel of the gun several times.

Defendant asked Berger if he had any money and he told Berger to put his cash on the pool table. Defendant told his daughter to take the amount of money that Berger owed her and she picked up thirty dollars. Defendant asked Berger if he would like to make a donation to the Society for the Prevention of Cruelty to Animals (SPCA). Berger replied that he would and he allowed defendant to decide the amount. Defendant removed a one hundred dollar bill from the pile of cash and wrote "SPCA" on the bill. Defendant hit Berger a few more times and ordered him to leave the premises.

Berger went to a friend's house and called the Lenoir County Sheriff's Department. Detective Jeffrey Herring (Herring) testified that he took Berger to a hospital emergency room for medical treatment after interviewing him. Berger suffered cuts to his nose and ears

and heavy bruises to his jaw, cheeks, and the back of his head. Herring obtained a search warrant for defendant's premises later that evening.

Herring and four other officers arrived at defendant's building around 11:15 p.m. to conduct a search of the premises. The officers knocked and identified themselves, did not receive an answer, and then forcefully entered the building. The officers found defendant and several other men lying on the floor. A bag containing 7.9 grams of marijuana was recovered in defendant's immediate proximity and a box containing bags of marijuana and a handgun was found on a couch in the same room. The officers removed keys and $1,051.00 in cash from defendant's pockets. They used the keys to open the women's bathroom, where they found a bag containing half a pound of marijuana, bags containing methamphetamine mixed with cocaine, syringes, rolling paper, handgun ammunition, and a box containing a bloodstained one hundred dollar bill. Captain Christopher Hill of the Lenoir County Sheriff's Department testified that there were no items of personal clothing, no bed, or other indication that the building was being used by someone as a home.

Defendant testified that his establishment was similar to a "hunt club" or "pool club." He acknowledged that he kept alcohol on the premises and that people at the establishment helped pay for it. Defendant testified that he became angry at Berger, backhanded him, pointed a pistol at him, and may have hit him with the pistol. He also testified that he took a one hundred dollar bill from Berger and that the blood found on the bill was the result of his beating Berger.

A jury found defendant guilty of robbery with a firearm, assault with a deadly weapon inflicting serious injury, possession of cocaine with intent to sell, possession of methamphetamine with intent to sell, possession of marijuana with intent to sell, selling marijuana, intentionally keeping or maintaining a building which is used for the purpose of unlawfully keeping or selling controlled substances, and possession of a handgun by a convicted felon. Defendant was sentenced to a minimum of 117 months and a maximum of 150 months in prison for robbery with a firearm, a minimum of 46 months and a maximum of 65 months in prison for assault with a deadly weapon inflicting serious injury, and a minimum of 20 months and a maximum of 24 months for possession of a firearm by a felon. Defendant also was sentenced to a total minimum of 14 months and a maximum of 17 months for possession of cocaine, methamphetamine, and marijuana with intent to sell and a total minimum of 14 months and a

maximum of 17 months for the sale of marijuana and maintenance of a place for unlawfully keeping or selling controlled substances. Defendant appeals.

[1] Defendant first argues the trial court abused its discretion and denied defendant's sixth amendment right to effective assistance of counsel under the United States Constitution when the trial court denied defendant's motion for a continuance. Defendant contends that twenty-one days was insufficient time for defendant's attorney to adequately prepare for trial.

> The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense.

State v. Cradle, 281 N.C. 198, 208, 188 S.E.2d 296, 302-03, *cert. denied*, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972).

> It is well-established that a motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing of abuse of discretion. However, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law.

State v. Poole, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982) (citations omitted). The defendant must specifically demonstrate how his case would have been better prepared had the continuance been granted or show that he was materially prejudiced by the denial of the motion. *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986); *see Cradle*, 281 N.C. at 208, 188 S.E.2d at 303 (stating that a motion for continuance should be supported by an affidavit setting forth the grounds for a continuance).

Defendant cites *State v. Rodgers*, 352 N.C. 119, 529 S.E.2d 671 (2000), in support of his argument. In *Rodgers*, our Supreme Court granted the defendant a new trial because his newly appointed counsel received only thirty-four days to prepare for a bifurcated capital trial after withdrawal by previous counsel. *Id.* at 125, 529 S.E.2d at 675-76. The *Rodgers* case was particularly complex with multiple inci-

dents occurring over several days. *Id.* The Court found that the defendant's counsel had not interviewed witnesses, submitted a jury questionnaire for distribution, or responded to orders issued in pretrial rulings. *Id.* Our Supreme Court stated that it was unreasonable to expect any attorney to be adequately prepared to try a bifurcated capital case with numerous witnesses in only thirty-four days. *Id.*

The *Rodgers* case is distinguishable from the case before us. Defendant's case did not possess the degree of complexity as the issues in *Rodgers*. This was not a capital case and there were a limited number of witnesses testifying at trial. Furthermore, the timeline in the case before us did not prevent defendant's counsel from following basic pretrial procedures.

Defendant offered no supporting affidavit or other evidence at trial to demonstrate the need for a continuance. Defendant also fails to show how his case would have been better prepared had a continuance been granted or that he was materially prejudiced by denial of his motion for a continuance. Defendant argues that he could have testified more effectively had he been granted a continuance. His argument is insufficient to warrant a new trial, especially in light of his lack of cooperation with his court-appointed attorneys. Defendant also argues that he was prejudiced by counsel calling him by the wrong name. However, defendant fails to demonstrate how counsel's mental error concerning defendant's name prejudiced him at trial. The trial court did not err in denying defendant's motion for a continuance. This assignment of error is without merit.

[2] Defendant next argues the trial court committed plain error by permitting his jury trial to begin while defendant was still dressed in his jail uniform. Defendant contends that his appearance in jail clothes impaired his presumption of innocence and deprived him of due process and a fair trial.

> 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." 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.

State v. Jones, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704 (2000) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)

(citations omitted), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). 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 appellant 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)) (emphasis omitted), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

" '[W]hile it is unlawful for any sheriff, jailer or other officer to require a prisoner to appear in court for trial dressed in the uniform of a prisoner, it is not necessarily unlawful for a prisoner to so appear.' " *State v. Johnson*, 128 N.C. App. 361, 364, 496 S.E.2d 805, 807 (1998) (quoting *State v. Berry*, 51 N.C. App. 97, 101-02, 275 S.E.2d 269, 272, *disc. review denied*, 303 N.C. 182, 280 S.E.2d 454 (1981)), *cert. denied*, 350 N.C. 842, 538 S.E.2d 581 (1999). Defendant failed to object to his attire at the beginning of his trial and the record demonstrates that defendant was given an opportunity to change into a suit of clothes during the morning break. Defendant has failed to demonstrate that the trial court committed fundamental error resulting in the denial of justice or to show that the jury would have reached a different result had the jury not viewed him in prison attire. The trial court did not err, nor deprive defendant of justice or a fair trial. This assignment of error is without merit.

[3] Defendant next argues the trial court erred in allowing the State to cross-examine defendant about convictions that were more than ten years old. Defendant contends he was unfairly and presumptively prejudiced by the admission into evidence of a 1982 conviction for possession of a controlled substance and a 1984 conviction for brandishing a firearm.

> Evidence of a conviction . . . is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the

> conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

N.C. Gen. Stat. § 8C-1, Rule 609(b) (2001); *see State v. Hunt*, 123 N.C. App. 762, 769-70, 475 S.E.2d 722, 726 (1996); *State v. Blankenship*, 89 N.C. App. 465, 366 S.E.2d 509 (1988). "[I]n order to adequately review the careful weighing of probative value and prejudicial effect necessitated by an evidentiary rule, an appellate court must consider the factual context of the entire trial." *Hunt*, 123 N.C. App. at 770, 475 S.E.2d at 727.

"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) (2001).

When considering evidence of convictions more than ten years old, the trial court must conduct a balancing test to determine if the probative value of the evidence substantially outweighs its prejudicial effect. *Hunt*, 123 N.C. App. at 769, 475 S.E.2d at 726.

> "[I]n those rare instances where the use of the older prior convictions [is] not more prejudicial than probative, the trial court must make appropriate findings of fact." These findings must concern "specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect."

State v. Farris, 93 N.C. App. 757, 761, 379 S.E.2d 283, 285 (1989) (citations omitted), *disc. review improvidently allowed*, 326 N.C. 45, 387 S.E.2d 54 (1990).

The transcript shows that defendant objected to the evidence of prior convictions beyond ten years and the trial court consulted with

both attorneys at the bench after each question. However, there is no indication in the transcript that the trial court made appropriate findings of fact in evaluating the probative value of the evidence. There are no findings of specific facts and circumstances in the record to support the trial court's determination that the evidence was more probative than prejudicial. The trial court's admission of defendant's prior convictions beyond ten years was error and we now examine whether defendant was prejudiced.

Defendant testified on direct examination that he had provided extensive assistance to law enforcement, including the FBI, ATF, and City of Richmond police, and was instrumental in the arrest and conviction of several criminals. During cross-examination the State asked defendant about his convictions and prison time in Virginia during the 1980's. Defendant attempted to avoid the State's question and evidence of his prior convictions was used to establish defendant's presence in Virginia during the 1980's. Evidence of his prior convictions also impeached defendant's denial that he had been in federal prison. Finally, the convictions served to rebut the self-aggrandized character testimony offered by defendant.

"[E]vidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant." *State v. O'Hanlan*, 153 N.C. App. 546, 561, 570 S.E.2d 751, 761 (2002). Defendant opened the door to impeachment of his character by testifying that he played major roles in law enforcement in the 1980's, thus permitting the State to offer evidence of defendant's bad character. *See Gappins*, 320 N.C. at 69-70, 357 S.E.2d at 658 (permitting cross-examination about specific conduct of the defendant where the defendant had put a "pertinent trait of his character" into issue). Since defendant's questionable character evidence arose from events more than twenty-five years prior to trial, admission of the evidence of convictions from that time period was appropriate to rebut defendant's testimony. Defendant's testimony regarding his own character of over twenty-five years ago warranted temporally proximate evidence for the purpose of rebuttal. *See O'Hanlan*, 153 N.C. App. at 561, 751 S.E.2d at 761 ("[W]here a defendant . . . raise[s] an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the State's rebuttal or explanatory evidence about the matter."); *see also State v. Bullard*, 312 N.C. 129, 157-58, 322 S.E.2d 370, 386 (1984) (finding that the defendant opened the door to cross-examination about the

details of a shooting). The trial court did not abuse its discretion in admitting evidence of defendant's prior convictions.

Finally, defendant has failed to demonstrate that he was prejudiced by the admission of the convictions. Defendant has not shown that the outcome of the trial likely would have been different had evidence of these two convictions been excluded. Any error in the admission of the evidence was harmless in light of the overwhelming evidence of defendant's guilt. This assignment of error is without merit.

[4] Defendant next argues that he was denied due process of law because the trial judge admonished him in front of the jury. Defendant contends the judge's instruction ordering defendant not to speak to the jury harmed his credibility and biased the jurors. N.C. Gen. Stat. § 15A-1222 (2001) states that a "judge may not express 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." Judges must be careful to ensure they do not directly or indirectly convey an opinion to the jury. *State v. Jenkins*, 115 N.C. App. 520, 524-25, 445 S.E.2d 622, 625, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *Id.*

In the case before us, defendant responded to the first question of his direct examination by asking the jury if they could hear him. The judge subsequently stated, "Mr. Smith, you need to just answer your lawyer's questions. Do not speak to the jury again." After defendant responded, the judge further stated, "That's exactly what I said. Do not speak to the jury directly again. Don't ask them any questions. You answer your lawyer's questions."

After an examination of the record, we find that the jury could not have reasonably inferred that the trial judge intimated an opinion as to defendant's credibility. The trial judge's comments were "made in the course of the right and duty the trial judge had to control exam-

ination and cross-examination of witnesses." *State v. Alverson*, 91 N.C. App. 577, 579, 372 S.E.2d 729, 730 (1988). The judge was simply instructing defendant to refrain from speaking with the jurors in order to maintain proper decorum and order in the trial. There is no evidence that the judge harbored an opinion concerning defendant or his credibility. Furthermore, defendant has failed to demonstrate that he was prejudiced by the judge's statements. This assignment of error is without merit.

[5] Defendant next argues the trial court committed plain error by failing to instruct the jury on lesser-included offenses of felony assault inflicting serious injury and misdemeanor assault inflicting serious injury. Defendant contends the trial court should have given these instructions because the evidence regarding defendant's pistol whipping of Berger was conflicting. As 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.

> Our Supreme Court has held that a trial court must instruct the jury on a lesser-included offense only if there is evidence that the defendant might be guilty of the lesser-included offense. Evidence of a lesser-included offense must be evidence that might convince a rational trier of fact to convict of the lesser offense. If the State's evidence is clear and positive as to each element of the charged offense, and if there is no evidence of the lesser-included offense, there is no error in refusing to instruct on the lesser offense.

State v. Hannah, 149 N.C. App. 713, 721, 563 S.E.2d 1, 6 (citations omitted), *disc. review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002).

In *State v. Bell*, 87 N.C. App. 626, 362 S.E.2d 288 (1987), this Court held that it was plain error not to include an instruction for simple assault on a charge of assault with a deadly weapon inflicting serious injury. The evidence in *Bell* presented an issue as to whether the defendant used a firearm during an assault, but the jury instructions did not provide jurors with alternative options for resolving the issue. In granting a new trial, we reasoned that there was "no way to ascertain what verdict the jury might have reached had they been given an alternative." *Id.* at 635, 362 S.E.2d at 293.

In the case before us, there was conflicting evidence as to whether defendant used a pistol to assault Berger. The trial court instructed the jury on the charge of assault with a deadly weapon inflicting serious injury as alleged in the indictment. The trial court also instructed the jury on assault with a deadly weapon and simple assault. Instruction on these two lesser included offenses gave the jury sufficient alternatives, by removing one element of the greater charge. If the jury believed that defendant assaulted Berger with a pistol but did not inflict serious injury, or that defendant assaulted Berger without a pistol, it could have reached either verdict consistent with the jury instructions. The instructions defendant argues for on appeal would have provided no additional bases for resolution of the factual issues because the conceivable options were covered under the instructions actually given. The jury instructions provided a sufficient framework for ascertaining the jury's decision in the face of alternatives and constituted instruction on lesser included offenses as required by law. This assignment of error is without merit.

[6] Defendant next argues the trial court erred in not vacating the judgment for sale of a controlled substance due to a fatal variance between the indictment and the evidence presented at trial. Defendant contends that the indictment alleges sale of marijuana to Berger while the evidence actually showed a sale of marijuana to Chadwell.

> [A]n indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known. A defendant must be convicted, if at all, of the particular offense charged in the indictment. The State's proof must conform to the specific allegations contained in the indictment. If the evidence fails to do so, it is insufficient to convict the defendant of the crime as charged.

State v. Wall, 96 N.C. App. 45, 49, 384 S.E.2d 581, 583 (1989) (citations omitted).

In *Wall*, we held there was a fatal variance between the indictment and evidence presented at trial based on facts similar to this case. The indictment in *Wall* charged the defendant with the sale and delivery of cocaine to Mr. Riley. *Id.* at 49, 384 S.E.2d at 583. The evidence in the record showed that Mr. Riley gave money to his friend, Ms. McPhatter, to purchase cocaine from the defendant. *Id.* at 47, 384 S.E.2d at 582. While there was evidence that the defendant knew the

two individuals had been together, our Court found there was not substantial evidence presented at trial that the defendant sold and delivered the cocaine to Mr. Riley, as alleged in the indictment. The evidence was insufficient to permit a jury to determine whether or not the defendant knew Ms. McPhatter was acting on behalf of Mr. Riley. *Id.* at 50, 384 S.E.2d at 583.

An examination of the trial transcript in the case before us shows no substantial evidence that defendant knew he was selling marijuana to Berger, as alleged in the indictment. While the testimony by Berger indicates that he and Chadwell went to defendant's establishment to purchase marijuana and that Chadwell entered the building to make the purchase on their behalf, there is no testimony that defendant knew Chadwell was acting on Berger's behalf at the time of the marijuana sale. The evidence was insufficient to permit a jury to determine that defendant knowingly sold marijuana to Berger. Therefore, there was a fatal variance between the indictment and evidence at trial and the trial court should have vacated the judgment. As our Court stated in *Wall*, "[w]e note that the State is at liberty to obtain another bill of indictment charging defendant with sale and delivery to [Chadwell]." *Id.* We vacate the judgment on the sale of a controlled substance.

[7] Defendant next argues that the trial court erred in denying his motion to dismiss the possession of a firearm by a convicted felon charge at the close of all the evidence. Defendant contends that the building in which he possessed the gun was his home, thus constituting an exception under N.C. Gen. Stat. § 14-415.1(a) (2001), which permits a convicted felon to have possession of a firearm within his own home.

> A defendant who is charged with [possession of a firearm by a convicted felon] and seeks to utilize the exception has the burden of bringing himself within the exception. Absent any evidence that defendant is within the exception of the statute, the State is required to prove only that defendant possessed a handgun within five years of his conviction of or release from prison for a felony specified in N.C. Gen. Stat. § 14-415.1(b).

State v. Bishop, 119 N.C. App. 695, 698, 459 S.E.2d 830, 832 (1995) (citations omitted).

In *State v. McNeill*, 78 N.C. App. 514, 337 S.E.2d 172 (1985), *disc. review denied*, 316 N.C. 383, 342 S.E.2d 904 (1986), the defendant

possessed a gun in the commons area of a residential housing complex and argued that he was within the statutory exception for "one's own home." In defining the word "home," this Court stated:

> By using the words "within his own home" in the exception, as opposed to some broader terminology, the Legislature clearly expressed its intent to limit the applicability of the exception to the confines and privacy of the convicted felon's own premises, over which he has dominion and control to the exclusion of the public.

Id. at 516, 337 S.E.2d at 173. We held that the exception did not apply and that the word "home" did not "encompass common areas of an apartment house, such as stairways, hallways and porches." *Id.* Similarly, in *State v. Cloninger*, 83 N.C. App. 529, 532, 350 S.E.2d 895, 897 (1986), our Court held that the exception did not apply to the common areas of motels.

In *State v. Locklear*, 121 N.C. App. 355, 465 S.E.2d 61 (1996), our Court held that the statutory exception did not apply when the defendant possessed a gun outside of a trailer that he owned but did not live in. *Id.* at 359, 465 S.E.2d at 64. We ruled that the defendant had surrendered domain and control of the trailer property when he rented it to tenants and consequently was not covered by the exception. *Id.* Similarly, our Court has determined that the exception does not apply when a defendant takes a pistol onto his neighbor's property. *State v. Hinson*, 85 N.C. App. 558, 355 S.E.2d 232, *disc. review denied*, 320 N.C. 635, 360 S.E.2d 98 (1987).

"Defendant's location at the time of the offense would be a substantive issue, requiring negative proof by the State . . . only upon some positive evidence by defendant that defendant's location was within the exception to the statute." *McNeill*, 78 N.C. App. at 517, 337 S.E.2d at 174. In the case before us, defendant testified that he lived in the building and considered it a hangout or pool club. Defendant said that he slept on the sofa and that he showered at the homes of his girlfriend, mother, or daughter. Defendant testified that the property was deeded to his daughter and that he did not own the building. There is no evidence that he paid rent to his daughter. Testimony demonstrated that there were no items of personal clothing, bed, or other indication that the building was being used by someone as a home.

Viewing the evidence in a light most favorable to the State, we find there was substantial evidence in the record to permit a reason-

able juror to conclude that the premises did not constitute defendant's home. The evidence supports a conclusion that defendant did not maintain exclusive dominion and control over the premises. The jurors were able to weigh the evidence and conclude that defendant was not covered by the statutory exception. The trial court did not err by refusing to dismiss the charge of possession of a firearm by a convicted felon. This assignment of error is without merit.

[8] Finally, defendant argues the trial court erred in calculating his prior record level because there was insufficient evidence in the record to support defendant's prior convictions. The State concedes that the trial court sentenced defendant based on a prior record level worksheet submitted by the district attorney without further documentation or stipulation by defendant. *See* N.C. Gen. Stat. § 15A-1340.14(f) (2001).

In *State v. Goodman*, 149 N.C. App. 57, 560 S.E.2d 196 (2002), we held that the State failed to prove the defendant's prior record level by a preponderance of the evidence where it did not submit evidence to prove that fact. While "the trial court [could] accept any method of proof which it deem[ed] reliable," the trial court failed to make findings regarding the reliability of the information used. *Id.* at 71, 560 S.E.2d at 205. Without entering evidence of the defendant's prior record level into the record, the State failed to satisfy its burden.

In the present case, the State failed to prove defendant's prior record level by a preponderance of the evidence. The State must offer into evidence documentation to prove defendant's prior record level. We remand this case for a resentencing hearing.

In summary, the trial court erred in not dismissing the sale of a controlled substance charge and that conviction is vacated. We find error in the sentencing of defendant and remand for resentencing. We find no error as to the remaining issues.

Vacated in part and remanded for resentencing.

Judges GREENE and WYNN concur.

LAMAR OUTDOOR ADVERTISING, INC., PETITIONER v. THE CITY OF HENDERSONVILLE ZONING BOARD OF ADJUSTMENT AND THE CITY OF HENDERSONVILLE, RESPONDENTS

No. COA01-1252

(Filed 31 December 2002)

1. Zoning— outdoor advertising—no state preemption

The North Carolina Outdoor Advertising Control Act does not preempt local regulation of outdoor advertising because the language in the Act proclaimed a public policy and provided a basis for regulating outdoor advertising, but did not express an intention to regulate outdoor advertising on a statewide basis or to preclude local regulation.

2. Zoning— outdoor advertising sign—repair to replacement cost ratio—evidence insufficient

The whole record supported the Board of Adjustment's decision that an outdoor advertising company (Lamar) did not carry its burden of proving the ratio between the cost to repair a billboard and the replacement cost. Although Lamar presented evidence, the Board concluded that a true estimate of the repair costs could not be had without information which had been omitted.

Appeal by petitioner from judgment entered on 6 July 2001 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 14 August 2002.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for petitioner-appellant.

Whitmire & Fritschner, by Samuel H. Fritschner, for respondent-appellee City of Hendersonville.

Michael Egan, for respondent-appellee City of Hendersonville Zoning Board of Adjustment.

HUDSON, Judge.

Lamar Outdoor Advertising, Inc. ("Lamar") is an outdoor advertising company. In April, 2000, a windstorm damaged one of Lamar's billboards ("the Billboard") on leased property ("the Property") in the City of Hendersonville. The Billboard was originally constructed in

1981, within the federally regulated corridor that extends to 660 feet from the nearest edge of a federal primary highway.

On 1 May 2000, a representative of Lamar contacted Susan Cox, the Zoning Administrator for the City of Hendersonville, and asked her how he should proceed to make repairs to the Billboard. Ms. Cox responded by letter 2 May 2000, which advised Lamar to submit a written request for a permit to make the repairs. The letter explained that in its request, Lamar should include the tax value of the Billboard, the replacement cost of one of comparable value and an estimate of the cost of repairs. Lamar sent a letter 5 May 2000 to Ms. Cox, enclosing a Billboard Valuation Worksheet and an estimate of the repair costs, based on the 1991 Billboard Valuation Guide published by the North Carolina Department of Revenue Property Tax Division Ad Valorem Tax Section.

Ms. Cox reviewed Lamar's proposal and by letter 5 July 2000 she denied Lamar's request to repair the Billboard. Specifically, Ms. Cox found that the Billboard was a nonconforming advertising sign and that the cost of repairs would exceed sixty percent of the replacement cost of a sign of comparable quality, the criteria for repairing such signs under section 13-4(b) of the City's Zoning Ordinance. Lamar appealed Ms. Cox's decision to the City Board of Adjustment ("BOA").

The BOA heard evidence from both Lamar and the City. Although Lamar submitted different evidence of lower repair costs from the estimate Lamar earlier sent to Ms. Cox, the BOA upheld the denial of the permit to repair.

Lamar then sought review of the BOA's decision by writ of certiorari in the Superior Court. Superior Court Judge Dennis J. Winner heard arguments from the parties, and upheld the decision of the BOA. Lamar appeals to this Court.

Upon review of a decision from a Board of Adjustment, the superior court should:

> (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in

> the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). This court, on review of the superior court's order must determine whether the trial court correctly applied the proper standard of review. *Id.*

This court applies the "whole record test" when reviewing the sufficiency of the evidence to support the findings of fact and, in turn, conclusions of law based thereon. *Id.* To do so, we must determine "whether the Board's findings are supported by substantial evidence contained in the whole record." *Id.* Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* "Where the petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined." *Id.* at 470, 513 S.E.2d at 74.

[1] Lamar's first argument is an issue of law: it contends that North Carolina's Outdoor Advertising Control Act, G.S. § 136-126 to -140.1 ("OACA"), preempts the City from enforcing its zoning regulations affecting billboards. The superior court rejected this argument, and upon *de novo* review, so do we.

The General Assembly has conferred upon cities the power to enact ordinances to "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city . . . . N.C. Gen. Stat. § 160A-174(a). As a limitation on this power, G.S. § 160A-174 provides that:

> (b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> . . .
>
> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

N.C. Gen. Stat. § 160A-174(b)(5) (2001). Thus, to determine whether the General Assembly intended to provide statewide regulation to the exclusion of local regulation, we must determine whether the General

Assembly showed a clear legislative intent to provide such a "complete and integrated regulatory scheme." *Id.*

In seeking to determine what the General Assembly intended when it adopted the OACA, we must look to the "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Taylor v. Taylor*, 343 N.C. 50, 56, 468 S.E.2d 321, 323 (1996), *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996). "Where legislative intent is not readily apparent from the act, it is appropriate to look at various related statutes *in pari materia* so as to determine and effectuate the legislative intent." *Craig v. County of Chatham*, 356 N.C. 40, 46, 565 S.E.2d 172, 176 (2002).

In *State v. Williams*, our Supreme Court ruled that state law preempted local regulation of malt beverages in the Town of Mount Airy. *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973) In that case, the defendants were arrested for the possession of an open container of beer, in violation of a Mount Airy city ordinance. The defendants' motion to quash the warrants was granted because the ordinance prohibiting the possession of open containers of beer in public places conflicted with North Carolina statutes, which allowed possession of malt beverages by eighteen-year-old consumers "without restriction or regulation." *Id.* The Supreme Court looked to the purpose and intent of the legislature in enacting the statute, which was "to establish a *uniform system of control* over the sale, purchase . . . and possession of intoxicating liquors . . . to insure, as far as possible, the proper administration of this Chapter under a *uniform system throughout the State.*" *Id.* at 553, 196 S.E.2d at 758 (*quoting* N.C. Gen. Stat. § 18A-1 (1975)) (emphasis added).

Relying in part upon *Williams*, the Supreme Court likewise found a legislative intent to preempt local regulation of sprinkler systems in certain high-rise buildings. *Greene v. City of Winston-Salem*, 287 N.C. 66, 75, 213 S.E.2d 231, 237 (1975). The Court noted that the legislature indicated its intent when it vested controlling regulatory authority in the North Carolina Building Code Council and "provided that the installation of the sprinkler systems required by statute must ultimately be of such design, condition, and scope 'as may be approved by the North Carolina Building Code Council.' " *Id.* at 75, 213 S.E.2d at 237. The Court also noted that the intent to create a

> complete and integrated regulatory scheme is further evidenced by the language of [the statute], which delegates to the Commissioner of Insurance the responsibility of administrating

and enforcing the provisions of the North Carolina Building Code pertaining "to plumbing, electrical systems, general building restrictions and regulations, heating and air conditioning, *fire protection* and the construction of buildings generally."

Id.

More recently, in *Craig v. County of Chatham*, the Supreme Court found that the stated purpose and intent in the "Swine Farm Siting Act" and the "Animal Waste Management Act" showed that the General Assembly intended that those acts be a "complete and integrated system" for swine farm regulation in North Carolina. *Craig v. County of Chatham*, 356 N.C. 40, 565 S.E.2d 172 (2002). In the Swine Farm Siting Act, the General Assembly included under the Purpose section the following language: "[C]ertain limitations on the siting of swine houses and lagoons for swine farms can assist in the development of pork production, which contributes to the economic development of the State, by lessening the interference with the use and enjoyment of adjoining property." N.C. Gen. Stat. § 106-801 (2001). The Animal Waste Management Act provides in pertinent part that "[i]t is the intention of the State to promote a *cooperative and coordinated* approach to animal waste management among the agencies of the State . . . ." N.C. Gen. Stat. § 143-215.10A (2001) (emphasis added). Upon reviewing the stated purpose and intent of the Swine Farm Siting Act and the Animal Waste Management Act, the Supreme Court concluded that the General Assembly intended to cover the entire field of swine farm regulation in North Carolina.

Turning to the OACA, we note that the General Assembly provided in its "Declaration of Policy" that "[i]t is the intention of the General Assembly to provide and declare herein a public policy and statutory basis for the regulation and control of outdoor advertising." N.C. Gen. Stat. § 136-127 (2001). This provision does not contain preemptive language similar to that in *Williams*, *Greene* or *Craig*. Rather, the language in the OACA indicates simply that the General Assembly intended to proclaim a public policy and provide a statutory basis upon which a government entity could regulate outdoor advertising. We do not conclude that, when it enacted these statutes, the General Assembly expressed an intention to regulate outdoor advertising only on a statewide basis, or to preclude local entities from regulating in this area.

Finding no express intention to preempt in the OACA, we look to its scope and breadth, and likewise find no indication that the

General Assembly intended to preempt local regulation. *See Craig.* Indeed, whereas the General Assembly in the Swine Farm Citing Act specifically limited a county's authority to regulate swine farms, G.S. § 153A-340(b)(1) (2001), the OACA expressly anticipates local involvement.

The very definition of "State law" in the OACA contemplates the involvement of local governments: "a State constitutional provision or statute, or an ordinance, rule or regulation enacted or adopted by a State agency or *political subdivision* of a State pursuant to a State Constitution or statute." N.C. Gen. Stat. § 136-128(6) (2001) (emphasis added). In addition, G.S. § 136-136 specifically demands local involvement in the area of outdoor advertising regulation, by requiring that local zoning authorities notify the Department of Transportation ("DOT") if they establish or change "commercial and industrial zones within 660 feet of the [primary highway] right-of-way." N.C. Gen. Stat. § 136-136 (2001). Beyond the statutory scheme set out in the General Statutes, the DOT, under authority vested in it by Article 11, even defers to local regulation of outdoor advertising when it provides that conforming signs, in order to be rebuilt, must "not conflict with any applicable state, federal or *local* rules, regulations or ordinances." 19A NCAC 2E .0225(b)(2) (April 2002) (emphasis added). Thus, we conclude that the OACA does not preempt local regulation of outdoor advertising.

[2] Lamar next argues that both the BOA and the superior court erred in their interpretation of section 13-4(b)(7) of the City's zoning ordinances regarding the replacement cost of a sign of comparable value. However, a review of the record discloses that the BOA did not expressly interpret section 13-4(b)(7). Its only reference to section 13-4(b)(7) is in Conclusion of Law number 1, which reads as follows:

> 1. Lamar did not carry its burden, pursuant to Hendersonville Zoning Ordinance[] § 13-4-(b)(7) of showing that it could "repair" its billboard for less than or equal to 60% of the replacement cost of the sign.

On review, the superior court noted that although petitioner argued that the court should review this conclusion *de novo*, it concluded that the standard of review is whether or not the BOA's decision was supported by the evidence. The superior court conducted the proper review and thus, we also apply the "whole record" test to our analy-

sis of the sufficiency of the evidence to support the findings and conclusions on this issue (appellants fourth argument). *See Whiteco Outdoor Adver.*, 132 N.C. App. at 468, 513 S.E.2d at 73.

Lamar argues that "The City presented no witness that could contradict or rebut [Lamar's witness Derek Collier's] testimony with quotes of billboard components of comparable quality." However, the burden of proving that the billboard could be repaired within the criteria set out in section 13-4-(b)(7) rested with Lamar. Hendersonville's Zoning Ordinance provides that "[t]he burden of proof shall rest with the applicant in all proceedings required or authorized by [the Zoning Ordinance]." City of Hendersonville, N.C., Zoning Ordinance art. 6, sec. 6-18.

In its decision, the BOA made findings of fact that included, *inter alia*, that the "board did not hear complete, accurate and credible evidence of the actual cost to 'repair' the billboard," and that the "board did not hear complete, accurate and credible evidence of the replacement cost of the billboard." In addition to Conclusion of Law number 1, the BOA reached the following Conclusion of Law:

> 2. Lamar did not carry its burden of proving that the Zoning Administrator erred in denying its request for a permit to "repair" the billboard.

Our review of the record, including testimony from Lamar and The City, discloses substantial evidence to support the BOA's findings of fact, which in turn support its conclusions of law. The figures that Lamar presented to the BOA to prove that it could reconstruct the billboard for less than sixty percent of the replacement cost of a sign of comparable value were inadequate in several respects. Most notably, the repair cost figure that Lamar presented to the BOA was lower than the repair cost figure that Lamar presented to Susan Cox when it first applied for a permit to reconstruct, due to several changes and omissions made by Lamar in the subsequent repair cost figure. First, Lamar lowered the labor cost estimate by $560.00 from the original estimate submitted to Susan Cox. Second, Lamar's own witness, Derek Collier, testified that the cost to rebuild the sign, as presented to the BOA, omitted several essential components of the reconstruction cost including, the costs for certain lighting parts, the costs for electrical wires for the billboard, and the labor costs for installing the electrical wiring. Though Lamar failed to include these lighting and wiring costs in the figure presented to

Susan Cox as well as the BOA, without such information a true estimate of the repair cost could not be had, and a true cost of repair was not put into evidence.

The foregoing evidence supports the BOA's decision that, under the Hendersonville Zoning Ordinance, Lamar did not meet its burden of proving the ratio between the cost to repair the sign and the replacement value of a sign of comparable quality. While Lamar may have presented evidence in an attempt to prove these facts, the BOA concluded it was not enough. Where the whole record supports this determination, "neither the trial court nor this Court may substitute its own judgment for that of the Board's." *Whiteco Outdoor Adver.*, 132 N.C. App. at 469, 513 S.E.2d at 74. In light of our holding that the BOA's decision was supported by the whole record, we also hold that the BOA's decision was neither arbitrary nor capricious, as the BOA reasonably concluded from the evidence that Lamar did not carry its burden of proof.

Thus, we affirm the superior court's order upholding the decision of the City of Hendersonville Zoning Board of Adjustment.

Affirmed.

Judges WYNN and CAMPBELL concur.

APRIL SHIPMAN, PLAINTIFF, APPELLANT v. CASEY DEAN SHIPMAN, DEFENDANT, APPELLEE

No. COA02-332

(Filed 31 December 2002)

1. Child Support, Custody, and Visitation— change of primary custody—changed circumstances—substantial evidence

In an action which resulted in a change in the primary custody of the child from plaintiff mother to defendant father, there was substantial evidence in the record supporting the trial court's findings of plaintiff's transience, defendant's planned remarriage, and plaintiff's denial of defendant's visitation rights, and these findings supported the conclusion that there had been a substantial change in circumstances affecting the welfare of the child.

2. Child Support, Custody, and Visitation— support—change—lack of notice to Child Support Agency

Lack of notice to the Henderson County Child Support Agency of a change in defendant's child support obligation and arrearage did not result in the change being disturbed on appeal. Lack of notice to the agency is not fatal where there was a change in circumstances causing a custody modification and the agency had prior notice through the appearance of its testifying agent.

3. Child Support, Custody, and Visitation— support—changed custody—existing arrearage—credited to new obligation

The trial court did not err in a child support and custody action by not compelling immediate payment by defendant of an arrearage where primary custody was changed to defendant, plaintiff went from receiving support to paying support, and the court credited the arrearage to plaintiff's new support obligation. Plaintiff receives the support, but in a different form.

4. Trials— court's comments to witness—irrelevant

The trial court did not err in a child custody and support case by instructing a bank employee, a witness for plaintiff, about proper procedures for subpoenaed documents; the court's comments were directed toward future compliance and were irrelevant to the issues at bar.

Judge WALKER dissenting.

Appeal by plaintiff from an order entered 5 October 2001 by Judge Laura J. Bridges in Henderson County District Court. Heard in the Court of Appeals 14 November 2002.

Wade Hall for plaintiff-appellant.

Edwin R. Groce; and Bazzle & Carr, P.A., by Eugene M. Carr III, for defendant-appellee.

TYSON, Judge.

I. Background

April Shipman ("plaintiff") and Casey Dean Shipman ("defendant") are the parents of Spencer Reed Shipman ("Spencer"), born 8 July 1998. On 29 April 1999, after the parties had separated, plaintiff filed an action for sole custody of Spencer and requested that defendant be ordered to pay child support. On 5 October 1999, the

parties entered into a consent order awarding them joint custody and granting plaintiff primary care, custody and control of Spencer. The consent order also established visitation for defendant and ordered him to pay $110.00 per week in child support.

On 9 May 2001, defendant moved for sole custody of Spencer, alleging a material change in circumstances affecting Spencer's welfare. He also moved the trial court to vacate the child support award after payment of his arrearage. In support of his claim of a material change in circumstances, defendant alleged plaintiff's relationship with her boyfriend, Christopher Vaughn, created an "abusive" and "neglectful" living environment that was not in Spencer's best interest. Defendant further alleged that plaintiff refused to comply with his visitation rights as set forth in the consent order.

In her reply to defendant's motion, plaintiff denied defendant's allegations and asked the trial court to hold him in contempt and order his wages be garnished for failure to pay child support as required by the consent order.

On 5 October 2001, the trial court made the following pertinent findings after a hearing on defendant's motion for modification of the child custody order and support obligation:

> 1. That the Consent Order entered in this cause on October 5, 1999, provided for the parties to have joint custody of Spencer Shipman, born July 8, 1998, with the primary custody of the child to be with the Plaintiff and the Defendant to have certain specified visitation with the child.
>
> . . .
>
> 4. That the Plaintiff is a good Mother, provided for the child in a good manner and took care of the child's needs from day to day.
>
> 5. That the Defendant has been a good Father, has parenting skills and is capable for [sic] providing for the child.
>
> 6. That a large and direct part of the conduct of the Plaintiff, especially during the year of 2001, has been to deprive the Defendant of his visitation of the minor child, by deceit, and that the Plaintiff moved in and lived with Chris Vaughn, with the minor child present, in violation of the Order that was entered on October 5, 1999, and she did not inform the Defendant of her address or phone number. The Plaintiff did not give direct and revealing answers to questions when she was cross examined and

she has denied the Defendant visitation, until this matter came on for Hearing on September 6, 2001, from January, 2001.

7. That the child knows the Father/Defendant, loves the Father/Defendant and was glad to see him when visitation took place. The Father/Defendant had a good relationship with the child, enjoyed visiting with the child, loves the child and the child loves the Father/Defendant, and the child looks forward to seeing the Father/Defendant, even though the Plaintiff would not allow the Father to see the child or the Paternal Grandmother to see the child. It was also revealed to the court that the Plaintiff allowed the child to go to Georgia to stay with the Plaintiff's Mother in the same home where the Plaintiff was molested, and the Plaintiff has deprived the child of interaction with the Father/Defendant and his family, including Sheila Bishop, the Paternal Grandmother.

8. The Defendant has not been blameless, as he has failed to pay child support as he was ordered to do, and at the time of the hearing, the Defendant was in arrears in the amount of $5853.22, and would only pay when he was made to pay, and he has not done what he should have done, and that was to provide some support, even though, the testimony was that he had lost a job during this time.

9. The Defendant and Kelly Squirer have a three bedroom home, can provide for the child, Kelly Squirer has a four year old son and can help with the child.

10. . . . [T]he plaintiff does not have a home, has worked at the same job for a considerable period of time, but has moved numerous times, which shows instability.

11. That the Court finds that there has been a substantial change in circumstances since the entry of the Order in this cause on October 5, 1999, affecting the welfare of the minor child.

The trial court awarded the parties joint custody and granted defendant primary care, custody and control of Spencer. The trial court also established visitation rights for plaintiff and ordered her to pay child support based on her earnings after a credit of $5853.22, defendant's arrearage as set by the trial court at the hearing.

II. Issues

The issues are (1) whether there was substantial evidence to support the trial court's findings of fact and whether those findings sup-

port the conclusions of law and (2) whether the trial court erred in modifying defendant's child support obligation and arrearage.

III. Findings of Fact Support Conclusions of Law

[1] Plaintiff contends that the trial court's findings are not supported by competent evidence and that the findings do not support its order awarding primary custody to defendant. In child custody cases, the trial court is vested with broad discretion. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000). If there is substantial evidence in the record to support a trial court's findings on a motion for modification of child custody, such findings are conclusive on appeal. *Id.* at 423, 524 S.E.2d at 97-98. The trial court's conclusions of law are reviewable *de novo*. *Id.* at 423, 524 S.E.2d at 98.

The trial court's finding of fact that "there has been a substantial change in circumstances since the entry of the Order in this cause on October 5, 1999, affecting the welfare of the minor child[]" is restated as a conclusion of law and supported by the other findings of fact. Substantial evidence supports those findings of fact. The trial court found that both parents were good parents who had made mistakes during Spencer's lifetime. The trial court found that plaintiff had violated the consent order (1) by cohabiting with Chris Vaughn in Spencer's presence, (2) deceiving defendant about her whereabouts and (3) denying defendant visitation with his son which deprived Spencer of interaction with his father and his father's family. The trial court further found that plaintiff took Spencer to visit her mother in Georgia. Plaintiff's mother continued to live with plaintiff's stepfather who had molested plaintiff when she was younger.

The trial court also made findings of fact that defendant and his girlfriend had purchased and lived in a three-bedroom home, were engaged to be married, and could provide for the child. In contrast, the trial court found that plaintiff "does not have a home" as she had moved in and out of her grandmother's home, into and out of a home with Chris Vaughn, and back into her grandmother's home.

Defendant's upcoming marriage, plaintiff's cohabitation with Chris Vaughn in violation of the consent order, plaintiff's denial of defendant's visitation with Spencer, and plaintiff's transience are cumulatively sufficient to establish a substantial change in circumstances affecting the welfare of the child.

In *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998), our Supreme Court broadened the trial court's discretion in making the

determination whether the changed circumstances affected the welfare of the child, and stated "a showing of a change in circumstances that *is, or is likely to be, beneficial* to the child may also warrant a change in custody." *Id.* at 620, 501 S.E.2d at 900 (emphasis supplied). The Court then noted that a custody decree " 'is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order.' " *Id.* (quoting *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)).

This Court has held that the denial of visitation with a child's father is sufficient to constitute a change in circumstances affecting the welfare of the child. *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986). "[W]here . . . interference [with a custody order] becomes so pervasive as to harm the child's close relationship with the noncustodial parent, there can be a conclusion drawn that the actions of the custodial parent show a disregard for the best interests of the child, warranting a change of custody." *Id.*

The trial court's findings of fact are supported by substantial evidence in the record. The findings of fact support the conclusion of law that there was a substantial change in circumstances affecting the child. All of the findings of fact including (1) plaintiff's transience, (2) defendant's remarriage, and (3) plaintiff's denial of defendant's visitation rights are supported by substantial evidence and affect the welfare of the child.

IV. Modification of Child Support

[2] Plaintiff contends the trial court erred in modifying defendant's child support obligation and arrearage. Plaintiff objects to the modification on the grounds that (1) the court erred in modifying defendant's child support arrearage without giving notice to the Henderson County Child Support Agency and (2) the court erred in aiding defendant avoid his imposed child support obligation by not compelling payment and penalizing plaintiff for not being financially stable.

The Henderson County Child Support Agency had intervened to assist in the collection of defendant's past due child support. The agency did not represent plaintiff's interests during the trial, but a member of that agency testified at trial. Plaintiff had retained her

own attorney. Lack of notice to the agency of the modification is not fatal where there was a change in circumstances causing a custody modification and the agency had prior notice through the appearance of its testifying agent. *See* N.C.G.S. § 50-13.7(a) (2001); *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (change in custody from one parent to another is a changed circumstance supporting modification of the supporting party's child support obligation.)

[3] Plaintiff's other argument regarding child support generally criticizes the trial court for not compelling immediate payment of defendant's child support arrearage. Although no immediate payment was compelled, the court credited the arrearage at the date of the hearing to plaintiff's support obligation as the secondary custodial parent. This general argument cites no supporting law but merely emphasizes the facts. Plaintiff will receive the child support but in different form. We decline to disturb the trial court's findings of fact which were based upon substantial evidence.

V. Conduct of the Trial Court

[4] Plaintiff argues that the trial court erred in interacting with and advising plaintiff's witness. Debra Potter, a bank employee, testified about deposits to defendant's bank account. The trial judge instructed Ms. Potter regarding proper procedures for subpoenaed documents. The trial court's comments were directed toward future compliance and were irrelevant to the issues at bar.

VI. Conclusion

We hold that the trial court's findings of fact were supported by substantial evidence and supported their conclusions of law. The order of the trial court is affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge WALKER dissents.

WALKER, Judge, dissenting.

I respectfully dissent from the majority opinion affirming the trial court's modification of child custody and the support obligation.

A determination that there has been a substantial change of circumstances to warrant modification of child custody is a legal conclusion which must be supported by adequate findings. *Garrett v. Garrett*, 121 N.C. App. 192, 464 S.E.2d 716 (1995). In determining whether to modify a child custody order, the trial court must focus on the effect on the child. *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000). "[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967) (citation omitted); *see also Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

Here, the trial court found that "there has been a substantial change in circumstances since the entry of the Order in this cause on October 5, 1999, affecting the welfare of the minor child." Although labeled as a finding, the determination that a substantial change in circumstances has occurred affecting the welfare of the child is a legal conclusion and must be supported by adequate findings. However, the trial court focused only on the parties' conduct and failed to make any findings as to how this conduct constituted a substantial change in circumstances and affected the child's welfare.

The trial court found the plaintiff had violated the consent order by cohabitating with her boyfriend as support for a substantial change in circumstances. However, the trial court also found that defendant was cohabitating with his girlfriend during the same time period, also a violation of the consent order. Conveniently, the trial court seems to disregard defendant's violation of the consent order as it noted the defendant and his girlfriend planned their wedding for the day after the custody hearing. I can only speculate whether the trial court's ruling would have been different if plaintiff had offered similar evidence that she was to be married immediately following the custody hearing.

One of the cardinal principles of child support is that the obligor is required to pay the child support obligation even though visitation privileges cannot be exercised as required by the trial court's order. *See Appert v. Appert*, 80 N.C. App. 27, 41, 341 S.E.2d 342, 350 (1986) (stating that "the duty of a parent to support his or her children is not dependent upon the granting of visitation rights, nor is it dependent upon the parent's opportunity to exercise visitation rights"); N.C. Gen. Stat. § 52C-3-305(d) (2001). Here, for no apparent reason, the

trial court failed to enforce defendant's child support arrears which were due to plaintiff. Instead, the trial court provided the plaintiff with a "credit" against any future child support obligation she may incur. Again, the trial court's modification of the child support arrears seems to be premised on its disapproval of plaintiff's conduct relating to defendant's visitation with the child contrary to the law of this State. If, however, the trial court based the modification of the support obligation on a substantial change in circumstances using the factors which may be considered under our law, it should make this basis apparent in its findings and conclusions.

Because the trial court's order is devoid of findings as to how the parties' conduct affects the child's welfare so as to constitute a substantial change in circumstances, I conclude the modification of child custody and the support obligation is not supported by adequate findings. Thus, I would vacate the order and remand this matter for a new hearing as to whether there has been a substantial change in circumstances and how such a change in circumstances affects the welfare of the child so as to warrant a modification of custody and the child support obligation.

SCOTLAND COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF SHANNON C. POWELL, PLAINTIFF v. JOHN A. POWELL, DEFENDANT

No. COA02-183

(Filed 31 December 2002)

1. Child Support, Custody, and Visitation— support—grandparents' contributions—irrelevant

Evidence of third party contributions from plaintiff's parents while she lived with them was irrelevant in a child support action because plaintiff and the children were not living with her parents at the time of the hearing. Moreover, the evidence was in fact introduced and explained in detail on cross-examination.

2. Child Support, Custody, and Visitation— support—presumptive amount—findings

The trial court's findings were adequate to support application of the presumptive child support amount where the court made specific findings as to the reasonable needs of the children

and the relative ability of each party to provide support. The findings were adequate to indicate that the court based its conclusion not to deviate from the guidelines on the interplay between the amount necessary to meet the needs of the children and the relative ability of the parties to provide that amount.

3. Child Support, Custody, and Visitation— support—parent's income—sales commissions—speculative

The trial court did not err in a child support action by not including plaintiff's sales commissions from Avon where those commissions were speculative.

4. Appeal and Error— preservation of issues—failure to object at trial—appeal precluded

Defendant's failure to object at trial precluded his raising on appeal the trial court requiring financial affidavits but not allowing cross-examination on the contents in a child support action.

5. Child Support, Custody, and Visitation— support—use of worksheet—findings—defendant not assuming disproportionate share of costs

There was no error in a child support action where the trial court used a child support worksheet without a modification for one parent assuming a disproportionate share of costs.

Appeal by defendant from order entered 30 August 2001 *nunc pro tunc* 30 March 2001 by Judge Richard T. Brown in Scotland County District Court. Heard in the Court of Appeals 14 October 2002.

Edward H. Johnston, Jr., P.A., by Edward H. Johnston, Jr., for plaintiff-appellee.

Middleton & Mullins, LLP, by Ayn Muse Middleton, for defendant-appellant.

THOMAS, Judge.

Defendant, John A. Powell, appeals from an order requiring him to provide medical insurance coverage on his two minor children, cover seventy-five percent of all their unpaid medical expenses and pay the presumptive amount of child support.

He contends the trial court erred by: (1) not allowing him to present evidence of third-party contributions to plaintiff, Shannon C. Powell, and the children in support of his request for a deviation

from the North Carolina Child Support Guidelines; (2) failing to make adequate findings of fact to justify application of the presumptive child support amount after hearing evidence in support of his request for a deviation; (3) failing to include as income certain commissions earned by plaintiff as a sales representative; (4) ordering the parties to submit financial affidavits without affording each the opportunity to cross-examine the other on the contents of the affidavits, and then relying solely on plaintiff's affidavit when making findings regarding the reasonableness of the children's expenses; and (5) ordering him to pay the presumptive amount of support under the guidelines when the evidence shows he assumed a disproportionate share of the costs of the children's care and support. For the reasons herein, we affirm.

The Powells were married on 15 June 1989, separated on 29 December 1998, and subsequently divorced. They have two children, Christin and Kelsey Powell. During the summer of 1999, the parties entered into a Parenting Agreement providing joint physical custody of both children. Plaintiff contracted with the Scotland County Child Support Enforcement Agency, which filed a complaint on 13 September 2000 to establish child support. Defendant answered and also requested the establishment of child support under the child support guidelines. Neither party sought a deviation from the guidelines in their initial pleadings.

According to Child Support Worksheet B, which is used to determine support when the parents have joint physical custody of the children, defendant's presumptive child support obligation is $349.00 per month. This figure takes into consideration that defendant pays the children's health insurance premiums. The worksheet indicates plaintiff earns a gross income of $1,365.00 per month, and defendant earns a gross income of $3,745.00 per month.

At the hearing, defendant attempted to elicit testimony concerning plaintiff's earlier living arrangements with her parents. Plaintiff objected, and the trial court ruled that such evidence was not relevant because plaintiff and the children were not living with her parents at the time of the hearing.

Plaintiff claimed she and the children began living with Amy Stewart on McNair Avenue one month prior to the hearing and paid $300.00 per month in rent and utilities. Before that, they lived with plaintiff's parents for approximately six months. Plaintiff and the children had also lived with her parents for approximately four or five

months on one other occasion following the parties' separation. While plaintiff and the children lived with her parents, she claims she paid "around" $300.00 in rent and utilities and paid her mother $20.00 per week for child care. Plaintiff also supplied food and clothes for herself and the children.

Plaintiff testified that she provided the children with housing, clothing, food, school supplies, cheerleading supplies, entertainment and gifts. She acknowledged that defendant provided medical insurance coverage, piano lessons, and any amount not covered by insurance for eye and dental care.

Defendant, meanwhile, testified that he provided for the following: health insurance coverage (including medical, dental and vision), school supplies, school field trips, school pictures, bowling league fees, weekly church contributions, premiums on two life insurance policies for each child, and a computer.

Following closing arguments, and prior to judgment, the trial court ordered the parties to submit financial affidavits. When court resumed the following morning, defendant and defense counsel were not present. Plaintiff's affidavit of expenses was received into evidence and the trial court announced its judgment in open court. Defendant's affidavit was received by the court that same morning following recitation of the judgment.

In its order, the trial court made the following pertinent findings of fact:

> 9. Defendant suffers no mental or physical disability which would make him unfit for work and is capable of employment; he is currently employed with earnings of $3,745.00 per month (this amount is based on gross pay for regular employment of forty hours weekly and does not include overtime).
>
> 10. Ms. Powell earns $1,365.00 monthly at BellSouth.
>
> 11. Defendant provides medical insurance coverage on the children through his employment and the cost for the children's coverage is $32.00 monthly.
>
> . . .
>
> 14. A worksheet calculating the appropriate child support in accord with State guidelines was received in evidence and the

support amount per the State guidelines is $349.00 per month from the Defendant.

15. Defendant is able to pay those sums set out in the mandate portion of this order and said sums are reasonable and in conformity with State guidelines.

16. There was no evidence received which would constitute the basis for a deviation from the State guidelines.

17. The Court received into evidence and reviewed Shannon C. Powell's "Affidavit of Income, Assets and Expenses" which is an itemized list of monthly expenses for Ms. Powell and more particularly for these children and the Court finds these children's expenses to be customary, reasonable, not excessive or extraordinary, and supportive of an adequate basis for the imposition of the support obligations of the Defendant contained in the mandate.

. . . .

The court then ordered defendant to pay the presumptive amount of $349.00 per month in support for his two children, provide and maintain medical insurance coverage on the children, and pay seventy-five percent of all unpaid medical expenses of the children.

[1] Defendant first contends the trial court erred in not allowing him to present evidence of third-party contributions to plaintiff and the children in support of his request for a deviation from the child support guidelines. Specifically, he argues the trial court erred in sustaining plaintiff's objection to the relevancy of evidence regarding support she and the children received while living with her parents. Plaintiff counters by arguing that defendant failed to make a timely request or motion for deviation from the guidelines.

N.C. Gen. Stat. § 50-13.4(c) (2001) provides: "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines[.]" *See also State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 645, 507 S.E.2d 591, 593-94 (1998). However, the trial court may deviate from the presumptive amount "upon request of any party" that the trial court hear evidence and find facts "relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." N.C.G.S. § 50-13.4(c); *see Browne v. Browne*, 101 N.C. App. 617, 623, 400 S.E.2d 736, 740 (1991). Following

such request and hearing, the trial court may deviate from the presumptive guidelines if:

> after considering the evidence, the [c]ourt finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. . . .

N.C.G.S. § 50-13.4(c).

Absent a request by a party, the trial court is not required to take evidence, make findings of fact, or enter conclusions of law "relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support." *Browne*, 101 N.C. App. at 624, 400 S.E.2d at 740 (quoting N.C.G.S. § 50-13.4(c)). The party seeking a variance from the guidelines is required to give advance notice of such request. *Id.* If the advance notice is not contained in the original pleadings, it must be given at least ten days prior to the hearing. *Id.* Absent a proper request for variance, the trial court is only required to hear such evidence as may be necessary for proper application of the presumptive guidelines as adopted by the Conference of Chief District Court Judges. *Id.* Absent a request for variation, support consistent with the guidelines "is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education and maintenance." *Id.*

Here, neither party requested a deviation in their initial pleadings. However, at the hearing, defendant attempted to elicit evidence concerning plaintiff's pre-hearing living arrangements with her parents. Defendant asked the trial court to consider such evidence in support of his request to deviate from the presumptive guidelines.

Although the trial court initially ruled that such evidence was irrelevant because plaintiff and the children no longer lived with her parents, similar evidence was subsequently admitted, without objection, on cross-examination of plaintiff. In addition, both parties introduced, without objection, other evidence of the children's needs and the parties' relative ability to provide support. Therefore, any failure by defendant to give timely and proper notice of his request for a deviation from the presumptive guidelines was waived. *See Gowing v. Gowing*, 111 N.C. App. 613, 617, 432 S.E.2d 911, 913 (1993); *Browne*, 101 N.C. App. at 624, 400 S.E.2d at 741.

In *Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996), our Supreme Court held that contributions and support from third-parties may be considered when determining whether to deviate from the child support guidelines. *Id.* at 172, 473 S.E.2d at 9. While such third-party contributions will not always support deviation, the trial court should have such evidence at its disposal to "examine the extent and nature of the contributions in order to determine whether a deviation from the guidelines is appropriate[.]" *Id.* at 171, 473 S.E.2d at 9.

Defendant relies on *Guilford County* in arguing that the trial court erred in sustaining plaintiff's objection to evidence of the children's pre-hearing living arrangements with her parents. However, in *Guilford County*, the evidence showed that the plaintiff-father and the children were living in a house owned by the maternal grandparents at the time of the hearing. The maternal grandparents paid the water bill and did not charge plaintiff rent. The children also spent a great deal of time at their grandparents' home and the grandparents provided for other needs of the children including clothing, haircuts, and medical bills. *Id.* at 168, 473 S.E.2d at 7.

Here, however, the evidence shows plaintiff and the children were not living with her parents at the time of the hearing. They had moved out approximately one month earlier. Thus, the trial court correctly ruled such evidence irrelevant. Nonetheless, plaintiff later testified on cross-examination to the two occasions during which she and the children lived with her parents. Plaintiff provided details of the living arrangements with her parents, including the fact she paid $300.00 per month in rent and utilities and paid her mother $20.00 per week to keep the children. Thus, the evidence defendant sought to introduce concerning alleged third-party support, although properly excluded initially, was in fact introduced and explained in detail by plaintiff on cross-examination. Accordingly, defendant's first assignment of error lacks merit.

[2] Defendant next contends the trial court failed to make adequate findings of fact to support application of the presumptive child support amount after hearing evidence in support of defendant's request for a deviation. We disagree.

Since a hearing was conducted and evidence presented relating to the reasonable needs of the children and the relative ability of each parent to provide support, the trial court was required to find facts and enter conclusions on the evidence. *Browne*, 101 N.C. App.

at 623, 400 S.E.2d at 740. In finding facts, the trial court was required to consider:

> the reasonable needs of the child[ren] for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child[ren] and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c1); *see State ex rel. Fisher*, 131 N.C. App. at 645, 507 S.E.2d at 594. The trial court's conclusion whether to deviate from the presumptive amount of child support was required to be based on "factual *findings* specific enough to indicate to [this Court] that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child[ren] and the parents." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quoting N.C.G.S. § 50-13.4(c)) (emphasis in original).

In the case *sub judice*, the trial court made specific findings of fact as to the reasonable needs of the children and the relative ability of each party to provide support. The findings of fact here are adequate to indicate the trial court based its conclusion not to deviate from the guidelines on the interplay between (1) the amount of support necessary to meet the reasonable needs of the children and (2) the relative ability of the parties to provide that amount. *See State ex rel. Fisher*, 131 N.C. App. at 646, 507 S.E.2d at 594; *Atwell v. Atwell*, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985). Accordingly, we hold the trial court did not err in awarding the presumptive amount of child support called for under the guidelines.

[3] Defendant next contends the trial court erred in failing to include in plaintiff's income certain commissions she earned as a sales representative for Avon.

The trial court found that plaintiff earned $1,365.00 per month working at BellSouth. This was the amount used on Worksheet B. In her testimony, plaintiff indicated she had been selling Avon products for two weeks, that her commission was "ten or twenty percent," and she would "probably" make $20.00 per week. In her financial affidavit, plaintiff listed $15.00 per week as income from selling Avon. However, plaintiff also said her supplies would cost "more than that." It is not clear from her testimony whether she was comparing her cost to the $100.00 in sales or her ten to twenty percent commission. Plaintiff also testified she had yet to receive a commission check for selling Avon products. The trial court did not err in deciding not to

include as income any amount for plaintiff's sale of Avon due to its speculative nature.

[4] Defendant next contends the trial court erred in ordering the parties to submit financial affidavits without allowing them to cross-examine one another on the contents of the affidavits, and then solely relying on plaintiff's affidavit in finding that the children's expenses were reasonable. We disagree.

After each party was ordered to submit financial affidavits, the trial court indicated it did not intend to receive any testimony the next morning related to the affidavits. The parties were then asked if there was anything else they wished to address and neither party responded. When court reconvened the following morning, defendant and defense counsel were absent and no objection had been entered, orally or in writing, to the trial court's stated intentions. The trial court then received plaintiff's financial affidavit and entered its ruling in open court. Defendant's affidavit was received later that morning.

Defendant had ample opportunity to make known to the trial court his objection to the procedure and his desire to cross-examine plaintiff. Having failed to do so, he is precluded from raising such issue on appeal and we reject the assignment of error.

[5] Defendant next contends the trial court erred in ordering him to pay the presumptive amount of support when the evidence shows he assumed a disproportionate share of the cost of the children's care and support. We disagree.

The instructions for completing Child Support Worksheet B (joint or shared custody) state: "[t]o the extent that one parent assumes a disproportionate share of costs . . . the worksheet should not be used or should be modified accordingly." Here, defendant introduced canceled checks and receipts as evidence of support provided by him from February 1999 to February 2001. Nonetheless, the trial court found "defendant has failed to adequately contribute to the support and maintenance of his named children." This constitutes a finding that defendant did not assume a disproportionate share of the children's costs. Accordingly, the trial court did not err in using Worksheet B and ordering defendant to pay the presumptive amount of child support.

Defendant's remaining assignments of error are deemed abandoned since they are not argued or supported in his brief. N.C.R. App. P. 28(b)(6) (2001).

For the reasons discussed herein, we affirm the trial court's order of child support.

Affirmed.

Chief Judge EAGLES and Judge TYSON concur.

STATE OF NORTH CAROLINA v. TERRY LEE McNEIL, DEFENDANT

No. COA02-175

(Filed 31 December 2002)

1. Evidence— DNA testing—motion to require—denied

Defendant's motion under Brady v. Maryland for DNA testing of hair samples from a cap dropped at the scene of a robbery and kidnapping was properly denied because defendant failed to show that the material he sought meets the requisite level of materiality.

2. Kidnapping— indictment—two purposes

A kidnapping indictment was proper where it alleged that defendant removed the victim for the purpose of terrorizing him and facilitating flight. This did not charge two crimes of kidnapping, but two purposes for which the kidnapping took place.

3. Kidnapping— elements—restraint not inherent in robbery

In a kidnapping and robbery prosecution, the State presented evidence of a restraint not inherent in the robbery where defendant moved the victim to the back of the store at gunpoint after completing the robbery.

Appeal by defendant from judgments entered 8 June 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 16 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

John T. Hall, for defendant-appellant.

HUDSON, Judge.

Terry Lee McNeil ("defendant") was convicted of second-degree kidnapping and robbery with a dangerous weapon. He appeals the convictions, arguing that the trial court erred when it (1) denied his motion that a knit cap found at the scene be tested for hair and DNA; (2) denied his motion to dismiss the indictment because it improperly charged him with two separate kidnapping offenses; and (3) denied his motion to dismiss the kidnapping charge on the grounds that the State presented insufficient evidence of restraint separate from that inherent in the armed robbery. For the reasons set forth below, we see no error in defendant's convictions or sentence.

BACKGROUND

James Kelly worked part-time at Martin's Cleaners in Apex, North Carolina. On 9 November 2000, around 6 p.m., Kelly was watching television in the back of the store when he heard a sliding glass door squeak. He stood up and saw someone reach in through the door and grab a metal box that was located under the front counter. The intruder retreated through the same sliding door and got in a car. As the car began to pull away, Kelly heard one of the occupants exclaim to the other, "there is no money in the box." The car turned back to the front of the building, and one occupant, later identified as defendant, got out of the car, knocking his knit cap to the ground in the process.

Defendant, who now carried a gun, reentered the cleaners through the front door. Defendant pointed the gun at Kelly and told him to go to the rear of the building. Kelly did, and defendant told him to kneel. Defendant ordered the kneeling Kelly to hand over his wallet, which contained about sixty dollars. As Kelly complied, defendant ripped the phone out of the wall.

Defendant then told Kelly to stand up and, with the gun at Kelly's back, walked Kelly to the front of the cleaners. Defendant ordered Kelly to show him how to open the store's cash register and then to lie down on the floor. Touching the gun to the back of Kelly's head, defendant told Kelly to lie still. Defendant opened the cash register and took all of the money, approximately sixty dollars.

Defendant told Kelly to stand up and, again with the gun to his back, to walk to the rear of the cleaners. Defendant then left. Kelly stood where he was for two or three minutes until he heard the sound of tires on gravel. When Kelly looked out the window, he saw a car

pulling away and then went to the business next door and called the police. Officer Blomgren of the Apex police department responded and while at the scene collected the knit cap that had fallen in the parking lot.

Police arrested defendant on 2 January 2001 and charged him with kidnapping and robbery with a dangerous weapon. A jury found him guilty on both counts on 8 June 2001. The court sentenced defendant to 146 months to 185 months in prison for armed robbery and to a consecutive sentence of 59 to 80 months for second-degree kidnapping. Defendant now appeals.

ANALYSIS

I.

[1] Defendant argues first that the trial court erred when it denied his motion, pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), to have the knit cap tested for hair samples and that those samples be compared with defendant's hair and DNA. Defendant contends, "upon information and belief," that the two samples would not match, thereby exculpating him.

In *Brady*, the United States Supreme Court held that a defendant's due process rights are violated when the prosecution suppresses evidence that is "favorable to an accused" if the evidence is "material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 10 L.Ed.2d at 218. To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. *Id.* Evidence is considered material only if there is a "reasonable probability" of a different result had the evidence been disclosed to the defense. *United States v. Bagley*, 473 U.S. 667, 682, 87 L.Ed.2d 481, 494 (1985).

In our view, *Brady* does not apply, for several reasons. First, because the State never tested the hairs in the cap, there was no report to be disclosed to defendant. Moreover, another panel of this Court already has held that hair samples taken from the scene of a crime are not material for *Brady* purposes where, inter alia, the prosecution never conducted a DNA analysis. *State v. Campbell*, 133 N.C. App. 531, 515 S.E.2d 732, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). As that court explained:

> The district attorney did not have DNA analysis performed on the hair samples. Therefore, their inculpatory or exculpatory nature

> is unknown. The existence of the hairs, alone, does not directly bear on the question of innocence for assuming *arguendo* that the hair samples came from an individual other than defendant, so this fact merely provides some support for the theoretical possibility that another individual was in the victim's room and was the perpetrator of the crime. While it is the better practice for the prosecution to disclose potentially exculpatory evidence, we find that the hair samples in this case do not rise to the level of materiality defined in *United States v. Bagley* . . . .

Id. at 541, 515 S.E.2d at 739. As the court in *Campbell* rejected the defendant's *Brady* argument, we conclude in this case that defendant has not shown that the material he sought rises to the requisite level of materiality.

Here, Kelly took only seconds to select defendant from a photo lineup presented one week after the incident. He was equally certain in his identification of defendant in court, and defendant has made no argument that either identification was unduly suggestive. Kelly described his opportunity to observe the robber and the vehicle used by the robber. In light of this evidence, we do not believe that DNA evidence, if any had been available, would have presented a reasonable probability of a different result. Thus, as in *Campbell*, we overrule defendant's assignment of error.

II.

[2] Defendant also argues that the indictment improperly charged him with two separate crimes of kidnapping, in violation of N.C. Gen. Stat. § 15A-924(a)(2). Accordingly, he contends that the trial court erred when it denied his motion to dismiss the indictment in its entirety.

The indictment charged defendant with "unlawfully confining, restraining, and removing [the victim] . . . from one place to another, without his consent and for the purpose of terrorizing him and facilitating flight following the commission of . . . Robbery with a Dangerous Weapon." Contrary to defendant's assertion, however, two different crimes are not alleged. Rather, the indictment sets forth two different *purposes* for which the kidnapping took place, a technique our Supreme Court explicitly approved in *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). The Court explained as follows in that case:

> Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute. The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment. Although the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping.

Id. (internal citations omitted). Relying on *Moore*, we conclude that the trial court did not err in refusing to dismiss the indictment.

III.

[3] Defendant also assigns error to the trial court's failure to dismiss the kidnapping charge. He argues that the State presented insufficient evidence of a restraint separate from that inherent in the robbery and that, as a result, he cannot constitutionally be convicted of both crimes.

The offense of kidnapping, defined by statute, provides in pertinent part:

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

N.C. Gen. Stat. § 14-39. In *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), our Supreme Court interpreted the statute to mean "that it was not the legislature's intent . . . to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." *Id.* at 102, 282 S.E.2d at 446. Rather, "restraint" connotes a restraint separate and apart from that inherent in the commission of the other felony. *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994). The key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or "subjected to the kind of danger and abuse the kidnapping

statute was designed to prevent." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446.

Our appellate courts have, in the past, explored when the defendant's restraint of a victim constitutes an inherent part of an armed robbery and, therefore, cannot properly be the basis for a separate offense of kidnapping. One factor the courts have considered is whether the victim was forcibly moved for any reason other than commission of the armed robbery. In *Irwin*, relied upon in defendant's brief, the defendant was charged with kidnapping and an attempted armed robbery of a drug store. The State alleged that the defendant kidnapped the victim when, during the attempted robbery, his accomplice "forced [the victim] at knifepoint to walk from her position near the fountain cash register to the back of the store in the general area of the prescription counter and safe." *Id.* at 103, 282 S.E.2d at 446. In reversing the conviction for kidnapping, the Supreme Court held that the "victim's removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish defendant's objective of obtaining drugs, it was necessary that either [the store owner or the victim] go to the back of the store to the prescription counter and open the safe . . . . [The victim's] removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Id.* at 103, 282 S.E.2d at 446.

In a case similar to the one here, we upheld the denial of a motion to dismiss kidnapping charges where three people in a clothing store were forced at gunpoint to go from the front of the store to a dressing room in the rear some thirty to thirty-five feet away. *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518, *disc. review denied*, 314 N.C. 670, 337 S.E.2d 583 (1985). Because none of the stolen property was kept in the dressing room, we explained, it was not necessary to move the victims there in order to commit the robbery. *Id.* at 543, 335 S.E.2d at 520. We reasoned that removal of the victims to the dressing room was not an integral part of the robbery but instead constituted a "separate course of conduct designed to remove the victims from the view of passersby who might have hindered the commission of the crime." *Id.* But see *State v. Joyce*, 104 N.C. App. 558, 567, 410 S.E.2d 516, 521 (1991), *disc. review denied*, 331 N.C. 120, 414 S.E.2d 764 (1992) (trial court did not err in denying motion to dismiss kidnapping charges where the victims were moved from one room to another room where they were confined, an act independent of the robbery; the "rooms where the victims were ordered to go did

not contain safes, cash registers or lock boxes which held property to be taken."

In *State v. Weaver*, an accomplice pointed a gun at the victim and demanded that she hand over her car keys and money. 123 N.C. App. 276, 473 S.E.2d 362, *disc. review and cert. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996). Because the victim had left those items in her hotel room, she had to enter the room to retrieve them in order for the planned robbery to be completed. *Id.* at 282, 473 S.E.2d at 366. After leading the victim into her hotel room at gunpoint, the defendants and their accomplices took the keys and money and quickly left. *Id.* The defendants were later convicted of kidnapping, convictions that this Court reversed on appeal. As we explained, there was "no indication in the record that [the victim] was forcibly moved to her room for any reason other than to complete the underlying robbery." *Id.* Moreover, "As in *Irwin*, it was necessary for the defendants to move the victim in order to effectuate their robbery, because the desired property was elsewhere. As in *Irwin*, the defendant moved the victim only as far as necessary to complete the robbery, and promptly released her." *Id.* at 282-83, 473 S.E.2d at 366.

Likewise in *State v. Ross*, 133 N.C. App. 310, 515 S.E.2d 252 (1999), this Court reversed a defendant's convictions for kidnapping in connection with an armed robbery. There, the defendant and others ordered the victims to first lie on the floor in their apartment and then to take the defendants into their bedrooms for their personal belongings. We held that the defendant's "actions, while reprehensible, were an 'inherent' part of the armed robbery." *Id.* at 315, 515 S.E.2d at 255.

Another factor that the courts have noted in the analysis of whether the restraint of a victim is an act independent of the armed robbery is whether that restraint exposed the victim to greater danger than that inherent in the underlying felony itself. In *State v. Muhammad*, 146 N.C. App. 292, 552 S.E.2d 236 (2001), for example, we found no error in the defendant's conviction for common-law robbery and second-degree kidnapping where the defendant approached the victim from behind, put an arm around the victim's throat, and hit the victim three times in the side. *Id.* at 293, 552 S.E.2d at 236. The defendant walked the victim to the front of the restaurant where the restaurant manager gave the defendant cash from the safe and register. The defendant then fled. *Id.* at 293-94, 552 S.E.2d at 237. We held that the defendant's actions "constituted restraint beyond what was necessary for the commission of common law robbery." *Id.* at 296,

552 S.E.2d at 238. The "defendant did substantially more than just force [the victim] to walk from one part of the restaurant to another;" he placed the victim in a choke hold, hit him in the side three times, wrestled with him on the floor, grabbed him around the throat, pointed a gun at his head, and marched him to the front of the store. *Id.* at 296, 552 S.E.2d at 238.; see also *State v. Beatty*, 347 N.C. 555, 559-60, 495 S.E.2d 367, 370 (1998) (holding that there was no kidnapping where the victim was forced to go inside the restaurant and held at gunpoint during the robbery but was not harmed or otherwise moved, but that there was a kidnapping where a second victim was forced to lie on the floor with his wrists and mouth bound with duct tape and then kicked twice in the back); *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (sustaining a kidnapping conviction where the defendant bound the victim's hands and feet); *State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 352 (1978) (upholding a kidnapping conviction where the defendant bound both rape victims' hands).

The Court in *Muhammad*, when upholding the defendant's conviction for second-degree kidnapping, did imply that moving the victim at gunpoint, standing alone, would not necessarily constitute restraint beyond that what was necessary for the commission of the robbery. 146 N.C. App. at 295, 552 S.E.2d at 238 ("Defendant in the present case did not simply hold [the victim] at gun point and force him to walk to the cash register.").

Here, in order to effectuate the robbery, it was not necessary for defendant to move Kelly to the back of the cleaners at gunpoint. When defendant did so, the robbery had already been completed; defendant already had taken Kelly's wallet and had emptied out the cash register. Defendant did not move Kelly to the rear of the store to obtain more stolen items or otherwise to act in furtherance of the robbery. Defendant, moreover, did more than simply hold Kelly at gunpoint and force him to walk to the cash register. Defendant marched Kelly to the cash register with the gun at his back and then, after completing the robbery, marched Kelly to the rear of the store and left him there while he fled. This evidence sufficiently established additional restraint beyond that necessary for the robbery for the purpose of facilitating flight, as alleged in the kidnapping indictment.

Thus, we conclude that the trial court did not err in denying defendant's motion to dismiss the kidnapping charge and entering judgment thereon.

CONCLUSION

For the reasons set forth above, we overrule defendant's assignments of error.

No Error.

Judges McGEE and BIGGS concur.

SHOWCASE REALTY AND CONSTRUCTION COMPANY, PETITIONER-APPELLEE v. CITY OF FAYETTEVILLE BOARD OF ADJUSTMENT AND STEPHEN BURNHAM, RESPONDENTS-APPELLANTS

No. COA02-314

(Filed 31 December 2002)

1. **Zoning— setback requirements—variance—findings unsupported by evidence**

A decision of a board of adjustment allowing a zoning variance as to the setback requirements for a mini-storage facility being constructed on respondent's property was unsupported by substantial evidence in the whole record where (1) the evidence was insufficient to support the board's finding that there was unnecessary hardship in enforcing the zoning ordinance against respondent because the only evidence of hardship was the cost of relocating concrete slabs, financial loss alone does not constitute unnecessary hardship, and there was no evidence that respondent could obtain no reasonable return or use from his property if he complied with the setback requirements, and (2) the evidence was insufficient to support the board's findings that a variance will not impair the adequate supply of light and air to adjacent property and that a variance will not impair established property values within the surrounding area.

2. **Zoning— variance—findings mirroring language of ordinance—sufficient**

A board of adjustment's findings in granting a zoning variance were not conclusory or insufficient in form or substance simply because they mirrored the language of the ordinance.

Appeal by petitioner from judgment entered 7 December 2001 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 30 October 2002.

McCoy, Weaver, Wiggins, Cleveland & Raper, P.L.L.C., by Richard M. Wiggins and James A. McLean, III, for petitioner-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for respondents-appellants.

McGEE, Judge.

Stephen Burnham (Burnham) is the owner of a 1.79 acre tract of real property located at 148 Horseshoe Road in Fayetteville, North Carolina. Burnham obtained a special use permit to construct a mini-storage facility on his property. He submitted a site plan to the City of Fayetteville's Planning Department (Planning Department), which contained provisions for a front setback of 50 feet and a side setback of 30 feet, as required by City of Fayetteville's zoning ordinance. The site plan was approved and Burnham began construction.

The City of Fayetteville's Inspections Department (Inspections Department) conducted an on-site investigation and approved the pouring of concrete slabs for the construction. During the subsequent course of construction, the Inspections Department questioned the distance of the construction site from the road. Burnham received a letter from Mr. Combs of the Inspections Department requesting an "as built survey" to address the issue. Upon receipt of the letter, and before construction was completed, Burnham ceased construction on the building. The Inspections Department found that the construction only provided a front setback of 25 feet and a side setback of 29 feet.

Burnham applied to the Fayetteville Board of Adjustment (the Board) for a zoning variance as to the setbacks for the property on 4 November 2000. The Board held an initial hearing regarding Burnham's request on 11 December 2000. The Board heard testimony from Burnham, Mr. Combs, and the owner of the adjacent property, Showcase Realty and Construction Company (petitioner). The Board voted on 19 December 2000 to allow Burnham's requested variance.

Petitioner filed a petition for judicial review of the Board's decision on 2 February 2001, pursuant to N.C. Gen. Stat. § 160A-388. The Board filed an answer and moved to dismiss the petition on 5 April 2001; Burnham filed a response on 6 April 2001. The trial court

affirmed the Board's approval of the variance on 7 December 2001, determining that the Board's decision to grant the variance was not arbitrary and capricious and that the decision was supported by substantial evidence in the whole record. Petitioner appeals.

"On review of a superior court order regarding a board's decision, this Court examines the trial court's order for error of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjust.*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001); *see In re Appeal of Willis*, 129 N.C. App. 499, 501-02, 500 S.E.2d 723, 726 (1998). Our Supreme Court has held that the review of a decision of a municipal board by a superior court under N.C. Gen. Stat. § 160A-388(e) consists of:

(1) Reviewing the record for errors of law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and,

(5) Insuring that decisions are not arbitrary and capricious.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

"It is not the function of the reviewing court . . . to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board and whether the Board made sufficient findings of fact." *Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 364, 219 S.E.2d 223, 226 (1975). If the petitioner argues the municipal body's decision was either unsupported by the evidence or arbitrary and capricious, the trial court must apply the "whole record" test. *Willis*, 129 N.C. App. at 501, 500 S.E.2d at 725. "[T]his Court is to inspect all of the competent evidence which comprises the 'whole record' so as to determine whether there was indeed substantial evidence to support the Board's decision." *Appalachian Outdoor Advertising Co. v. Town of Boone Bd. of Adjust.*, 128 N.C. App. 137, 140, 493 S.E.2d 789, 792 (1997), *disc. review denied*, 347

N.C. 572, 498 S.E.2d 375 (1998). "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

If the petitioner argues the governmental body's decision was erroneous as a matter of law, the trial court must review the issue *de novo*. *Willis*, 129 N.C. App. at 501, 500 S.E.2d at 725. When the initial reviewing court should have conducted a *de novo* review, we will review that court's decision *de novo*. *See Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994). "*De novo* review requires a court to consider the question anew, as if not considered or decided by the agency or, as here, the local zoning board." *Tucker*, 148 N.C. App. at 55, 557 S.E.2d at 634.

[1] Petitioner argues that the trial court erred in upholding the zoning variance because the Board's decision was arbitrary and capricious and was unsupported by substantial evidence in the whole record. The trial court used the correct standard of review in examining the Board's decision by applying the whole record test. We now examine whether the trial court correctly applied this standard of review.

The record shows that the Board heard testimony from Burnham, Mr. Combs, and Mr. Etowski, petitioner's owner. Burnham testified that the Inspections Department told him the building was required to be 50 feet away from the road, not 50 feet from the right-of-way. The Inspections Department approved the pouring of the concrete slab. He also stated that he was not in the construction business and relied on the concrete company and the Inspections Department to locate the concrete slab within the required area. Burnham testified that he had no recourse with the concrete company and that he had expended all construction funds, thus preventing him from beginning new construction within the appropriate setbacks or moving the existing construction. He also indicated that he had owned the land for seven years but had been unable to make use of the land because of "incidences such as the one presented." Mr. Combs testified that there was road construction occurring at the time of the field measurements that could have resulted in the incorrect measurements. The construction would have made it difficult to ascertain where the shoulder of the road started. The current building met the appropriate setback requirements when measured from the road rather than

from the right-of-way, which was consistent with Burnham's testimony regarding the Inspections Department's instructions. Mr. Combs stated that he understood how such a mistake could be made under the circumstances.

Mr. Etowski testified that there were pins in the ground that demonstrated the location of the road, despite the ongoing construction, and that the concrete slab had been in place for over a year at the time of the hearing. He also testified as to the requirements that must be met before beginning commercial construction. Mr. Etowski stated that he would suffer a loss in property value and damage to his business if the variance were granted. Burnham's construction altered the surface of the land in a manner that will force water onto petitioner's property. Mr. Etowski also testified that Burnham's building would mask any proposed development or signs on petitioner's property.

The Fayetteville zoning ordinance provides for the granting of a variance "only when it can be shown that [][t]here are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance." The ordinance further requires the applicant for the variance to show that it could "secure no reasonable return from, or make no reasonable use of, his property." After reviewing the whole record, there is insufficient evidence in the record to find that there are "practical difficulties or unnecessary hardships" in enforcing the ordinance against Burnham. Burnham did state that he had been unable to make reasonable use of his land in the past because of similar incidences; however, this is a conclusory statement unaccompanied by evidence in the record. Burnham testified that he could move the building to comply with the ordinance, but such action would be a prohibitive financial burden. However, there is no evidence in the record demonstrating that Burnham could "secure no reasonable return, or make no reasonable use of, his property."

Our Supreme Court stated in *Lee v. Board of Adjustment*, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946), that a "board cannot disregard the provisions of the statute or its regulations. It can merely 'vary' them to prevent injustice when the strict letter of the provisions would work 'unnecessary hardship.' " In granting a variance, the Board must make findings based on sufficient and competent evidence that comply with each of the requirements of the Code of City of Fayetteville § 32-71(2). The first term found in section 32-71(2) requires that the applicant suffer "practical difficulties or unnecessary hardships" in carrying out the strict letter of the ordinance.

§ 32-71(a). While the Board found that there were "practical difficulties and unnecessary hardships in the way of carrying out the strict letter of the ordinance," there is insufficient evidence in the record to support this conclusion.

In *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 548 S.E.2d 793 (2001), our Court recently held that a state administrative agency failed to find facts that addressed the issue of whether the appellee had been denied reasonable use of his land. In reaching our decision, we adopted language from the Maryland Court of Appeals stating that an unnecessary hardship occurs where the " 'restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership.' " *Id.* at 486, 548 S.E.2d at 798 (quoting *Belvoir Farms Homeowners Assoc., Inc. v. John C. North, II*, 734 A.2d 227, 237 (Md. 1999)). We also noted that the Virginia Supreme Court has held that financial loss alone is insufficient to constitute an exceptional hardship to justify a zoning variance. *Id.* (citing *Natrella v. Board of Zoning Appeals of Arlington County*, 345 S.E.2d 295, 300 (Va. 1986)). In reviewing whether the applicant for a variance "suffers from unnecessary hardship due to strict application of" an ordinance, we apply the reasoning in *Williams* that the board must make findings of fact and conclusions of law as to the "impact of the [ordinance] on the landowner's ability to make reasonable use of his property." *Id.* at 487, 548 S.E.2d at 798.

As in *Williams*, to determine whether Burnham suffered unnecessary hardship due to strict application of the ordinance, "the [Board] must make findings of fact and conclusions of law as to the impact of the [ordinance] on [Burnham's] ability to make reasonable use of his property." *Id.* The Board failed to make findings about Burnham's "reasonable return from" or "reasonable use of" his property as required by the Fayetteville ordinance. There is also no evidence in the record that would support a finding that Burnham could obtain no reasonable return or use from his property if he complied with the setback requirements of the ordinance. The only evidence in the record demonstrating a possible unnecessary hardship to Burnham of denial of the variance was the financial cost to Burnham of relocating the concrete slabs for the construction. However, financial hardship alone is insufficient to constitute an "unnecessary hardship" to satisfy the requirement of the ordinance. The record fails to demonstrate any additional reason to support a finding of "unneces-

sary hardship." Thus, there is insufficient evidence to support the Board's finding of fact on this issue. Since there was no "unnecessary hardship" to Burnham in strict enforcement of the ordinance, section 32-71(2)(a) was not met and a variance should not have been granted.

Additionally, the record lacks sufficient evidence to support the Board's findings as required by the ordinance that the "variance will not impair any adequate supply of light and air to adjacent property" and the "variance will not impair established property values within the surrounding area." Mr. Etowski testified to the negative implications to petitioner's property value and business from the variance. However, there was no testimony or evidence that the variance would not impair the light and air supply of the adjacent property or impair property values. The ordinance requires a specific finding on these issues and an assumption without evidence is insufficient to satisfy these requirements. While the Board stated that established property values in the surrounding area would not be impaired since the building should be deemed an improvement, there is no evidence to support this finding. The Board did not consider evidence of existing property values or projections of what effect the zoning variance would have on adjoining property values. There is no evidence in the record that would allow the Board to objectively measure the impact. The record lacks substantial evidence to support the Board's findings of fact on these issues.

[2] Petitioner also contends the Board's findings of fact were conclusory statements that violated the standards established by statute and local ordinance. Petitioner cites *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 458 S.E.2d 510 (1995), in support of its argument. In *Shoney's*, this Court found that the Board of Adjustment's conclusions were simply a "preprinted form couched in the language of the relevant section of the City's zoning ordinance." *Id.* at 423, 458 S.E.2d at 512. The only written finding by the Board in *Shoney's* was that "[p]etitioner did not satisfy requirements set forth in [the] opening statement." *Id.* at 422, 458 S.E.2d at 512. The remainder of the findings consisted of circling words on a preprinted form to justify the decision of the Board. *Id.* at 422-23, 458 S.E.2d at 512. These findings were insufficient to determine if the Board's decision was based upon sufficient evidence. *Id.* at 424, 458 S.E.2d at 512-13.

In the present case, the Board made findings of fact on its own accord and did not rely on a preprinted form as in *Shoney's*. The findings of fact made by the Board were not conclusory or insufficient in

form or substance simply because the language mirrored that of the ordinance. However, the record demonstrates a lack of sufficient evidence to support three of the Board's findings of fact, upon which its conclusion of law and its decision are based. For this reason, the Board erred in granting Burnham's variance.

The order of the trial court affirming the Board's decision to grant a variance is reversed.

Reversed.

Judges HUDSON and BIGGS concur.

MITSUBISHI ELECTRIC & ELECTRONICS USA, INC., PLAINTIFF v. DUKE POWER COMPANY, A DIVISION OF DUKE ENERGY CORPORATION, AND DUKE ENERGY CORPORATION, DEFENDANTS

No. COA02-105

(Filed 31 December 2002)

Appeal and Error— appealability—interlocutory order—contract and tort claims distinct—no risk of separate verdicts

Plaintiff's appeal was dismissed as interlocutory in an action arising from the provision of industrial electrical service where plaintiff appealed from a trial court order dismissing its contract claims as being within the exclusive jurisdiction of the Utilities Commission, finding that its tort claims were derivative of the contract claims, and staying the tort claims pending review by the Utilities Commission. Although plaintiff argued that a substantial right was affected in that there was a risk of inconsistent verdicts, the contract and tort claims address entirely separate issues. Moreover, plaintiff has preserved its objections and can appeal from the trial court's ultimate disposition of the entire controversy.

Appeal by plaintiff from judgment entered 22 October 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 10 October 2002.

Francis & Austin, P.L.L.C., by Charles T. Francis and Alan D. Woodlief, Jr., for plaintiff-appellant.

Parker, Poe, Adams & Bernstein L.L.P., by Irvin W. Hankins, III and James C. Thornton, for defendant-appellees.

HUDSON, Judge.

Appellant Mitsubishi Electric & Electronics USA, Inc. ("MEUS") brought suit against the appellees ("Duke Power") in May 2001, seeking recovery of payments made for electrical services. In its complaint, MEUS asserted both breach of contract and tort claims. Duke Power then filed a motion to dismiss for lack of subject matter jurisdiction and, in the alternative, a stay pending review by the North Carolina Utilities Commission ("Utilities Commission"). In October 2001, the trial court granted Duke Power's motion to dismiss the contract claims for lack of subject matter jurisdiction. The court also concluded that the remaining claims were derivative of the contract claims and, accordingly, stayed the former pending a final decision by the Utilities Commission on the contract issues. MEUS appealed. For the reasons set forth below, we dismiss this appeal as interlocutory.

BACKGROUND

A.

In August 1997, Duke Power entered into a five-year electric service agreement with the predecessor of MEUS for the sale and delivery of up to 8300 kilowatts of electric service to a manufacturing plant in Durham, North Carolina. In late 1998, MEUS's predecessor and Duke Power renegotiated the 1997 agreement, reducing the contract obligation for service capacity to 1000 kilowatts. This renegotiation resulted in a new agreement, effective 21 January 1999, with a five-year term. On 1 July 2000, MEUS acquired the rights to the Durham plant and assumed performance of the 1999 agreement.

Among other things, the agreement provided that Duke Power would furnish, install, own, and maintain certain extra facilities beyond those typically furnished without cost. In return, MEUS would pay Duke Power an extra facilities charge of almost $20,000 per month, in addition to the monthly charge for electrical power and energy. The agreement also provided that all services to be rendered or performed were subject to the terms and conditions of Duke Power's rate schedule and service regulations, both approved by and on file with the Utilities Commission.

From January 1999 to March 2001, Duke Power provided electrical power under the agreement, and MEUS paid the monthly charge for electrical power and the monthly extra facilities charge. In early 2001, MEUS sought to sell the Durham plant and eventually reached an agreement to sell the property to Jersey Durham, LLC ("Jersey Durham"). After reaching agreement with Jersey Durham, MEUS informed Duke Power that it planned to sell the plant. MEUS requested that Duke Power provide it with an estimate of a "buyout price" that would satisfy MEUS's obligation under the five-year agreement.

In response, Duke Power calculated two options for the termination payment, one constituting a buyout of the remainder of the agreement and the other representing Duke Power's loss due to the early retirement of the extra facilities that Duke Power had installed. Under the buyout calculation, Duke Power asserted that MEUS owed it $885,818.81. Under the other calculation, Duke Power claimed that MEUS owed it $805,876. Duke Power permitted MEUS to choose the lesser of the two alternatives.

MEUS informed Duke Power that neither option was contained in the parties' agreement and, therefore, was not properly collectable. When Duke Power would not reduce either of its calculations, MEUS told Duke Power that it desired simply to continue performance under the agreement. Duke Power refused this offer and instead demanded that MEUS make the lump sum payment.

MEUS and Jersey Durham had contracted to close the sale on the Durham plant no later than 30 March 2001. Shortly before the closing date, Jersey Durham told MEUS that Duke Power had informed it that Duke Power would deny electric service to Jersey Durham at the Durham plant unless MEUS made the lump sum payment. Because it had to close the deal with Jersey Durham no later than 30 March 2001, and believing that it had no other choice, MEUS paid $805,876 to Duke Power under protest.

Following the closing of the sale, MEUS requested that Duke Power return that portion of its payment that exceeded the monthly extra facilities charge remaining under the agreement. Duke Power refused.

B.

MEUS brought suit against Duke Power in May 2001. MEUS asserted a claim for breach of contract, alleging that the payment

demanded and ultimately coerced by Duke Power was not provided for in the parties' agreement and that Duke Power's conduct in securing the payment breached its implied covenant of good faith and fair dealing. MEUS also claimed economic duress and sought restitution, on the grounds that Duke Power had exploited its monopoly, had exerted economic pressure, and had threatened to deny electric service to Jersey Durham with the intent of coercing MEUS to pay the lump sum payment. In addition, MEUS asserted claims for intentional interference with contractual relations, intentional misrepresentation, and unfair and deceptive acts and practices in contravention of Chapter 75 of the North Carolina General Statutes.

Duke Power moved to dismiss the lawsuit. It argued that the North Carolina Utilities Commission had exclusive jurisdiction over MEUS's claims. It also argued, in the alternative, that the court should stay the action pending review by the Utilities Commission of those issues over which the Commission had exclusive jurisdiction. The trial court agreed. It found that "[p]laintiff's contract claims seeking recovery of payments made to defendants for electrical services and for the termination of electrical services should be dismissed as they involve matters within the exclusive jurisdiction of the North Carolina Utilities Commission . . . Plaintiff cannot maintain these claims in Superior Court without first seeking relief from the North Carolina Utilities Commission." The court also found that MEUS's tort claims were derivative of the contract claims and, as such, should be stayed "pending a final decision by the North Carolina Utilities Commission regarding the dispute between the parties on rates and charges with respect to electrical services."

MEUS now appeals, asserting (1) that the Utilities Commission did not have exclusive jurisdiction over its claims and that the complaint should not have been dismissed and (2) that the tort claims were not derivative of the contract claims and that those claims should not have been stayed.

ANALYSIS

Before we address these issues, we must decide whether MEUS's appeal is interlocutory and subject to dismissal. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *Bartlett v. Jacobs*, 124 N.C. App. 521, 523, 477 S.E.2d 693, 695 (1996) (citation and quotation marks omitted), *disc. review denied*, 345 N.C.

340, 483 S.E.2d 161 (1997). A party generally has no right to appeal an interlocutory order. *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 775, 501 S.E.2d 353, 354, *disc. review denied*, 349 N.C. 355, 525 S.E.2d 449. An appeal is, however, permitted if (1) the order is final as to some but not all of the claims or parties, and the trial court certifies that there is no just reason to delay the appeal, N.C. R. Civ. P. 54(b); or (2) the trial court's decision deprives the appellant of a substantial right that would be lost absent immediate review, N.C. Gen. Stat. § 7A-27(d)(1).

Here, the trial court dismissed MEUS's contract claims but stayed the remaining claims. This is an interlocutory order. See *Turner v. Norfolk Southern Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) ("When the trial court granted defendants' motion to dismiss the contract claim, the pending tort claim was not disposed of and the appeal is therefore interlocutory.") Thus, because there was no certification pursuant to Rule 54 of our rules of civil procedure, MEUS must demonstrate why a substantial right is at stake. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (noting that the burden of establishing that a substantial right will be affected is on the appealing party).

The substantial right most often addressed by our courts is the right to avoid inconsistent verdicts created by separate trials on the same issues, *Rudisail v. Allison*, 108 N.C. App. 684, 686, 424 S.E.2d 696, 698, *disc. review denied*, 333 N.C. 575, 429 S.E.2d 572 (1993), an argument that MEUS, too, makes in its brief. However, we are not convinced that there is a risk of inconsistent verdicts here. The trial court's stay ensures that MEUS's contract claims will be determined by the Utilities Commission before the trial court adjudicates the tort claims on the merits. The contract dispute at issue concerns a payment that MEUS made to Duke Power for electrical services. Any determination of this dispute will involve a review of the electrical services agreement between the parties and various rate documents approved by and filed with the Utilities Commission. In contrast, the tort claims address entirely separate issues. Those claims seek compensatory and punitive damages for alleged tortious conduct by Duke Power, including statements allegedly made by Duke Power to a third party. The stay ensures that MEUS will try one set of claims before the Utilities Commission and another, distinct set of claims in the superior court, thus avoiding the possibility of inconsistent verdicts on the same facts.

We point out, too, that we have dismissed interlocutory appeals in the past in cases where, as here, contract claims and tort claims can be litigated without producing inconsistent verdicts. In *Turner*, the estates of motorists who were killed in a car/train collision brought a negligence action against the railroad and an engineering firm. 137 N.C. App. at 138-39, 526 S.E.2d at 668. The plaintiffs alleged that the defendants had breached a common-law duty to provide adequate warning devices at the railroad crossing—a tort claim—and that the defendants had negligently performed a contract between the railroad and the North Carolina Department of Transportation to design and erect automatic warning devices within a certain time period—a contract claim. *Id.* at 139, 526 S.E.2d at 668. The trial court granted the defendants' motion for summary judgment on the contract claim but denied the motion as to the tort claim. On appeal, the plaintiffs argued that a substantial right was affected because separate trials on the tort claim and the contract claim could result in inconsistent verdicts on factual and other issues. *Id.* at 142, 526 S.E.2d at 670. We disagreed, explaining as follows:

> Plaintiff's tort claim is predicated on the railroad's duty to give reasonable and timely warning of the approach of a train to the crossing. To establish such a claim, the plaintiff must show that the crossing in question is peculiarly and unusually hazardous to those who have a right to traverse it.
>
> In contrast, plaintiff's contract claim centers on the performances due on a contract . . . . Plaintiff's claim focuses on the defendants' failure to act, and thus the defendants' breach of a contractual duty. The issues to be addressed in this claim would include plaintiff's status as a third party beneficiary to the contract, the duties imposed on defendants by the contract, and whether [the railroad] was negligent in its performance of the contract between itself and the [Department of Transportation]. Such issues are separate and distinct from those to be addressed in plaintiff's tort claim.

Id. at 143, 526 S.E.2d at 670. (internal citations and quotation marks omitted). In sum, the court held that the plaintiffs had failed to establish a substantial right that could not be "protected by a timely appeal from the trial court's ultimate disposition of the entire controversy" and dismissed the appeal. *Id.* at 143, 526 S.E.2d at 671.

Likewise in *Alexander Hamilton Life Insurance Company of America v. J&H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 543

S.E.2d 898 (2001), the trial court granted summary judgment on the plaintiff's contract claims but denied summary judgment on the tort claims. This Court again found the plaintiff's appeal to be interlocutory; the two kinds of claims did not "present identical factual issues that create the possibility of two trials on the same issues. . . . Because a second trial would not require plaintiff to retry [any claims], there are no overlapping issues and the possibility of inconsistent verdicts does not exist." *Id.* at 701-02, 543 S.E.2d at 900.

Finally, dismissing this appeal as interlocutory does not prejudice MEUS. Because MEUS has preserved its objections to the trial court's ruling that it lacked subject matter jurisdiction to review the contract claims, MEUS will be able to continue to preserve such issues and, if necessary, appeal from the trial court's ultimate disposition of the entire controversy. *Turner*, 137 N.C. App. at 143, 526 S.E.2d at 671.

CONCLUSION

For the reasons set forth above, we dismiss MEUS's appeal as interlocutory.

Dismissed.

Judges TIMMONS-GOODSON and CAMPBELL concur.

STATE OF NORTH CAROLINA v. JOHN EARL HINTON, JR.

No. COA01-1491

(Filed 31 December 2002)

1. Criminal Law— witness speaking to juror—no mistrial

There was no plain error in the trial court's failure to declare a mistrial ex mero moto in an armed robbery prosecution because a witness spoke with one of the jurors after his testimony where the witness did not speak with the juror about this case.

2. Robbery— elements—threat to victim—sufficiency of evidence

There was sufficient evidence in an armed robbery prosecution to submit to the jury the question of whether defendant had

endangered or threatened the victim's life by the use or threatened use of a knife.

3. Robbery— instructions—lesser included offenses—evidence of uncharged offense

The trial court correctly denied an armed robbery defendant's motion for an instruction on misdemeanor larceny where the amount stolen was less than $1,000, but defendant's testimony was that the robbery was staged for a security camera with the victim, with whom he was to split the money. Defendant's testimony, if believed, established a right to an instruction on embezzlement or larceny by an employee, but not misdemeanor larceny.

Appeal by defendant from judgment entered 18 July 2001 by Judge Abraham P. Jones in Wake County Superior Court. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Steven A. Armstrong, for the State.

William D. Auman, for the defendant.

BIGGS, Judge.

Defendant appeals his conviction of robbery with a dangerous weapon. The relevant trial evidence may be summarized as follows: Barbara Zaehring testified that on 21 January 2001, she was employed as a cashier at Grocery Boy Junior, a Wake County convenience store. Defendant entered the store early that morning, when no other customers were present. He approached the counter, displayed a "black handled knife with a silver blade," told Zaehring "I want your money," and then came behind the counter where Zaehring was standing. Zaehring grabbed a gun that the owner kept under the counter and pointed it towards defendant, who said "Go ahead, shoot me." Zaehring responded that it "wasn't worth it," replaced the gun on the counter, and opened the cash drawer for the defendant. He took all the money in the drawer and then left, telling Zaehring not to press the silent alarm. Zaehring testified that, although she did not recognize defendant during the robbery, she later remembered having seen him on one occasion at her husband's former place of employment.

Defendant testified that he became acquainted with Zaehring because he had worked for the same employer as Zaehring's husband. He and Zaehring became friends; he had visited her at the store, and

had also met her at a local park, where they discussed "a sexual engagement." She sometimes let him have things from the store without paying. Defendant also testified that he and Zaehring had planned together to steal money from the store. They had staged the mock "armed robbery" and had planned to divide the proceeds. On rebuttal, Zaehring denied any prior acquaintance with defendant.

Defendant was convicted of robbery with a dangerous weapon, and sentenced to a prison term of 146 to 185 months. He appeals from this judgment.

I.

[1] Defendant argues first that the trial court erred by failing to declare a mistrial in response to improper contact between a prosecution witness and a seated juror. We disagree.

At trial, Steve Byers, owner of the Grocery Boy Junior store that was robbed, testified concerning the store's security camera, the gun under the counter, and events occurring at the store on the morning of the robbery. His testimony was brief, and defendant did not cross-examine him. At some point after his testimony, Byers had a short conversation with one of the jurors. When he was questioned by the trial court about this, Byers testified that he had asked the juror, who was employed by a local newspaper, for advice on submitting articles for publication. He testified further that he had misunderstood the trial court's admonitions about not speaking with jurors; that the conversation was brief and entirely unrelated to the case; and that a second juror had been near enough to overhear their conversation. The two jurors were questioned by the trial court, and both stated that the brief conversation did not pertain to the case and would not influence their verdict. Defendant neither questioned the jurors, nor moved for a mistrial.

Defendant argues on appeal that the court erred by not declaring a mistrial. He alleges that Byers "was clearly [trying] to curry favor for himself with [the juror], . . . [and] may thereby have enhanced his credibility with that particular juror." He contends that the trial court "should have *ex mero motu* either declared a mistrial or, at a minimum, removed juror Blackwood in favor of an alternate."

N.C.G.S. § 15A-1061 (2001) provides that the trial court "must declare a mistrial *upon the defendant's motion* if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable

prejudice to the defendant's case." (emphasis added). However, in the instant case, because defendant failed to request a mistrial from the trial court, our review is limited to whether the court's failure to declare a mistrial constituted "plain error." *See* N.C.R. App. P. 10(c)(4) ("a question which was not preserved by objection noted at trial . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error"); *State v. Ross*, 100 N.C. App. 207, 211, 395 S.E.2d 148, 150 (1990) (where "defendant failed to object or move for a mistrial based upon the court's remarks," this Court reviews only for plain error).

Moreover, defendant failed to allege plain error in his assignments of error. He has thus waived review even for plain error. *State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995) (where the defendant fails to allege plain error in his assignments of error, he "waive[s] his right to appellate review of [the] issue"). Notwithstanding defendant's failure to properly preserve this issue for review, in the interests of justice and pursuant to our authority under N.C.R. App. P. 2, we elect to review the merits of defendant's argument.

Plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or . . . grave error which amounts to a denial of a fundamental right of the accused[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "In order to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict." *State v. Smith*, 151 N.C. App. 29, 37-38, 566 S.E.2d 793, 799 (2002), *disc. review denied*, 356 N.C. 311, 571 S.E.2d 208 (2002) (citation omitted).

The trial court's ruling on a motion for mistrial generally "lies within the sound discretion of the trial court and will be reversed only upon a showing of a manifest abuse of discretion." *State v. Lippard*, 152 N.C. App. 564, 574-75, 568 S.E.2d 657, 664, (2002), *disc. review denied*, 356 N.C. 441, — S.E.2d — (2002). In the present case, there is no indication that Byers attempted to discuss the case with the juror. Both jurors assured the trial court that the short conversation would not affect their verdict. Moreover, Byers' testimony was not crucial to the State's case; indeed, defendant did not even cross-examine him. We conclude that there is no basis to suppose that, absent Byers' brief interaction with a juror, the result of the trial would have been different. We hold that the trial court did not com-

mit plain error by failing to declare a mistrial *ex moro motu* on this basis. Accordingly, this assignment of error is overruled.

II.

[2] Defendant argues next that the trial court erred by failing to dismiss the charge against him for insufficient evidence. We disagree.

Upon a defendant's motion to dismiss criminal charges for insufficiency of the evidence, the trial court must consider the evidence "in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). The trial court should deny the motion if the State has presented "substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). "Evidence is considered substantial when 'a reasonable mind might accept [it] as adequate to support a conclusion.' " *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

Defendant was charged with robbery with a dangerous weapon, in violation of N.C.G.S. § 14-87 (2001). "The elements of robbery with a dangerous weapon are: (1) the unlawful attempt to take or taking of personal property from a person or presence, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of the person is threatened or endangered." *State v. Gay*, 151 N.C. App. 530, 532, 566 S.E.2d 121, 124 (2002). Defendant alleges that "there was no substantial evidence that the defendant either endangered or threatened the life of Zaehring." Defendant correctly states that mere possession of a weapon is insufficient to support a conviction for robbery with a dangerous weapon. *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981) (evidence insufficient that robbery occurred by the use or threatened use of weapon where victim was unconscious during robbery). However, in the instant case, Zaehring testified that defendant had a "black handled knife with a silver blade," and that "[h]e had already been here showing me his knife and he grabbed the door from me and pulled it back." When he came around behind the counter the defendant was "just holding it like it was pointing it (sic) this way, but not quite at me[.]" Zaehring also testified that when the defendant came behind the counter with his knife, that there was no other exit, or way for her to get out from behind the counter. Finally, Zaehring testified on rebuttal that she had opened the cash drawer "[b]ecause [she] feared for [her] life."

We conclude that Zaehring's testimony, even standing alone, was sufficient to submit to the jury the question of whether defendant had endangered or threatened her life by means of the use or threatened use of a knife. This assignment of error is overruled.

III.

[3] Defendant's final argument is that the trial court erred by denying his motion for an instruction on misdemeanor larceny.

"A defendant 'is entitled to an instruction on lesser included offense[s] if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). However, the right to an instruction on a lesser included offense arises "only if there is evidence that the defendant might be guilty of the lesser[-included] offense." *State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 191 (1993). Thus, "[i]f the State's evidence is clear and positive as to each element of the charged offense, and if there is no evidence of the lesser-included offense, there is no error in refusing to instruct on the lesser offense." *State v. Howie*, 116 N.C. App. 609, 613, 448 S.E.2d 867, 869 (1994) (citing *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)).

Larceny is a lesser included offense of robbery with a dangerous weapon. *State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988) ("we hold that larceny is a lesser included offense of armed robbery"). Under N.C.G.S. § 14-72(a) (2001), "larceny of property, . . . where the value of the property or goods is not more than one thousand dollars ($1,000), is a Class 1 misdemeanor." In the present case, it was undisputed that defendant took $277 from the cash box, a misdemeanor amount. Defendant contends that there was evidence from which the jury could find that he committed misdemeanor larceny, and thus, that the trial court should have granted his request for an instruction on the offense.

Reduced to its essentials, the pertinent evidence was the following: Zaehring testified that she had no personal acquaintance with defendant, and that while she was on duty as a cashier for Grocery Boy Junior, the defendant robbed her at knifepoint. In contrast, defendant testified that he and Zaehring were friends; that they planned together to steal money from Grocery Boy Junior and

split it; and that the "armed robbery" was a fake, staged for the benefit of the video security camera. Thus, although defendant was indicted for armed robbery of Zaehring, the defendant testified that he had not robbed Zaehring, and that he and Zaehring jointly committed an entirely different crime—embezzlement, or larceny by employee—from the store, rather than from Zaehring. On this evidence, the trial court concluded that it could not instruct the jury on an offense that was neither charged in the indictment, nor was a lesser included offense of the offense for which defendant was indicted. We agree.

The defendant's testimony, if believed, did not establish a right to an instruction on misdemeanor larceny, but on aiding and abetting embezzlement or larceny by employee. Defendant was not charged with either of these, and "[i]t is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegations and the proof must correspond." *State v. Rhome*, 120 N.C. App. 278, 298, 462 S.E.2d 656, 670 (1995) (quoting *State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E.2d 530, 532 (1969)). We conclude that the trial court did not err by denying defendant's motion for jury instructions on the offense of misdemeanor larceny. Defendant's testimony did not establish his entitlement to such an instruction, and the indictment under which he was charged would not support such a conviction.

For the reasons discussed above, we conclude that defendant had a fair trial, free from prejudicial error, and that his conviction must be affirmed.

No error.

Judges GREENE and WYNN concur.

SHARRON SHACKLEFORD-MOTEN, PLAINTIFF v. LENOIR COUNTY DEPT. OF SOCIAL SERVICES, DEFENDANT

No. COA00-1513-2

(Filed 31 December 2002)

Appeal and Error— preservation of issues—superior court review of agency decision—subject matter jurisdiction—assignments of error and briefing required

A superior court order in an administrative law action was affirmed where plaintiff raised subject matter jurisdiction issues in superior court but did not assign error to them or brief them to the Court of Appeals.

Appeal by plaintiff from order and judgment entered 26 May 2000 by Judge Charles H. Henry in Lenoir County Superior Court. Originally heard in the Court of Appeals 16 October 2001.

William J. Little, III, P.A., by William J. Little, III, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Mark A. Davis and Tamara P.W. Desai, for defendant-appellee.

THOMAS, Judge.

Plaintiff, Sharron Shackleford-Moten, appeals the trial court's order upholding her dismissal from employment by defendant, Lenoir County Department of Social Services (DSS).

She contends the local appointing authority: (1) violated her due process rights by failing to comply with N.C. Gen. Stat. § 150B-36(b) in entering its decision, and by not being an unbiased, impartial decision maker; (2) used matters outside the record in reaching its decision; and (3) reached a decision that was arbitrary and capricious and affected by errors of law. For the reasons herein, we affirm.

Plaintiff was employed as a Social Worker III with DSS for approximately nine years. In March 1996, a child fatality occurred in a case assigned to her. A review of the case file indicated errors and omissions by plaintiff in the handling of the case. Plaintiff's supervisor, Delores Bunch, informed her that all of her cases would be reviewed and that disciplinary action could be taken.

Plaintiff subsequently made allegations that Jack Jones, Director of Lenoir County DSS, had subjected her to racial harassment, racial discrimination and retaliation. These allegations were communicated to the DSS Board of Directors.

On 24 April 1996, plaintiff requested leave without pay pending resolution of her allegations against Jones by the DSS Board. The DSS Board denied plaintiff's request to have her grievance heard and she was instructed to proceed in accordance with the County's grievance policy. On 30 April 1996, Jones denied plaintiff's leave request because she had not provided sufficient explanation of her need for leave time.

On 1 May 1996, plaintiff submitted a request for leave under the Family and Medical Leave Act (FMLA). This request for FMLA leave was approved by Jones and plaintiff's leave time was applied retroactive to 24 April 1996. Plaintiff returned to work on 3 June 1996 after the expiration of her FMLA leave.

On 21 August 1996, plaintiff's attorney wrote Jones asking that plaintiff be placed on "leave without pay" status until the investigation of her case files was completed. On 23 August 1996, she was absent from work on sick leave but appeared at DSS offices with her attorney. They requested a meeting with Jones. Plaintiff and her attorney left before having an opportunity to meet with Jones, however, and when Jones telephoned plaintiff later that day, she refused to meet with him. Plaintiff told Jones to deal with her attorney. Jones reminded plaintiff that she would need to follow the County's leave policy. Plaintiff did not resume her duties at work thereafter.

On 5 September 1996, Jones sent a letter to plaintiff instructing her to return to work on 9 September 1996. The letter advised plaintiff that her failure to do so would be treated as a voluntary resignation without notice under the "Personnel Rules for Local Government Employees Subject to the State Personnel Act."

On 9 September 1996, plaintiff came to work and asked to speak with Bunch. Plaintiff told Bunch she was going to a doctor's appointment. Bunch then asked if plaintiff needed a FMLA leave request form with plaintiff responding that her FMLA leave time was exhausted. Bunch told plaintiff she needed to speak with Jones regarding additional leave time, but plaintiff refused and left. She did not return to work that day or on 10, 11, or 12 September 1996. Plaintiff neither requested nor received authorization for these absences. In fact, all of her absences from 26 August 1996 forward were unauthorized.

On 12 September 1996, plaintiff was informed by letter from Jones that her refusal to report to work constituted a voluntary resignation without notice which carried no appeal or grievance rights under the Office of State Personnel Rules.

On 28 October 1996, plaintiff filed a petition for a contested case hearing with the Office of Administrative Hearings alleging her termination was without just cause and was based on racial discrimination and retaliation. Following a hearing, the ALJ issued its recommended decision concluding plaintiff's separation from employment was not a voluntary resignation without notice. The recommendation was for plaintiff to be reinstated. The ALJ also concluded there was no evidence of retaliation by Jones against plaintiff.

On 9 April 1998, the State Personnel Commission (SPC) issued an advisory opinion adopting the ALJ's recommended decision. The SPC also denied plaintiff's motion for recusal of defendant as the final decision maker.

On 9 July 1998, Jones, who as Director of DSS was the local appointing authority pursuant to N.C. Gen. Stat. § 126-37, issued the final agency decision in this matter. Jones rejected the SPC's advisory opinion. He concluded that plaintiff's separation from the employ of DSS was properly deemed a voluntary resignation without notice.

On 29 July 1998, plaintiff filed a petition for judicial review pursuant to N.C. Gen. Stat. § 150B-46. By order entered 26 May 2000, the superior court affirmed the local appointing authority's final decision. Plaintiff appeals.

This Court granted defendant's motion to dismiss plaintiff's appeal due to extensive violations of the Rules of Appellate Procedure. *See Shackleford-Moten v. Lenoir Co. DSS*, 147 N.C. App. 525, 558 S.E.2d 262 (2001) (unpublished). However, the Supreme Court entered an order on 27 June 2002 vacating this Court's dismissal of plaintiff's appeal and remanding for reconsideration on the merits. *See Shackleford-Moten v. Lenoir Co. DSS*, 355 N.C. 751, 565 S.E.2d 670 (2002). We now proceed.

Under the North Carolina Administrative Procedure Act (NCAPA), a final agency decision is subject to superior court review as follows:

> [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the admin-

istrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

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

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2001).

The superior court's standard of review is dictated by the nature of the errors asserted. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580, 281 S.E.2d 24, 28 (1981). If the petitioner argues the agency's decision was affected by an error of law, *de novo* review is required. *Deep River Citizen's Coalition v. N.C. Dep't of Env't & Natural Res.*, 149 N.C. App. 211, 213, 560 S.E.2d 814, 816 (2002). If the petitioner questions whether the agency's decision was supported by the evidence, was arbitrary and capricious or was the result of an abuse of discretion, the reviewing court must apply the "whole record" test. *Hedgepeth v. N.C. Div. of Servs. For the Blind*, 142 N.C. App. 338, 346, 543 S.E.2d 169, 174 (2001).

De novo review requires a court to consider a question anew, as if the agency has not considered or decided it. *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001). However, under the "whole record" test, the trial court must examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by substantial evidence. *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (citing *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)).

The proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law. *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392. Until recently, precedent suggested that an appellate court's obligation to review a superior court's order for errors of law included determining whether the superior court exercised the appropriate scope of review. *Id.; Deep River*, 149 N.C. App. at 213, 560 S.E.2d at 816; *Hedgepeth*, 142 N.C. App. at 347, 543 S.E.2d at 175. If the superior court did not, or its order was unclear, this Court reversed and remanded with directions to the superior court to (1) advance its own characterization of the issues presented by the petitioner, and (2) clearly delineate the standards of review, detailing the standards used to resolve each distinct issue raised. *Deep River*, 149 N.C. App. at 215, 560 S.E.2d at 817; *Hedgepeth*, 142 N.C. App. at 349, 543 S.E.2d at 176.

However, our Supreme Court reversed this line of cases in a recent per curiam decision for reasons stated in a dissenting opinion from this Court. In *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 552 S.E.2d 265 (2001), *rev'd per curiam*, 355 N.C. 269, 559 S.E.2d 547 (2002), Judge Greene, in a dissenting opinion, wrote that an appellate court's obligation to review a superior court order examining an agency decision "can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Id.* at 392, 552 S.E.2d at 268 (Greene, J., dissenting). Thus, in reviewing a superior court order examining an agency decision, an appellate court must determine whether the agency decision (1) violated constitutional provisions; (2) was in excess of the statutory authority or jurisdiction of the agency; (3) was made upon unlawful procedure; (4) was affected by other error of law; (5) was unsupported by substantial admissible evidence in view of the entire record; or (6) was arbitrary, capricious, or an abuse of discretion. N.C. Gen. Stat. § 150B-51 (2001). In performing this task, the appellate court need only consider those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994); *Professional Food Services Mgmt. v. N.C. Dep't of Admin.*, 109 N.C. App. 265, 268, 426 S.E.2d 447, 449 (1993).

In its final decision, the local appointing authority included, among others, the following two reasons: (1) plaintiff had no right to appeal the local appointing authority's determination that her separa-

tion from employment was a voluntary resignation without notice, *see* 25 NCAC 1D.0518 (2002) (voluntary resignation from employment "is a voluntary separation from state employment and creates no right of grievance or appeal pursuant to the State Personnel Act"); and (2) plaintiff's contested case petition was untimely filed, *see* N.C. Gen. Stat. § 126-38 (2001) ("[a]ny employee appealing any decision or action shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal."). These reasons relate to the subject matter jurisdiction of OAH, and in turn the superior court, to hear plaintiff's case through the contested case procedure established by the NCAPA.

Plaintiff properly asserted error as to these and other issues in her petition for judicial review to the superior court and argued them in her accompanying memorandum of law. The superior court ruled against plaintiff on most issues, including these two subject matter jurisdiction issues. In the concluding paragraph of its order, the superior court stated: "Further, with the exception of number six, the remaining reasons given by the respondent in rejecting the advisory decision of the State Personnel Commission, were supported by substantial evidence in view of the entire record." The subject matter jurisdiction issues noted above were Reasons # 2 & # 3 in the final decision.

Despite having raised these subject matter jurisdiction issues in superior court, plaintiff has not assigned error to them or addressed them in her brief to this Court. This Court will only review those assignments of error set forth in the record on appeal and properly brought forward in the briefs. *See* N.C.R. App. P. 10(a); N.C.R. App. P. 28(a). Since plaintiff has failed to assign as error and argue two conclusions of law by the superior court which, if upheld, would defeat plaintiff's claim due to a lack of subject matter jurisdiction, we are constrained to affirm the superior court's order.

We have also reviewed plaintiff's assignments of error which are properly set forth and argued in her brief and find them lacking in merit.

For the reasons herein, we affirm the superior court's order.

Affirmed.

Judges GREENE and HUNTER concur.

CHARLES W. PLUMMER, M.D., PLAINTIFF v. COMMUNITY GENERAL HOSPITAL OF THOMASVILLE, INC., ALLEGIANT PHYSICIAN SERVICES, INC., AND PREMIERE ANESTHESIA, INC., DEFENDANTS

No. COA97-191

(Filed 31 December 2002)

Hospitals and Other Medical Facilities— privileges—distinct from service contract

The termination of an anesthesiologist's contract with defendant hospital, and defendant's entry into an exclusive contract with another provider, was not the legal equivalent of the revocation of staff privileges, so that plaintiff's contract was not breached by the lack of the notice and hearing required for terminating privileges. The trial court did not err by dismissing the action for failure to state a claim.

Appeal by plaintiff from order entered 21 October 1996 by Judge H.W. Zimmerman, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 12 November 2002.

Ronald Barbee for plaintiff-appellant.

Horton and Gsteiger, P.L.L.C., by Elizabeth Horton, for defendant-appellee Community General Hospital of Thomasville, Inc.

EAGLES, Chief Judge.

Charles W. Plummer, M.D. ("Dr. Plummer") appeals from order granting Community General Hospital of Thomasville, Inc.'s ("Hospital") motion to dismiss for failure to state a claim and expiration of the statute of limitations. After careful consideration of the briefs and record, we affirm.

The Hospital granted Dr. Plummer medical staff privileges in anesthesiology in 1983. The Hospital "reappointed [Dr. Plummer] to the medical staff" in 1984, 1986, 1988, 1990, and 1992 "with full medical staff privileges in anesthesiology." In December 1990, the "Hospital entered into a three year contract with Triad Anesthesia Associates, P.A. [("Triad")], to provide anesthesiology services to the patients at [the Hospital]." The contract could be terminated by either party upon ninety days notice. Dr. Plummer had formed Triad and was its sole shareholder. Triad employed Dr. Plummer as an anesthesiologist.

On or about 23 March 1993, the Hospital gave Triad notice that the contract would be terminated effective 23 June 1993. Dr. Plummer stated in his pleadings that "[w]hile the contract with [Triad] was terminated by Defendant Hospital, [Dr. Plummer] still continued to have full medical staff privileges at the said Hospital with full privileges in anesthesiology."

The Hospital then contracted with Premiere Anesthesia, Inc. ("Premiere") (subsequently d/b/a Allegiant Physician Services, Inc. ("Allegiant")) for Premiere exclusively to provide anesthesiology services to the Hospital. Premiere hired one of Triad's former anesthesiologists but did not offer employment to Dr. Plummer.

On 16 July 1993, Dr. Plummer requested a hearing before the Hospital's Executive Committee of the medical staff which was denied. Dr. Plummer requested a hearing from the Hospital's Board of Directors on 17 August 1993 which was also denied.

On 20 June 1996, Dr. Plummer commenced this action against the Hospital, Allegiant and Premiere. Dr. Plummer alleged breach of contract, misrepresentation, and negligence against the Hospital and intentional interference of contract against Allegiant and Premiere.

On 8 August 1996, the Hospital moved to dismiss pursuant to Rule 12(b)(6) alleging Dr. Plummer's failure to state a claim and expiration of the statute of limitations. On 27 September 1996, Allegiant and Premiere filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. The motions were heard before Judge H.W. Zimmerman, Jr. at the 21 October 1996 Civil Session of Davidson County Superior Court.

The trial court granted the Hospital's Rule 12(b)(6) motion to dismiss for failure to state a claim and expiration of the statute of limitations. By separate order filed 21 October 1996, the trial court granted Allegiant and Premiere's Rule 12(b)(6) motion to dismiss. Plaintiff appealed from both orders on 28 October 1996.

On or about 29 October 1996, Allegiant filed a petition in bankruptcy under Chapter 11 of the United States Bankruptcy Code in the Northern District of Georgia. The bankruptcy court issued an automatic stay of all proceedings against Allegiant. Subsequently, this Court entered a stay of the appeal based on the pending Chapter 11 proceeding. Based on documents before this Court, it appeared that the bankruptcy proceedings concluded and by order dated 21 February 2002, this Court lifted its stay.

On appeal, Dr. Plummer contends that the trial court erred in granting the Hospital's Rule 12(b)(6) motion to dismiss for failure to state a claim and expiration of the statute of limitations. The Hospital cross-assigned error to the trial court's refusal to admit in evidence the Hospital's Bylaws at the hearing on the Rule 12(b)(6) motion. After careful consideration, we affirm.

First, Dr. Plummer argues that the trial court erred in allowing defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim. Plaintiff argues that the Hospital's Bylaws became a part of his contract with the Hospital pursuant to *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 488 S.E.2d 284, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 38 (1997). Dr. Plummer argues that the Hospital's exclusive contract with Premiere to provide anesthesiology services "adversely affected [his] right as an active medical staff member . . . to have clinical privileges at the Hospital in the field of anesthesiology." Dr. Plummer argues that because it effectively terminated his medical staff privileges, he was entitled to notice and a hearing as provided by the Hospital's Bylaws. We disagree.

To determine whether a complaint is sufficient to survive a Rule 12(b)(6) motion to dismiss, the court must ascertain " '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.' " *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999) (citations omitted). Pursuant to Rule 12(b)(6), a complaint should be dismissed " 'if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.' " *Id.* (citations omitted).

Although we have not located any North Carolina decision addressing this issue, there are several relevant cases from other jurisdictions. In *Garibaldi v. Applebaum*, 742 N.E.2d 279, 280 (Ill. 2000), the Illinois Supreme Court addressed "what procedural rights, if any, a physician has under hospital bylaws when a hospital enters into an exclusive contract with a competing group of physicians for the performance of the same work as the physician performs." There, at the time of the hospital's entry into the exclusive contract, the bylaws stated in pertinent part that:

> Actions which limit, reduce, suspend or revoke membership or clinical privileges of a practitioner on the staff of the Hospital or revoke staff membership shall be deemed to be adverse to the

practitioner and shall entitle the practitioner to notice and the hearing and appeal procedures as provided in Article VIII. These actions include:

* * *

(2) Reduction, suspension or revocation of clinical privileges and/or admitting privileges;

* * *

(4) Suspension or revocation of specific clinical privileges or Staff membership;

(5) Other similar actions.

Such actions constitute a recommendation by the Executive Committee to the Governing Body.

Id. at 281. The court stated that "[a]lthough the practical effect of that decision may be to curtail or even eliminate a practitioner's ability to exercise his or her privileges at the particular facility, the hospital's decision does not also signify that it has reduced or terminated the practitioner's privileges under its bylaws." *Id.* at 285. The court noted that the plaintiff failed "to distinguish between his privileges and his ability to exercise those privileges in a 'closed' environment." *Id.*

In *Holt v. Good Samaritan Hospital & Health Center*, 590 N.E.2d 1318, 1319 (Ohio Ct. App. 1990), the plaintiff alleged that his medical staff privileges were revoked without the benefit of a hearing when the hospital did not renew his company's contract to provide emergency room services and entered into an exclusive contract with another health care provider to provide those services. The Ohio Court of Appeals in *Holt* held that the physician was not entitled to a hearing. *Id.* The court noted that "[w]hile Holt has a constitutionally protected right to practice medicine, he does *not* have a right to practice in any *particular hospital.*" *Id.* at 1321 (emphasis in original). Moreover, the court stated that:

> We agree with [the hospital] and [the exclusive provider] that if [plaintiff's] arguments were to prevail, it would be the death knell of exclusive contracts for medical services. Once having entered into a contract with a provider corporation, a hospital would be locked into continuing the association until the unlikely event that every member physician either ceased practicing medicine or lost his privileges due to incompetency. We will not sub-

> stitute our judgment for that of hospital boards throughout the nation, by removing a managerial option that has been universally acknowledged as valid and beneficial to the efficient administration of health care.

Id. The court went on to note that the physician's privileges were neither reduced nor revoked and that he retained his same privileges as before the entry of the new exclusive contract. *Id.* at 1323. *But see Lewisburg Community Hosp., Inc. v. Alfredson*, 805 S.W.2d 756, 761 (Tenn. 1991) (holding that the hospital's refusal to allow a radiologist access to its radiology equipment and staff after the termination of the radiologist's exclusive contract "significantly reduced his privileges" and "that the Hospital breached its contract by failing to provide him a hearing" according to the medical staff bylaws).

Several other states have addressed this issue and have concluded either that entry of an exclusive contract with a competing group did not necessarily serve as termination of medical staff privileges or that entry of an exclusive contract with a competing group did not entitle the current physician(s) to notice and a hearing concerning their medical staff privileges. *See Van Valkenburg v. Paracelsus Healthcare Corp.*, 606 N.W.2d 908, 918 (N.D. 2000) (stating that "we agree with the majority of courts, and we hold the hearing and due process provisions of the Hospital's medical staff bylaws are not implicated unless there are allegations bearing on professional competency, conduct, or character"); *Dutta v. St. Francis Reg'l Med. Ctr., Inc.*, 867 P.2d 1057, 1060 (Kan. 1994) (holding that plaintiff-radiologist was not entitled to a hearing under hospital bylaws when the hospital entered into an exclusive contract with another radiologist as plaintiff-radiologist's "staff membership remained intact and that the decision to revoke her access to the radiology facilities was purely a business decision"); *Bartley v. Eastern Maine Med. Ctr.*, 617 A.2d 1020, 1022-23 (Me. 1992) ("The granting of privileges signifies that a doctor is qualified to practice at the hospital. . . . The right to exercise the privileges, however, is a separate matter.").

Here, Dr. Plummer alleged in his complaint that according to "the medical staff Bylaws . . . 'Medical Staff privileges may only be terminated according to Articles VIII and IX of the medical staff Bylaws.' " Dr. Plummer further alleged that:

> Because Defendant Hospital entered into a contract with Premiere Anesthesia, Inc., to exclusively provide anesthesiology

> services to patients at the said Hospital, Plaintiff has been effectively denied by Defendant Hospital medical staff privileges at the Hospital in anesthesiology, notwithstanding the fact that such medical staff privileges had not been terminated in accordance with the bylaws of Defendant Hospital.

Dr. Plummer's three claims all contain allegations that the Hospital breached its contract with Dr. Plummer by entering into an exclusive agreement with Premiere or that the exclusive agreement with Premiere effectively terminated Dr. Plummer's privileges at the Hospital.

We hold that the termination of the Triad contract and entry of an exclusive contract with Premiere was not the legal equivalent of the termination of Dr. Plummer's medical staff privileges. The complaint shows that Dr. Plummer maintained his privileges at the Hospital even though the Hospital entered into an exclusive contract with Premiere. "The right to exercise medical privileges is separate from the granting or revoking of those privileges, and a physician with privileges is not guaranteed employment or the free and unfettered right to use a facility to exercise those privileges." *Van Valkenburg*, 606 N.W.2d at 918. Dr. Plummer was not entitled to notice and a hearing before the Hospital entered into an exclusive contract with Premiere because his privileges were not terminated. Dr. Plummer "fails to appreciate the difference between his privileges and his ability to provide services in a 'closed' [hospital]." *Holt*, 590 N.E.2d at 1323. The trial court properly dismissed Dr. Plummer's action for failure to state a claim.

Because we have concluded that the trial court properly dismissed this action for failure to state a claim, we need not address Dr. Plummer's remaining issue or the Hospital's cross-assignment of error.

Affirmed.

Judges GREENE and MARTIN concur.

JAMES ANDREW HAWLEY, PLAINTIFF v. CHARLES SAMUEL CASH AND ROSEWAY TRANSPORTATION, INC., DEFENDANTS

No. COA02-93

(Filed 31 December 2002)

1. Motor Vehicles— contributory negligence—slow driving

Driving slower than the posted speed limit was not sufficient to support contributory negligence by a driver rear-ended by a tractor-trailer on an interstate where there was no posted minimum and the court found that plaintiff's speed would not have impeded the normal and reasonable movement of traffic. The trial court did not err by granting plaintiff's motion for a directed verdict on the defense of contributory negligence.

2. Damages and Remedies— motion for a new trial—denied—award not excessive

The trial court's denial of defendants' motion for a new trial for excessive damages for a $2.5 million personal injury verdict to a 76 year old plaintiff was not an abuse of discretion.

3. Damages and Remedies— punitive—spoilation of documents—summary judgment

The trial court correctly granted defendants' motion for partial summary judgment on punitive damages in an automobile collision case where plaintiff based its appeal on the alleged spoilation of documents by defendants. Plaintiff did not forecast any evidence that would have supported punitive damages and pointed to nothing supporting such a claim in the discovery material he claims was inappropriately destroyed.

Appeal by defendants from order entered 12 July 2001 by Judge J.B. Allen, Jr. denying defendants' motion for a new trial. Appeal by plaintiff from order granting summary judgment entered 27 March 2001 by Judge J.B. Allen, Jr. in Granville County Superior Court. Heard in the Court of Appeals 10 October 2002.

Jones, Martin, Parris & Tessener, P.L.L.C., by Hoyt G. Tessener and Elizabeth C. Todd, for plaintiff-appellee.

Womble, Carlyle, Sandrige & Rice, P.L.L.C., by Clayton M. Custer and Bryan D. Graham, and Roberts & Stevens, by Frank P. Graham, Kenneth R. Hunt and Wyatt S. Stevens, for defendant-appellants.

CAMPBELL, Judge.

Defendants, Charles Cash ("Mr. Cash") and Roseway Transportation, Inc., appeal from a judgment granting plaintiff, James Hawley ("Mr. Hawley"), $2.5 million for personal injury and $20,000 for property damages. Defendants appeal the denial of their motion for new trial. On appeal, defendants contend that the trial court erred in two ways: I. By granting plaintiff's motion for directed verdict as to defendants' claim that plaintiff was contributorily negligent in causing the collision; and II. By denying defendants' motion for new trial because the damages awarded were excessive, the evidence was insufficient to justify the verdict, the jury manifestly disregarded the court's instructions, and the verdict was contrary to law. We disagree. Accordingly, we affirm the lower court's judgment.

On 17 August 1999, at around six o'clock in the morning, defendant, an employee of Roseway Transportation, Inc., was driving a tractor-trailer on Interstate 85 near Oxford. At approximately the same time, plaintiff was driving his 1969 pickup truck to work. Plaintiff entered Interstate 85 at exit 204. After plaintiff had traveled seven-tenths of a mile north of exit 204, defendant hit plaintiff's truck from behind, causing plaintiff's truck to cross the median and overturn. The one independent eyewitness to the accident, Julian Lowery ("Mr. Lowery"), testified that he was driving north on Interstate 85 in the passing lane. Mr. Lowery estimated that Mr. Cash was traveling at about 65 miles per hour and that Mr. Hawley was driving at 45-50 miles per hour even though this was a 65 mile per hour zone. Mr. Lowery testified that he noticed Mr. Cash "had his cab light on, and was leaning a little bit over to the inside, like he was getting something between the seats or something." After Mr. Lowery passed the tractor-trailer, he "passed this pickup truck that was running slower than the tractor and trailer." When Mr. Lowery looked in his rearview mirror after passing the pickup truck, he saw the tractor-trailer hit the pickup truck "right dead center in the back end, and knocked it across the median, and flipped it upside down." The parties stipulated that defendant Cash was negligent. Thus, the only issue before the jury was what amount of compensatory damages plaintiff was entitled to recover for personal injury and for property damage. Mr. Cash died, of causes unrelated to the accident, before service of the complaint. Roseway Transportation was included as a defendant under the theory of respondeat superior.

I. Contributory Negligence Issue

[1] Defendants first argue that the trial court erred in granting plaintiff's motion for directed verdict on defendants' affirmative defense of contributory negligence. In defendants' amended answer to plaintiff's amended complaint, defendants stated as an affirmative defense:

> Plaintiff was contributorily negligent in that he traveled on an interstate highway at an excessively slow speed, without activating his four-way flashers. Said low speed was in violation of G.S. § 20-141(c) and (h) or, in the alternative, was less speed than a reasonably prudent person would be using under the circumstances.

In his reply, plaintiff "denie[d] the allegations of negligence . . . and denie[d] that any negligence on [his] part . . . contributed to or was the cause of his injury."

In ruling on a motion for directed verdict, we apply the same standard of review as on a motion for judgment notwithstanding the verdict. *Holcomb v. Colonial Associates, L.L.C.*, 153 N.C. App. 413, 416, 570 S.E.2d 248, 250 (2002). Appellate review requires this Court to examine " 'all the evidence in the light most favorable to the nonmoving party,' " give that party " 'the benefit of every reasonable inference drawn therefrom' " and determine if " 'the evidence is sufficient to be submitted to the jury.' " *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)). The trial court correctly denies a motion for directed verdict " 'if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Id.* (quoting *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998)).

Furthermore, "[w]ith respect to contributory negligence as a matter of law, '[t]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes [plaintiff's] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.' " *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979) (quoting *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976)); *see also Edwards v. Cerro*, 150 N.C. App. 551, 564 S.E.2d 277 (2002).

In the subject case, the situation is unusual in that *plaintiff* made the motion for directed verdict on defendants' defense of contributory negligence at the close of all the evidence at trial. In most cases that set out the applicable standard of review, the defendant moves for a directed verdict on its affirmative defense that the plaintiff is barred from recovery as a result of plaintiff's contributory negligence. Thus, the evidence viewed in the "light most favorable to the non-moving party," is normally viewed in the light most favorable to the plaintiff. Here, however, the evidence must be considered in the light most favorable to defendants, since plaintiff was the moving party. Therefore, "if there is more than a scintilla of evidence supporting each element of [defendants'] claim" that plaintiff was contributorily negligent, then the issue should have been submitted for the jury to decide. Here, the trial court did not find that sufficient evidence of plaintiff being contributorily negligent exists such that the jury should have been allowed to decide. In clarifying its granting of plaintiff's motion for directed verdict, the trial court stated:

> [T]he only evidence at all that could be showing any negligence would be that [Mr. Hawley] was operating [his truck] too slow [sic] to . . . "impede the normal and reasonable movement" of traffic . . . all the evidence tends to show that the defendant, Cash, was operating the tractor-trailer and struck Mr. Hawley square in the . . . back of the pickup truck. That there were no skid marks. There was no evidence of any movement of the tractor-trailer to avoid the [] striking of the pickup truck. There is evidence that tends to show that Mr. Cash didn't see the pickup truck before the impact . . . The Court finds that Mr. Hawley has testified . . . that he was proceeding fifty (50) to fifty-five (55) at the time of the collision. There is evidence that tends to show that the . . . State trooper, who is an experienced law enforcement officer involved in investigating accidents . . . estimated that Mr. Hawley was going about fifty (50) miles per hour . . . The Court does find as a fact that from all of the evidence that even if Mr. Hawley was going forty (40) to forty-five (45) miles per hour when it [sic] was not any minimum speed, that the Court finds that this would not have impeded the normal and reasonable movement of the traffic of someone keeping a proper lookout, and keeping their vehicle . . . under control, and not ramming someone in the back. And the Court does find as a fact that taking all of the evidence in the light most favorable to the defendant in this case, that even if the vehicle was going . . . "approximately forty (40) miles per

> hour," [as Mr. Cash testified before he died], that in considering all the evidence in this case that the Court should not submit [the] contributory issue to the jury. The Court finds and rules as a matter of law that there is insufficient evidence in this case for this Court to allow an issue of contributory negligence to go to the jury. That the only possible issue of negligence on behalf of the defendant would be driving . . . at a slow speed to impede the normal and reasonable movement of traffic, and the Court is going to allow the directed verdict on contrib[utory negligence].

The trial court found as a fact that Mr. Hawley was driving slower than the posted speed limit and that no minimum speed limit was posted. Driving slower than the speed limit is not unlawful unless it is so slow as to "impede the normal and reasonable movement of traffic" in violation of N.C. Gen. Stat. § 20-141(c) and (h). The evidence produced at trial was not sufficient enough to show that Mr. Hawley was contributorily negligent even by "a scintilla." We find no error in the trial court's ruling on this issue.

II. Excessive Damages Issue

[2] Defendants' second argument is that the trial court erred in denying his motion for new trial because the damages were excessive and appeared to be the result of passion or prejudice, the evidence was insufficient to justify the verdict, the jury manifestly disregarded the court's instructions, and the verdict was contrary to law. It is has long been established that in reviewing the lower court's denial of the defendant's motion for new trial, this Court must decide whether the record "affirmatively demonstrates an abuse of discretion." *Whaley v. White Consol. Indus., Inc.*, 144 N.C. App. 88, 92, 548 S.E.2d 177, 180, *disc. rev. denied*, 354 N.C. 229, 555 S.E.2d 277 (2001). N.C. Gen. Stat. § 1A-1, Rule 59 provides that new trial may be granted for:

> Manifest disregard by the jury of the instructions of the court; . . . Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice; . . . Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]

N.C. Gen. Stat. § 1A-1, Rule 59(a)(5)-(7) (2001). In the case at bar, in denying defendants' motion for new trial, the trial court noted in its findings that defendants "argued for a new trial on the issue of personal injury damages only and abandoned [their] motion for a new trial on the issue of property damages." Thus, defendants' request is

based solely on the $2.5 million verdict awarded to plaintiff for personal injury damages. The trial court made the following findings at the hearing on the motion for new trial:

> 9. The Court . . . finds that there is evidence presented to the jury which tends to show . . . there was a permanent injury, a brain damage, as [a] result of this collision . . . [and] that Plaintiff could not continue to work, and even though he was 76 years old and had worked regularly and had a life expectancy of 9.5 years, that he had spent quite a deal of his time working in his yard and in his flower garden and he was unable to pursue those interests . . . that his normal relations and fellowship with his family and friends were diminished as a result of the injuries he received in this collision.
>
> 10. The Court finds that the law is that a motion for new trial is in the sound discretion of the trial court.
>
> 11. The Court finds that there was sufficient and admissible evidence for this jury to award the $2.5 million in damages for the personal injuries suffered by Plaintiff.
>
> 12. The Court finds that there is nothing in the record to indicate that the jury disregarded the Court's instructions or that the award for personal injury damages was excessive. And the Court does find that there was sufficient evidence to justify the verdict and that the verdict was not contrary to law.
>
> 13. The Court finds that this trial court is not empowered to change a jury's verdict, however the Court has sound discretion to either order a new trial or deny a motion for new trial.
>
> 14. The Court in recalling the actual trial of this matter and the evidence presented, finds as a fact that there is nothing to indicate that the jury disregarded the instructions of the Court. That this Court specifically told the jury they were not to award any damages based on pity or sympathy. The Court does find that there was evidence presented to this jury to justify the verdict that the jury gave, and there is nothing in the evidence, or the record of this trial, to show that the jury acted under passion or prejudice.

Absent an obvious "substantial miscarriage of justice," this Court cannot overturn a trial court's denial of a motion for new trial. *Whaley* at

92, 548 S.E.2d at 180 (citation omitted). From our review of the record, we find no abuse of discretion in the trial court's ruling on defendants' motion for new trial. We affirm.

[3] Finally, plaintiff appealed the trial court's granting of defendants' motion for partial summary judgment on plaintiff's punitive damages claim. Plaintiff's appeal is based on defendants' alleged spoliation of documents that plaintiff could have utilized in establishing a claim for punitive damages.

In reviewing a trial court's ruling on a motion for summary judgment, we must determine whether: "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 359, 558 S.E.2d 504, 506-7, *disc. rev. denied*, 356 N.C. 159, 568 S.E.2d 186 (2002) (quoting *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (citations omitted)). Based on a careful review of the record, we conclude that the trial court did not err in its ruling to grant defendants' summary judgment motion. Plaintiff did not forecast any evidence that would have supported a punitive damages claim. Further, plaintiff points to nothing that might be contained in the discovery material he claims was inappropriately destroyed which would support such a claim. We conclude that defendants were entitled to judgment as a matter of law as to this issue and the trial court correctly granted defendants' motion for partial summary judgment.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

[155 N.C. App. 587 (2002)]

CARIE FRANCIS McDUFFIE, PLAINTIFF v. MAURICE MITCHELL, DEFENDANT

No. COA01-1492

(Filed 31 December 2002)

1. **Child Support, Custody, and Visitation— visitation—grandmother's claim after mother's death—no existing custody action between parents**

The issue of whether a family was intact was not reached in a maternal grandparent's visitation action against the children's father where the custodial mother died, an existing custody action between the parents was dismissed, and the trial court correctly dismissed the grandmother's action for failure to state a claim. The grandmother's claim was dependent on there being an ongoing custody case between the parents or a finding that the parent or parents are unfit. N.C.G.S. §§ 50-13.5(j), 50-13.1(a).

2. **Child Support, Custody, and Visitation— custody—grandmother's claim after mother's death—fitness of father**

A grandmother did not sufficiently allege conduct inconsistent with a noncustodial father's status as a parent where she claimed that he had been estranged from the children and had enjoyed only limited visitation but the father had alleged in a previous action that he had been denied visitation and had pursued a modification of custody, and he sought custody immediately after the children's mother went into a coma. The trial court did not err by dismissing the action for failure to state a claim.

Appeal by plaintiff from judgment entered 1 June 2001 by Judge Eric L. Levinson in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 2002.

James, McElroy & Diehl, P.A., by Richard A. Elkins and Preston O. Odom, III, for plaintiff-appellant.

Richard L. McClerin for defendant-appellee.

THOMAS, Judge.

Plaintiff, Carie McDuffie, appeals the trial court's dismissal of her complaint seeking visitation and custody of her two grandchildren. For the reasons herein, we affirm.

Plaintiff is the maternal grandmother of Maurice Mitchell III and Ayanna Mitchell. Maurice was born on 10 July 1991 and Ayanna was born on 29 May 1993, both during the marriage of their mother and father, the late Sharon McDuffie (formerly Mitchell) and defendant, Maurice Mitchell. After the parents were divorced in 1997, the Superior Court of New Jersey, Chancery Division, entered an order giving custody of the children to Sharon and visitation rights to defendant.

Sharon and the children moved to North Carolina later that year. The New Jersey court order was registered in Mecklenburg County District Court in 98 CVD 15717. In July 2000, defendant filed a Motion to Modify Custody, alleging that he had been denied visitation by Sharon and her boyfriend, James Brown. A trial was held on 11 September 2000. On 27 November 2000, the court entered an order awarding continued custody to Sharon and visitation to defendant.

In early October 2000, however, Sharon suffered a medical emergency and went into a coma from which she was not expected to recover. Defendant filed an Emergency Motion to Modify Custody on 17 October 2000. Sharon died on 20 October 2000, prior to a hearing on that motion. On 27 October 2000, plaintiff filed a Motion to Intervene in what had been the custody case between Sharon and defendant. James Brown filed a Motion to Intervene on 30 October 2000. The children resided with plaintiff immediately after Sharon's death.

While those motions were pending, plaintiff instituted the present action by filing a complaint on the morning of 8 December 2000 seeking custody and injunctive relief. By notice pleading and later, by consent, visitation was sought as well. On the afternoon of 8 December 2000, defendant obtained an order authorizing him to take physical custody of the children.

On 5 January 2001, in the original case, the trial court denied the motions of plaintiff and Brown to intervene on the basis that there was no longer an ongoing custody action and that Brown had violated Rule 24 of the North Carolina Rules of Civil Procedure. The trial court then dismissed the motions to intervene, defendant's motion to modify custody, the 27 November 2000 order granting custody to Sharon, and an 11 August 1999 child support order. It ruled that the court's subject matter jurisdiction had ceased in the case and terminated the custody proceedings between Sharon and defendant.

On 17 January 2001, in the instant case, defendant filed an answer and a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). On 2 March 2001, defendant filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). Plaintiff then filed a Motion in the Cause pursuant to N.C. Gen. Stat. § 50-13.5(j) on 6 March 2001. Section 50-13.5(j) provides, in pertinent part:

> In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child.

N.C. Gen. Stat. § 50-13.5(j) (2001).

On 1 June 2001, the trial court denied and dismissed plaintiff's claims for visitation, custody and injunctive relief and dismissed her motion in the cause.

[1] By plaintiff's first assignment of error, she contends the trial court erred in dismissing her visitation claim under Rule 12(b)(6) because genuine issues of material fact existed regarding whether defendant and the children were an "intact family." We disagree.

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the trial court must take all of the allegations of the complaint as true. *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 571 S.E.2d 52 (2002). However, the trial court must also draw its own legal conclusions from the facts, which may differ from those advocated by plaintiff. *Id.* at 57.

We note that where one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children. *Comer v. Comer*, 61 N.C. App. 324, 300 S.E.2d 457 (1983). This right is not absolute, but it may be interfered with or denied "only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." Id. at 327, 300 S.E.2d at 459 (citing *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E.2d 759, 761 (1955)). *See also Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997).

Section 50-13.1(a) provides:

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

N.C. Gen. Stat. § 50-13.1(a) (2001). Pursuant to this section, a grandparent may institute an action for custody of his or her grandchild, but the statute does not grant grandparents the right to sue for visitation when no custody proceeding is ongoing *and* the minor children's family is intact. *McIntyre v. McIntyre*, 341 N.C. 629, 635, 461 S.E.2d 745, 750 (1995).

Plaintiff argues that the circumstances here sufficiently diverge from those in *McIntyre*, *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); *Montgomery v. Montgomery*, 136 N.C. App. 435, 524 S.E.2d 360 (2000); and *Fisher v. Gaydon*, 124 N.C. App. 442, 477 S.E.2d 251 (1996), *rev. denied*, 345 N.C. 640, 483 S.E.2d 706 (1997) so as to warrant a different result. In that line of cases, the non-custodial parent was the one who died. Here, it is the custodial parent who died, with the non-custodial parent not having the children in his physical control either immediately before or after the death. While we may sympathize with the distinction, and however harsh the result, the precise wording in those cases does not even allow us to reach the issue of whether the family here was intact.

Grandparents' right to visitation is dependent on there either being an ongoing case where custody is an issue between the parents or a finding that the parent or parents are unfit. *Price v. Breedlove*, 138 N.C. App. 149, 530 S.E.2d 559, *rev. denied*, 353 N.C. 268, 546 S.E.2d 111 (2000). Upon the death of the mother in the instant case, the ongoing case between the mother and father ended. *McIntyre v. McIntyre*, *supra*. Consequently, there was no on-going custody action when plaintiff filed her motion to intervene.

Plaintiff argues a further distinction by noting she did not appeal the dismissal of her motion to intervene in Case Number 98 CVD 15717. However, by filing a new complaint requesting custody, and through notice pleading and agreement also asking for visitation, she claims a right to visitation where the family is not intact or where a parent is shown to be unfit. Nonetheless, as aforementioned, whether

a family is intact, standing alone, is an irrelevant issue for this claim. The fact that the trial court specifically stated that its jurisdiction in the original action ended 5 January 2001, after the filing of plaintiff's complaint, in no way relieves plaintiff of her burden to allege and prove unfitness. *See Price v. Breedlove*, *supra*; *McIntyre v. McIntyre*, *supra*.

[2] By her second assignment of error, plaintiff contends the trial court erred in dismissing her custody claim pursuant to Rule 12(b)(6). Specifically, she insists she has alleged types of conduct which are inconsistent with defendant's status as a parent. We disagree.

Our courts recognize "the general principle that because of the strength and importance of the parents' constitutionally protected interests, those interests must prevail against a third party unless the court finds that the parents are unfit or have neglected the welfare of their children." *Price v. Howard*, *supra*. This Court stated in *Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1999):

> We read *Price* as broadening the rule of *McIntyre* by requiring that a third party, including a grandparent, who seeks custody of a minor child as against the child's natural parent, must allege facts sufficient to show that the natural parent has acted in a manner inconsistent with his or her constitutionally protected status.

The complaint here fails to sufficiently allege acts that would constitute "unfitness, neglect, [or] abandonment," or any other type of conduct so egregious as to result in defendant's forfeiture of his constitutionally protected status as a parent. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). It merely alleges that defendant has been "estranged from the children for some time and currently only enjoys limited visitation with the minor children." The rest of the complaint focuses on plaintiff's role in the children's lives, and asserts that remaining with her is in their best interests. Such allegations fall short of establishing that defendant acted in a manner inconsistent with his protected status. A best interests analysis is not appropriate absent such a finding. *See* N.C. Gen. Stat. § 50-13.2(a); *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997).

In fact, defendant pursued a modification in custody after he claimed he was denied visitation by Sharon and her boyfriend. The trial court in 98 CVD 15717 made several findings of fact that the mother and her boyfriend had denied defendant visitation. Further,

defendant sought custody of the children immediately after Sharon went into a coma.

The complaint here is insufficient to state a claim under N.C. Gen. Stat. § 50-13.1(a) on behalf of plaintiff for custody of defendant's minor children. We therefore affirm the trial court's order dismissing plaintiff's visitation and custody claims.

AFFIRMED.

Judges WALKER and McGEE concur.

JIMMY RAY COLE, PETITIONER v. JANICE FAULKNER, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA01-1483

(Filed 31 December 2002)

1. **Motor Vehicles— mandatory driver's license revocation— reviewed by certiorari**

The trial court did not err by reviewing by writ of certiorari a DMV decision to cancel the conditional restoration of driving privileges under N.C.G.S. § 20-19(e). Although N.C.G.S. § 20-25 provides a right to de novo review in superior court where there is a discretionary cancellation of a driver's license by DMV, revocation in this case was mandatory and N.C.G.S. § 20-25 did not apply. However, certiorari is the appropriate process to review the proceedings of inferior courts and bodies and officers exercising judicial or quasi-judicial functions where no appeal is provided by law.

2. **Motor Vehicles— driver's license revocation—whole record—malfunctioning Ignition Interlock**

In a certiorari review of DMV's revocation of the conditional restoration of a driver's license, the Court of Appeal's scope of review was whether the superior court applied the appropriate standard properly. The whole record, reviewed by the trial court, did not support the revocation because DMV relied on Ignition Interlock readings indicating alcohol consumption and petitioner produced evidence that the device malfunctioned and that he had

not consumed alcohol on either of the occasions relied upon by the DMV.

Appeal by petitioner from judgment entered 8 October 2001 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 September 2002.

Kirk, Kirk, Howell, Cutler & Thomas, L.L.P, by Joseph T. Howell and Jeffrey M. Cutler, for petitioner-appellant.

Roy Cooper, Attorney General, by Jeffrey R. Edwards, Assistant Attorney General, for the State.

THOMAS, Judge.

The trial court here affirmed an order of the Division of Motor Vehicles (DMV) cancelling the conditional restoration of driving privileges for petitioner, Jimmy Ray Cole. He now appeals and for the reasons herein, we reverse.

Cole's driving privileges had been revoked due to convictions for driving while impaired from 1973 to 1995. On 17 July 2000, a hearing was held with the DMV conditionally restoring his privileges pursuant to N.C. Gen. Stat. § 20-19(e).

As part of the conditional restoration agreement, Cole consented to certain conditions, including that he not operate a motor vehicle after consuming alcohol. Further, it was mandated that Cole "[o]nly operate a vehicle properly equipped and maintained with an Ignition Interlock device approved by the North Carolina Department of Motor Vehicles." The Ignition Interlock device requires a driver to pass an alcohol test by blowing into the device. The results are then recorded as logged events. If the device recognizes alcohol through the breath test, the vehicle is programmed not to start. Occasionally, an alcohol test will also be required while the vehicle is running. Cole agreed that he would not adjust or tamper with the ignition interlock device, and that he would have monitoring checks performed on it every sixty days.

On 11 April 2001, the DMV notified Cole to appear at a hearing to determine whether he had violated any of the provisions of the conditional restoration agreement. Evidence at the hearing showed that Cole had registered alcohol readings three different times, 0.02 on 4 November 2000, 0.11 on 22 December 2000, and 0.082 on 11 January 2001. There was also evidence that shortly after these readings, the

device registered no alcohol level readings. The November reading registered a "warn" attempt on the interlock system. Only the two "fail" readings, December and January, were the subject of inquiry at the hearing.

Cole testified that he had not consumed alcohol, but did have a soft drink before the December reading and coffee before the January reading. He said that his vehicle cranked on his third try in December, after he had consumed a soft drink. He said he did not know what was wrong with the device and subsequently went to Monitech, which services it. Monitech technicians told Cole to make sure he did not have anything in his mouth when he blew into the device.

In January, Cole was again unable to start his vehicle due to an alcohol reading of 0.082. He claimed only to have had decaffeinated coffee. Cole returned to the coffee shop and called Sergeant Jody Wall, a police officer with the Wendell Police Department. Wall administered an alco-sensor test, which registered 0.00. After the test, Wall and Cole walked to Cole's vehicle, which immediately started on his next attempt. Cole then took his vehicle back to Monitech for servicing. The ignition interlock device tested within calibration standards.

Cole stated he was the only one to blow in the device on these two dates. His vehicle is sometimes driven by his girlfriend and an employee, who do not drink.

At the close of all the evidence, the DMV's hearing officer determined there was sufficient evidence that Cole had violated the terms of the agreement. The restoration of his license was cancelled and the original permanent revocation of his driving privileges was placed back into effect.

Cole petitioned for review by the trial court, which affirmed the decision. It found the DMV did not act in an arbitrary and capricious manner by cancelling Cole's conditional restoration of his driving privileges.

[1] By his first assignment of error, Cole contends the trial court erred by reviewing the DMV's decision under a petition for writ of certiorari. Instead, he argues the trial court should have applied *de novo* review. We disagree.

Where the trial court sits without a jury, this Court reviews whether the competent evidence supports the trial court's findings,

and whether the findings in turn support the conclusions of law. *Meekins v. Box*, 152 N.C. App. 379, 567 S.E.2d 422 (2002).

Section 20-25 of the North Carolina General Statutes, titled "Right of appeal to court," provides:

> Any person denied a license or whose license has been canceled, suspended or revoked by the Division, *except where such cancellation is mandatory under the provisions of this Article*, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to *take testimony and examine into the facts of the case, and to determine* whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this Article. Provided, a judge of the district court shall have limited jurisdiction under this section to sign and enter a temporary restraining order only.

N.C. Gen. Stat. § 20-25 (2001) (emphasis added). Thus, a right to *de novo* review in superior court exists where there is a *discretionary* denial, cancellation, suspension, or revocation of a driver's license by the DMV. *See In re: Revocation of License of Wright*, 228 N.C. 301, 303, 45 S.E.2d 370 (1947), *reh'g denied*, 228 N.C. 584, 46 S.E.2d 696 (1948).

However, where the cancellation or revocation of the license is mandatory, there is no right to appeal under section 20-25. N.C. Gen. Stat. § 20-25; *Penuel v. Hiatt*, 100 N.C. App. 268, 268-69, 396 S.E.2d 85, 85-86 (1990).

Here, Cole's license was conditionally restored under N.C. Gen. Stat. § 20-19(e). Pursuant to that section, Cole entered into an agreement with the DMV. *See id.* (providing that the DMV may place reasonable conditions or restrictions on the person for any period up to three years from the date of restoration). Under the agreement, "a violation of any term, restriction, or condition . . . *shall* result in a termination of this restoration and the license continues in the original state of revocation." (Emphasis added). Thus, once the

DMV determined that a condition has been violated, revocation was mandatory. Accordingly, section 20-25 does not provide for review of this decision.

Although a superior court does not have authority to review mandatory license revocations by the DMV, a petitioner may appeal a permanent revocation of a driver's license pursuant to section 20-19(e) by petitioning for a writ of certiorari. *Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990). In *Davis*, the petitioner's driving privileges were permanently revoked pursuant to N.C. Gen. Stat. § 20-17(2), and, as here, N.C. Gen. Stat. § 20-19(e). In holding that the revocation could be reviewed by the superior court by writ of certiorari, the *Davis* Court stated:

> It is well settled in this jurisdiction that certiorari is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law.

Davis, 326 N.C. at 465, 390 S.E.2d at 340, (quoting *Russ v. Board of Education of Brunswick County*, 232 N.C. 128, 130, 59 S.E.2d 589, 591 (1950)).

Therefore, the trial court did not err in reviewing the DMV's decision by writ of certiorari and we overrule this assignment of error.

[2] Cole next argues that the trial court erred in affirming the revocation of the conditional restoration of his driver's license. Specifically, he argues that even when applying *certiorari* review, the whole record is devoid of competent evidence to support the DMV's decision. We agree.

When reviewing an appeal from a petition for writ of certiorari in superior court, this Court's scope of review is two-fold: (1) examine whether the superior court applied the appropriate standard of review; and, if so, (2) determine whether the superior court correctly applied the standard. *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citations omitted). Here, the superior court applied a whole record review. Therefore, we must determine whether the court properly did so.

Under the whole record test, the trial court reviews the record *de novo* for errors of law to determine if competent, material, and substantial evidence exists, based on the whole record, to support the

decision, and determines whether the decision was arbitrary and capricious. *Id.* at 54-55, 557 S.E.2d at 634. Significantly, the whole record test requires the court to consider both evidence justifying the agency's decision and contrary evidence that could lead to a different result. *In re Appeal by McCrary*, 112 N.C. App. 161, 167-68, 435 S.E.2d 359, 364 (1993). However, the test does not allow the reviewing court to replace the agency's judgment when there are two reasonably conflicting views, although the court could have justifiably reached a different result under *de novo* review. *Id.*

The record here shows that at the end of the non-compliance hearing, the DMV stated the terms of the agreement had not been met. After Cole's attorney inquired as to what terms were being referred to, the DMV responded "alcohol is being used." Thus, the DMV based its revocation on the December and January alcohol readings.

Cole, however, counters that the readings were erroneous because the device malfunctioned. He states that he only consumed a soft drink before the December reading and coffee before the January reading. Cole emphasized the evidence establishing subsequent readings taken shortly thereafter did not register any alcohol. Specifically, he points to the affidavits from Danny and Martha Jeffries, owners of Fleet Fuels, the service station where the December reading occurred. Mr. Jeffries asserts that Cole's second attempt to start his car was successful. Additional evidence was presented showing that after the January reading, Cole called the police and was administered an alco-sensor field test that revealed a blood alcohol level of 0.00. Finally, according to a technician employed by Monitech, Inc., the manufacturer of the device, the readings were "consistent with fast-dissipating mouth contaminants."

Accordingly, we hold that the record lacked substantial evidence to support the conclusion that Cole had consumed alcohol and thereafter operated a motor vehicle.

REVERSED.

Judges WALKER and McGEE concur.

E. L. FAULCONER, JR., PLAINTIFF v. WYSONG AND MILES COMPANY, DEFENDANT

No. COA02-291

(Filed 31 December 2002)

1. Appeal and Error— appealability—entire defense struck

An immediate appeal is available when an entire further answer or defense is struck.

2. Contracts— commercial frustration—business decline—not applicable

The doctrine of commercial frustration did not apply to a retirement agreement which a company attempted to avoid because its business had declined. The possibility that defendant might experience hard times was foreseeable and appears to have been expressly provided for in the agreement. The trial court did not err by granting plaintiff's motion to strike this affirmative defense.

Appeal by defendant from judgment entered 12 December 2001 by Judge William Z. Wood, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 14 November 2002.

Adams Kleemeier Hagan Hannah & Fouts, by Eric H. Biesecker, for plaintiff appellee.

Forman Rossabi Black Marth Iddings & Slaughter, P.A., by Amiel J. Rossabi, for defendant appellant.

McCULLOUGH, Judge.

Plaintiff E. L. Faulconer, Jr., served as an employee of defendant Wysong & Miles Company for approximately 30 years. On or about 26 October 1981, plaintiff and defendant entered into an Amended and Restated Agreement (Agreement). This Agreement provided for plaintiff to receive supplemental retirement and death benefits from defendant in recognition of his years of faithful service, loyalty to defendant (including a non-compete provision) and required physical check-ups.

Plaintiff retired from defendant's employ in 1987. According to plaintiff, defendant was obligated to him in the sum of $2,620.80 per month under the Agreement. It appears that all payments were made

up until the fall of 2000. At that point, defendant suspended its payments to plaintiff.

Plaintiff filed a complaint on 2 July 2001. According to plaintiff, as of the date of the complaint, defendant had missed 8 payments, and owed him the principal sum of $20,966.40 plus interest.

Defendant filed its answer on 10 September 2001. In its answer, defendant admitted that the two parties had entered into the aforementioned agreement. Defendant further admitted that it had failed to make the 8 payments, stating that "due to existing impracticability, Wysong has failed to make some payments to Mr. Faulconer." The focus of this appeal are the affirmative defenses included in defendant's answer. They are as follows:

FIRST AFFIRMATIVE DEFENSE

> Due to the precipitous decline in the metal-working machine manufacturing industry, for which Wysong is not in any way responsible, and the non-occurrence of which event was a basic assumption on which the Agreement was made, it is impracticable for Wysong to continue making payments to Mr. Faulconer and therefore, Wysong is discharged from any such responsibility.

SECOND AFFIRMATIVE DEFENSE

> Wysong repeats and realleges all of the allegations contained in the Complaint and the First Affirmative Defense as if restated herein. In addition, payments to Mr. Faulconer by Wysong, due to the precipitous decline in the metal-working machine manufacturing industry, could be made only at an excessive and unreasonable cost to Wysong.

THIRD AFFIRMATIVE DEFENSE

> Wysong repeats and realleges all of the allegations contained in the Complaint and the First and Second Affirmative Defenses as if restated herein. When the parties entered into the Agreement, both parties contemplated the continued economic prosperity of the metal-working machine manufacturing industry, and did not contemplate in any way such a precipitous decline as has occurred.

Plaintiff filed a motion to strike defendant's affirmative defenses on 15 October 2001 based on the failure of defendant to set forth facts sufficient to constitute a defense. The motion stated that "[t]he claim

that any decline in the metal-working machine manufacturing industry, or any commercial impracticability, discharges Defendant from its obligations under the [agreement] or in any way provide[s] a defense to Plaintiff's Complaint is not supported by applicable law."

Defendant submitted the affidavit of Thomas R. Adkisson, who was the Chief Operating Officer for defendant at the time. According to him, defendant hit hard times in the spring of 2000. Further, while other companies in the same business went bankrupt, defendant continued to pay its bills, even though it had to lay off some workers. As to the payments to plaintiff, defendant chose to suspend payments because a review of the Board minutes surrounding the execution of the agreements like plaintiff's led him to believe that these agreements depended on defendant's business continuing to prosper, and that it was not the intent behind those agreements to have to lay off employees in order to pay plaintiff and others like him.

A hearing was held on plaintiff's motion to strike on 10 December 2001. On 12 December 2001, the Honorable William Z. Wood, Jr., ruled for plaintiff and held that "[d]efendant's affirmative defenses are insufficient in that they fail to set forth facts sufficient to constitute a defense to the claim sued upon in this cause." Defendant appeals.

Defendant presents the following question on appeal: Did the trial court err in granting plaintiff's motion to strike defendant's affirmative defenses?

[1] Initially, we note that defendant's appeal is properly before us.

> Ordinarily, Rule 4(b) of the Rules of [Appellate Procedure] precludes an appeal "from an order striking or denying a motion to strike allegations contained in pleadings." However, when a motion to strike an *entire* further answer or defense is granted, an immediate appeal is available since such motion is in substance a demurrer.

Bank v. Easton, 3 N.C. App. 414, 416, 165 S.E.2d 252, 254 (1969) (citation omitted). Thus, we address the merits of defendant's appeal.

I.

[2] Defendant contends that it was error for the trial court to grant plaintiff's motion to strike his affirmative defenses, which attempt to assert the doctrine of commercial frustration, pursuant to Rule 12(f) of the N.C. Rules of Civil Procedure.

> Under Rule 12(f), the trial court "may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." G.S. § 1A-1, Rule 12(f). A motion under Rule 12(f) is a device to test the legal sufficiency of an affirmative defense. *See Trust Co. v. Akelaitis*, 25 N.C. App. 522, 525, 214 S.E.2d 281, 284 (1975). "If there is any question as to whether an issue may arise, the motion [under Rule 12(f)] should be denied." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108 [*disc. review denied*, 295 N.C. 735, 249 S.E.2d 804 (1978)].

Department of Transp. v. Blue, 147 N.C. App. 596, 600, 556 S.E.2d 609, 615 (2001).

In *Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E.2d 206 (1981), our Supreme Court discussed the defense of frustration of purpose.

> The doctrine of frustration of purpose is discussed in 17 Am. Jur. 2d *Contracts* § 401 (1964) as follows:
>
> > "Changed conditions supervening during the term of a contract sometimes operate as a defense excusing further performance on the ground that there was an implied condition in the contract that such a subsequent development should excuse performance or be a defense, and this kind of defense has prevailed in some instances even though the subsequent condition that developed was not one rendering performance impossible. . . . In such instances, . . . the defense doctrine applied has been variously designated as that of 'frustration' of the purpose or object of the contract or 'commercial frustration.'
> >
> > ["]Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. The doctrine of commercial frustration is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose."

> If the frustrating event was reasonably foreseeable, the doctrine of frustration is not a defense. In addition, if the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligations. 17A C.J.S. *Contracts* § 463(2) (1963). *See also Perry v. Champlain Oil Co.*, 101 N.H. 97, 134 A.2d 65 (1957); *Blount-Midyette & Co. v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E.2d 225 (1961); Annot., 84 A.L.R.2d 12 (1962).

Brenner, 302 N.C. at 211, 274 S.E.2d at 209.

Essentially, there must be an implied condition to the contract that a changed condition would excuse performance; this changed condition causes a failure of consideration or the expected value of performance; and that the changed condition was not reasonably foreseeable.

Defendant alleged in his affirmative defenses that there was a precipitous decline in its business, that it was an implied condition to the agreement that this decline not occur and the parties did not contemplate such a decline, and now it is impractical, excessive and unreasonable to continue to make payments to plaintiff.

We hold that the doctrine of frustration of purpose is inapplicable to the present case and that the trial court was correct in granting plaintiff's motion to strike. First of all, there is a problem with implication by defendant that there were some sort of implied conditions to this contract. The admissibility of such evidence is questionable at best under the parol evidence rule, considering the Agreement states that "[t]his Amended and Restated Agreement amends and restates in its entirety the Agreement dated January 30, 1978 between the Employee and the Company, together with all amendments thereof. This Amended and Restated Agreement may not be amended or modified except by a writing signed by the Employee and the Company." The Agreement mentions nothing about what would happen during a period of decline.

However, we do not address this issue (as the parties have not) as this defense is not viable, because it is reasonably foreseeable that a business may suffer a distinct period of decline. This is not a situation in which the parties could not reasonably have protected themselves. The affidavit of the Chief Operating Officer states that the company was nearly bankrupt in the early 1990s. The company had obviously experienced periods of decline before. It cannot now

expect this Court to entertain the notion that it never expected to have them again. Further, there is no connection between the fortunes of the company and its obligation to plaintiff. The possibility that defendant may again experience hard times was foreseeable, and appears to have been expressly provided for in the agreement. The agreement states:

> Unsecured Obligation. . . . To the extent that [plaintiff] and his surviving spouse may be entitled to receive payment from [defendant] under this Amended and Restated Agreement, [plaintiff] and his surviving spouse shall have no rights against [defendant] other than those accorded to general, unsecured creditors of [defendant] under law.

It appears to this Court that this section contemplates bad times currently suffered by defendant, namely bankruptcy. It is implied that defendant would still owe on the contract even if it went bankrupt, and plaintiff would then be an unsecured creditor with a right to collect from defendant commensurate with other unsecured creditors like him. This provision allocates to plaintiff the risk that defendant may go bankrupt, and prevents the application of the doctrine of frustration.

Affirmed.

Judges WALKER and TYSON concur.

BERNICE LEO FREEMAN, PLAINTIFF v. DOROTHY JANIE (SIC) FREEMAN, DEFENDANT

No. COA02-222

(Filed 31 December 2002)

1. Divorce— motion to set aside—timeliness

Defendant's motion in the cause to set aside a divorce was timely filed where divorce judgment was set aside as null. Void judgments may be attacked at any time.

2. Divorce— motion to set aside—one party now deceased

The evidence was sufficient to support an order setting aside a divorce judgment after the death of the husband (the plaintiff)

for lack of service on his wife. Although the husband's estate produced evidence from which contrary findings could have been made, the weight, credibility, and convincing force of the evidence is for the trial court.

Appeal by plaintiff from order entered 13 November 2001 by Judge Ernest J. Harviel in Alamance County District Court. Heard in the Court of Appeals 29 October 2002.

Randall & Hill, by John C. Randall, for plaintiff-appellant.

David R. Huffman for defendant-appellee.

MARTIN, Judge.

Bernice Freeman and defendant Dorothy Freeman were married 4 July 1980. On 10 July 1985, Bernice Freeman instituted this action for divorce, and on 28 August 1985, a judgment of absolute divorce was entered. Bernice Freeman died on 20 April 1998. On 4 April 2000, defendant filed a motion in the cause in this action to set aside the judgment of absolute divorce, and served the motion on the administrator of Bernice Freeman's estate, who was subsequently substituted as party plaintiff. By order dated 13 November 2001, the trial court concluded the judgment of absolute divorce was void and granted defendant's motion to set it aside. Plaintiff administrator appeals.

Evidence presented at the hearing tended to show that the original plaintiff, Bernice Freeman, married defendant, Dorothy Freeman, on 4 July 1980, in Durham County. At the time of their marriage, Mr. Freeman had three children, Darryl Freeman, Glenda Freeman (now) Wilson, and Todd Freeman, and defendant had two children, Floyd and Christopher May. In June 1985, defendant separated from Bernice Freeman and moved, with her sons, out of the marital residence in Durham County to a mobile home in Orange County for the summer of 1985. Defendant testified that during their separation, Bernice Freeman visited her frequently and they had sexual relations and took trips to the beach together. Less than nine months after the summer of 1985, defendant gave birth to their son, Matthew Bernice Freeman.

In July 1985, Bernice Freeman's attorney prepared a complaint for absolute divorce alleging the parties had separated on 5 May 1984. The complaint was verified by Bernice Freeman on 9 July 1985 and

filed with the Alamance County Clerk of Court, and summons issued, on 10 July at 10:26 a.m. An acceptance of service was filed at 10:28 a.m. bearing the date in the attorney's handwriting and the purported signature of defendant. Bernice Freeman's attorney, Robert Steele, testified that although he had no memory of the Freeman divorce, it was the practice of his office at that time to allow the plaintiff in a "friendly" divorce case to take the summons to the defendant for acceptance of service. Defendant never filed an answer to the complaint and did not appear at the divorce hearing. A judgment of absolute divorce based on one year's separation was entered on 28 August 1985.

Defendant subsequently moved back into Bernice Freeman's home in Durham County and Bernice Freeman and defendant resumed and continued life as a married couple until Bernice Freeman's death in 1998. In 1986, Bernice Freeman purchased real property in Orange County which was titled in his name and defendant's as tenants by the entireties. The parties built a residence on the property in 1990, executing a deed of trust. In 1997, they filed paperwork for social security benefits as husband and wife. Upon decedent's death, an unsigned will was found that had been drafted in or about May 1989 and referred to defendant as decedent's wife.

The present motion was apparently occasioned by defendant's sale of the Orange County residence and the discovery thereafter of the 1985 divorce decree. Both the personal representative of Bernice Freeman's estate and the grantee of the property filed suit against defendant regarding the property sale.

The issue is whether the trial court erred in determining that the 1985 divorce judgment is void for lack of service of process. Plaintiff challenges the trial court's order with two arguments that require discussion: (1) that the motion to set aside the divorce was not timely, and (2) that there was insufficient evidence to support the trial court's determination that defendant was not served with the summons and complaint. After careful consideration of the record, we reject both arguments.

[1] G.S. § 1A-1, Rule 60(b) provides in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . .

> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void; . . ., or
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> *The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.* . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2002) (emphasis added). Plaintiff contends that, because defendant's motion was grounded upon allegations and evidence of Bernice Freeman's intrinsic fraud in lying to the court in 1985 concerning the length of the parties' separation prior to his filing the divorce action, defendant was required by Rule 60(b)(3) to file the motion no later than a year after the judgment was entered.

Although defendant's motion included allegations regarding misrepresentation of the length of the parties' separation in the divorce complaint and related inaccurate findings in the judgment, the motion also contained allegations that defendant had never been served with process. The trial court based its order setting aside the divorce judgment on the determination that the judgment was a "nullity." Rule 60(b)(4) provides relief from judgments that are void, and the statute indicates that a motion under this provision must be made "within a reasonable time." Case law indicates that because a void judgment is a legal nullity, it may be attacked at any time. *See Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 567 S.E.2d 179 (2002). We hold that the motion under Rule 60(b)(4) was timely.

[2] Plaintiff's more substantive argument addresses the sufficiency of the evidence to support the trial court's order. The key issue in this case is whether defendant was properly served with the summons and divorce complaint. "[A] court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods." *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999). The law is well set-

tled that without such jurisdiction, a judgment against defendant is void. *See Thomas v. Thomas*, 43 N.C. App. 638, 645, 260 S.E.2d 163, 168 (1979) (citing *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974)). The record is clear that Bernice Freeman, and the present plaintiff, relied solely upon service pursuant to G.S. § 1A-1, Rule 4(j5) to establish personal jurisdiction. The rule provides:

> (j5) Personal Jurisdiction by Acceptance of Service. Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

N.C. Gen. Stat. § 1A-1, Rule 4(j5) (2002). Where acceptance of service is used, there is a rebuttable presumption that service was proper if the return of process bears the defendant's signature and is dated. *See Latimer v. Latimer*, 136 N.C. App. 227, 522 S.E.2d 801 (1999). In order to overcome this presumption, a defendant must produce clear, unequivocal, and convincing evidence of the alleged defect. *See id.* If supported by such evidence, the findings of the trial court are binding on this Court, although the conclusions of law may be reviewed *de novo*. *See id.* at 230, 522 S.E.2d at 803.

In *Latimer*, a case involving a motion to set aside a divorce judgment where the acceptance of service was backdated, the Court stated that " '[t]he return may be attacked by the oral testimony of the defendant.' " *Id.* at 229, 522 S.E.2d at 802 (citation omitted). In the instant case, defendant produced not only her own testimony, but also evidence of several circumstances inconsistent with her having signed the return of service. Defendant testified that she had never been to the Alamance County courthouse, where the return of service must have been signed within the two-minute window between the filing of the complaint and the filing of the return of service. Although plaintiff presented a handwriting analysis expert who stated his opinion "based on a reasonable degree of scientific certainty," that the signature on the acceptance of service was defendant's, defendant also presented testimony by another handwriting expert, who stated that he could not with any degree of scientific certainty say that the questioned signature was defendant's. In fact, defendant's expert also testified that the contested signature had some characteristics in

common with Bernice Freeman's signature on the verification accompanying the divorce complaint. Defendant testified that Bernice Freeman had signed her name to documents on other occasions.

In addition, defendant also submitted evidence of other circumstances supporting her claim that she had not been served with the divorce complaint nor known about the divorce. She and others testified that she and decedent continued to live as a married couple after the divorce was entered. They purchased property together, lived together, raised a son together, and decedent applied for social security disability benefits listing defendant as his wife. Though plaintiff produced evidence from which contrary findings could have been made, defendant offered explanations to meet such evidence. The weight, credibility, and convincing force of such evidence is for the trial court, who is in the best position to observe the witnesses and make such determinations. *Upchurch v. Upchurch*, 128 N.C. App. 461, 495 S.E.2d 738, *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998). The trial court specifically found defendant's evidence to be "clear, unequivocal and convincing" that defendant had not been served with process.

Once a party to a divorce dies, the divorce judgment cannot be later attacked unless it is void. *See Dunevant v. Dunevant*, 142 N.C. App. 169, 175, 542 S.E.2d 242, 246 (2001) ("the trial court may not set aside a valid divorce decree and thereby revive the marital status of a party who is deceased"). " 'A divorce granted without proper service of process upon the defendant is void when [s]he does not appear in the action or does not otherwise waive service of process.' " *Thomas*, 43 N.C. App. at 645, 260 S.E.2d at 168 (citation omitted). In this case, the judgment of divorce was void due to lack of service on defendant. Accordingly, the judgment could be attacked and set aside following Bernice Freeman's death. The order from which plaintiff appeals is affirmed.

Affirmed.

Judges GREENE and BRYANT concur.

STATE OF NORTH CAROLINA v. ANTHONY SEAN YANCEY

No. COA01-1490

(Filed 31 December 2002)

Evidence— character—defendant as "asset" of drug dealer

The trial court erred in a cocaine trafficking prosecution by admitting testimony that defendant was an "asset" for the witness in trafficking cocaine. This testimony came before defendant put on any evidence, it effectively characterized defendant as a drug dealer, and it was prejudicial because it was the only evidence definitively linking defendant with drug trafficking.

Appeal by defendant from judgments entered 1 June 2001 by Judge Dwight L. Cranford in Pitt County Superior Court. Heard in the Court of Appeals 12 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Jonathan E. Jones for defendant appellant.

TIMMONS-GOODSON, Judge.

Anthony Sean Yancey ("defendant") appeals from the judgments of the trial court entered upon a jury verdict finding defendant guilty of trafficking in cocaine and conspiring to traffic in cocaine. For the reasons stated herein, we vacate the judgment of the trial court and remand defendant's case for a new trial.

At trial, the State presented evidence tending to show the following: On 31 December 1999, law enforcement officers with the Greenville Police Department executed a search warrant for a residence on Chestnut Street in Greenville, North Carolina. At the time of the search warrant, the residence was rented to Otis Barrett ("Barrett"). Upon entering the residence, officers found four occupants, including Barrett, defendant and two women. After securing the occupants, the officers searched the residence. In the kitchen, officers discovered twenty to thirty small plastic sandwich bags with their corners cut in a manner commonly used to package crack cocaine. Officers also discovered several ounces of crack cocaine hidden beneath some bed linens, and found razor blades and scales typically used to cut and weigh crack cocaine. When the officers searched Barrett, they found $1,414.00 on his person.

Omar Fogg ("Fogg") presented further testimony on behalf of the State. Fogg testifed that he was serving a prison sentence for drug possession with the North Carolina Department of Correction. Fogg stated that he met defendant at the Pitt County Detention Center, where defendant shared a cell with Fogg's brother. After Fogg's release from the detention center, he remained in contact with defendant by supplying him with cocaine. Fogg subsequently obtained defendant's release from the detention center by posting defendant's bond. Fogg explained that he posted defendant's bond because he "thought [defendant] was an asset to help me [in] trafficking the cocaine." According to Fogg, defendant informed him that the cocaine seized by law enforcement officers on 31 December 1999 belonged to him.

The State presented further testimony by Kenzar Maye ("Maye"). Maye testified that in the late evening and early morning hours of 30 and 31 December 1999, he and a friend stopped by Barrett's residence in order to purchase crack cocaine. As he approached Barrett's residence, Maye noticed defendant walking away from the rear of the house. Maye was later arrested that evening for drug possession.

Defendant testified that he was unaware of the presence of the drugs seized by officers at the Barrett residence on 31 December 1999. Defendant stated that Barrett was merely an acquaintance and that he had been at Barrett's residence only twenty minutes before the officers searched it. Defendant denied making the statements attributed to him by Fogg. Defendant's sister, Lisa Stagol, also testified that she was present at the Barrett residence on 31 December 1999 and had no knowledge of the drugs seized by law enforcement officers. She further denied any knowledge of defendant's participation in drug trafficking.

Upon considering the evidence, the jury found defendant guilty, and the trial court sentenced defendant to a minimum term of imprisonment of thirty-five months and a maximum term of forty-two months for the trafficking in cocaine by possession charge. The judge imposed the same sentence for the charge of conspiracy to traffic in cocaine by possession, to run consecutively to the first sentence. From these judgments and resulting sentences, defendant appeals.

Defendant presents three issues for review on appeal, arguing that the trial court committed prejudicial error in (1) admitting

improper character evidence; (2) admitting irrelevant evidence; and (3) denying defendant's motion for a mistrial.

By his first assignment of error, defendant argues that the trial court erred in allowing Fogg to testify that he "thought [defendant] was an asset to help [him in] trafficking the cocaine." Defendant asserts that Fogg's characterization of defendant as an "asset" was tantamount to identifying defendant as a drug dealer, thereby constituting improper character evidence. Because this evidence was improper and prejudicial, defendant contends that he is entitled to a new trial. We agree.

Rule 404(a) of the North Carolina Rules of Evidence provides that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ." N.C. Gen. Stat. § 8C-1, Rule 404(a) (2001). Thus, evidence of the defendant's reputation in the community as a drug dealer is not admissible to show that the defendant is guilty of trafficking in drugs. *See State v. Taylor*, 117 N.C. App. 644, 651-52, 453 S.E.2d 225, 229 (1995); *State v. Morgan*, 111 N.C. App. 662, 668, 432 S.E.2d 877, 881 (1993). Character evidence is admissible, however, when first offered by the accused, in which case the prosecution may offer evidence to rebut such a showing by the defendant. *See* N.C. Gen. Stat. § 8C-1, Rule 404(a)(1). Until a defendant offers such evidence of his character, the State may not introduce evidence of his bad character. *See Taylor*, 117 N.C. App. at 651-52, 453 S.E.2d at 229-30.

We agree with defendant in the present case that Fogg's description of defendant as an "asset" in his drug trade effectively characterized defendant as a drug dealer. The word "asset" is defined as "[a] useful or valuable quality, person, or thing; an advantage or a resource." *The American Heritage College Dictionary* 82 (3d ed. 1997). Further, Fogg did not state that defendant *would be* an asset; rather, he stated that defendant *was* an asset, indicating that defendant had assisted Fogg in the past. In characterizing defendant as an "asset" to his cocaine trade, Fogg represented defendant to be a useful person in furthering his drug trafficking trade. As the State offered this testimony before defendant put forth any evidence, the trial court erred in admitting this statement. *See Taylor*, 117 N.C. App. at 652, 453 S.E.2d at 229-30; *Morgan*, 111 N.C. App. at 668, 432 S.E.2d at 881.

In order to gain a new trial, however, defendant must also show that he was prejudiced by the erroneous admission of this evidence.

A defendant is prejudiced "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . ." N.C. Gen. Stat. § 15A-1443(a) (2001). The State contends that defendant cannot meet such a burden here. The State points to other damaging testimony by Fogg in support of its argument that, even if the admission of Fogg's description of defendant as an "asset" was error, such error was harmless in light of the evidence against him. We disagree.

The State points to the following evidence in support of its contention that the error was harmless: Fogg stated that he met defendant at the detention center, where he supplied defendant with cocaine. Fogg explained that he posted bail for defendant, and that defendant had informed him that the cocaine seized by officers during the search of the Barrett residence belonged to him. Fogg also stated that defendant indicated that he was not worried about his arrest in connection with the 31 December 1999 seizure of cocaine, because "he was going to be able to walk because ain't nobody [sic] willing to testify against him . . . and that he's still got a military gun." Defendant allegedly informed Fogg that there was five thousand dollars in cash beneath the couch at Barrett's residence. The evidence also tended to show that Barrett was a known drug dealer. The State asserts that this evidence demonstrated that defendant was guilty of trafficking in cocaine, such that the erroneous admission of Fogg's statement was harmless. We are not so persuaded.

Although the evidence against defendant tends to show that defendant was a drug *user*, none of the evidence conclusively establishes that defendant *trafficked* in drugs, much less trafficked or conspired to traffic the drugs seized at Barrett's residence. The fact that Fogg supplied defendant with drugs in prison does not prove that defendant sold such drugs. When the officers searched Barrett's residence, they found no contraband of any type on defendant's person. The drugs seized at Barrett's residence were not in plain view, but located beneath some bed linens in a separate room from where the officers found defendant. *See State v. Autry*, 101 N.C. App. 245, 253-54, 399 S.E.2d 357, 363 (1991) (holding that, where the defendant was not the owner of the premises, nor present in the room where law enforcement officers discovered illicit drugs, the defendant did not constructively possess the drugs seized). There was no evidence to contradict defendant's statement that he had been at Barrett's residence for less than half of an hour before the officers arrived. Defendant's alleged boast to Fogg that he would "walk," as well as

the fact that he owned a weapon, are irrelevant to the issue of whether defendant was involved in trafficking the drugs seized at Barrett's residence. In reviewing the evidence, it is clear that the only evidence definitively linking defendant with drug trafficking in any manner is the inadmissible testimony by Fogg. Given the paucity of evidence against defendant in the instant case, we conclude that, had the trial court properly excluded the inadmissible testimony by Fogg, there is a reasonable possibility that the jury would have reached a different verdict. Defendant must be given a new trial. *See State v. Moctezuma*, 141 N.C. App. 90, 95, 539 S.E.2d 52, 56 (2000) (holding that, where there was insufficient evidence to connect the defendant with the drugs seized at defendant's residence, the admission of such evidence was erroneous and prejudicial, requiring a new trial).

Given our conclusion that defendant is entitled to a new trial, we need not address defendant's remaining assignments of error.

New trial.

Judges HUDSON and CAMPBELL concur.

EVELYN POWELL, MAMIE WHITEHEAD, McARTHUR KING, MOTHER'S CARE AND INFANTS CENTER AND MORNINGSTAR BAPTIST CHURCH, INC., PLAINTIFFS v. WALTER PHILLIP BULLUCK, VICKY LYNN BULLUCK, AND HANOR COMPANY, INC., DEFENDANTS

No. COA02-29

(Filed 31 December 2002)

1. Nuisance— farm—pleadings—mediation

The trial court erred by dismissing on the pleadings some of the parties in a hog farm nuisance action for not submitting to pre-trial mediation where the pre-litigation mediation request did not list all of the plaintiffs, but their pleadings alleged that they participated in the mediation and the mediator's report does not list any party as absent. Taking the pleadings with attachments in the light most favorable to plaintiffs, plaintiffs satisfied the requirements for requesting and participating in pre-litigation mediation. N.C.G.S. § 7A-38.3(c).

2. Appeal and Error— appealability—denial of motion to dismiss counterclaim—costs—refusal of sanctions

An appeal was dismissed in part as interlocutory because the denial of plaintiffs' motion to dismiss defendant's counterclaim did not affect a substantial right; no substantial right is involved that would allow an immediate appeal where, under uncomplicated circumstances, a court directs a party to pay fees or costs; and an order refusing to impose sanctions is not immediately appealable absent a showing that a substantial right is involved.

Appeal by plaintiffs from judgment entered 12 October 2001 by Judge Frank R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 9 October 2002.

Land Loss Prevention Project, by Marcus Jimison and Pamela Thombs, for plaintiffs-appellants.

Poyner & Spruill, LLP, by J. Nicholas Ellis; and Etheridge, Sykes, Britt & Hamlett, LLP, by Raymond M. Sykes, Jr., for defendants-appellees Walter Phillip Bulluck and Vicky Lynn Bulluck.

Hunton & Williams, by Jason S. Thomas, for defendant-appellee Hanor Company, Inc.

WALKER, Judge.

Prior to filing their original complaint, plaintiffs Evelyn Powell and Morningstar Baptist Church, Inc. (Morningstar) and Concerned Citizens of Edgecombe II (CCE II), a group of Morningstar residents joined to oppose the operation of industrial-sized hog farms in the Morningstar community, requested and participated in pre-litigation mediation concerning a hog farm nuisance dispute against defendants. The mediation did not resolve the dispute, and on 11 February 1999, the mediator certified an impasse. On 15 June 1999, plaintiffs Evelyn Powell, Morningstar and others, including CCE II, initiated a hog farm nuisance action against defendants.

On 14 June 2000, Superior Court Judge Russell Duke dismissed plaintiffs Powell and Morningstar without prejudice and dismissed CCE II with prejudice for failing to allege in its complaint that it had complied with pre-litigation mediation requirements. On 4 June 2001, plaintiffs including Powell and Morningstar filed the present farm nuisance action against defendants, who counterclaimed alleging mali-

cious and false statements and intentional interference with contractual relations. Subsequently, defendants moved for costs and to dismiss plaintiffs pursuant to N.C.R. Civ. P. 12(c) for failing to initiate pre-litigation mediation. Plaintiffs then filed a motion to dismiss defendants' counterclaim and sought N.C.R. Civ. P. 11 sanctions against defendants for filing their counterclaim.

All motions were heard, and on 10 October 2001, the trial court entered an order allowing defendants' motion to dismiss plaintiffs Whitehead, King and Mother's Care and Infants Center (Mother's Care) and defendants' motion for costs. The trial court denied plaintiffs' motions for sanctions and to dismiss defendants' counterclaim. Plaintiffs appealed, alleging the trial court erred in dismissing plaintiffs Whitehead, King and Mother's Care, awarding costs to defendants and in denying their motions for sanctions and to dismiss defendants' counterclaim.

[1] First, we consider the trial court's dismissal of plaintiffs Whitehead, King and Mother's Care. We note that this issue is interlocutory, but in our discretion, we elect to treat plaintiffs' appeal on this issue as a petition for *writ of certiorari* as it affects the proper parties to the lawsuit. *See* N.C. Gen. Stat. § 7A-32(c) (2001); N.C.R. App. P. 21(a)(1); *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 574, 541 S.E.2d 157, 161 (2000).

In ruling on a motion for judgment on the pleadings, the trial court "is to consider only the pleadings and any attached exhibits, which become part of the pleadings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984); see N.C. Gen. Stat. § 1A-1, Rule 12(c) (2001). In a Rule 12(c) motion, "[n]o evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings." Minor, 70 N.C. App. at 78, 318 S.E.2d at 867; *see Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 202, 528 S.E.2d 372, 378 (2000). In reviewing a Rule 12(c) motion, the trial court must accept all material allegations in the complaint as true and accurate and consider them in the light most favorable to the nonmoving party. *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002); *Garrett v. Winfree*, 120 N.C. App. 689, 691, 463 S.E.2d 411, 413 (1995).

Prior to initiating a farm nuisance action, a party is required to submit to pre-litigation mediation. N.C. Gen. Stat. § 7A-38.3(c) (2001). The purpose of this mandatory mediation is "to facilitate . . . settle-

ment . . . and to make civil litigation more economical, efficient, and satisfactory to litigants and the State." N.C. Gen. Stat. § 7A-38.1(a) (2001). If a party brings a farm nuisance action before "a farm resident or any other party" has initiated pre-litigation mediation, then that action "shall, upon the motion of any party prior to trial, be dismissed without prejudice by the court." N.C. Gen. Stat. § 7A-38.3(c). Farm nuisance pre-litigation mediation is conducted pursuant to N.C. Gen. Stat. § 7A-38.1 which provides that parties "shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge." N.C. Gen. Stat. § 7A-38.1(f) (2001).

Specifically, all individual parties and counsel for each party must "physically attend until an agreement is reduced to writing and signed . . . or an impasse has been declared." N.C.R. Super. Ct. Mediated Settlement Conf. Rule 4 (2002). However, the attendance requirement will be "excused or modified, including the allowance of that party's or person's participation without physical attendance . . . [b]y agreement of all parties and persons required to attend and the mediator. . . ." *Id.*

Here, plaintiffs alleged in their complaint:

> On April 29, 1997, Plaintiffs initiated pre-litigation mediation of a farm nuisance dispute. Plaintiffs have completed pre-litigation mediation as required by N.C. Gen. Stat. § 7A-38.3. See Attachment A to Complaint, Report of Mediator. Attorney Henry Gorham served as mediator for this farm nuisance pre-litigation mediation. The mediation impassed and Plaintiffs filed suit on August 27, 1999. The original complaint was dismissed without prejudice on June 14, 2000. By order of the Court, Plaintiffs were given one year from June 14, 2000 to re-file suit. Plaintiffs now re-file.

The pre-litigation mediation request was submitted by Powell, CCE II and Morningstar. The report of the mediator attached to plaintiffs' complaint indicated that pre-litigation mediation was conducted, and the report did not list any party as being absent.

Defendants moved for judgment on the pleadings and for costs asserting plaintiffs Whitehead, King and Mother's Care should have been dismissed because the pleadings with attachments showed that they did not request pre-litigation mediation. After a hearing, the trial court dismissed the complaints of Whitehead, King and Mother's Care

without prejudice and allowed defendants' motion for costs. Plaintiffs' motions to dismiss and for sanctions were denied.

Even though the pre-litigation mediation request does not list the names of all of the plaintiffs, the action is not subject to dismissal as to those plaintiffs. The statute does not require that all interested parties, who may later become plaintiffs, join in the request for mediation. The statute providing for pre-litigation mediation specifically states that "a farm resident or any other party" may initiate mediation. N.C. Gen. Stat. § 7A-38.3.

Here, the pleadings allege that plaintiffs participated in pre-litigation mediation, and the mediator's report does not list any party as being absent. Taking the pleadings with attachments in the light most favorable to the plaintiffs, we find that plaintiffs have satisfied the requirements for requesting and participating in pre-litigation mediation as required by our rules and statutes.

[2] Next, we consider defendants' argument to dismiss the appeal as interlocutory. Although the trial court allowed defendants' motion for costs and denied plaintiffs' motions for sanctions and to dismiss defendants' counterclaim, significant issues remain in this case. Also, the trial court did not certify this case as immediately appealable pursuant to N.C.R. Civ. P. 54(b). Judgments and orders that are not a final determination of the entire controversy as to all parties are interlocutory. *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). As a general rule, there is no right of immediate appeal from interlocutory orders. *McCall v. McCall*, 138 N.C. App. 706, 707, 531 S.E.2d 894, 895 (2000); *See Veazy v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). However, plaintiffs claim the trial court's orders are appealable because they affect a substantial right.

An order, though interlocutory, is immediately appealable if it affects a substantial right that would be lost, prejudiced or less than adequately protected if an immediate appeal were not allowed. N.C. Gen. Stat. § 1-277(a) (2001). The burden is on the appellant to show "(1) the judgment affects a right that is substantial; and (2) the deprivation of that substantial right will potentially work injury to him if not corrected before appeal from final judgment." *Collins v. Talley*, 135 N.C. App. 758, 760, 522 S.E.2d 794, 796 (1999).

The denial of a motion to dismiss is not immediately appealable, without showing a substantial right is affected. *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 120-21, 535 S.E.2d 397, 401, (2000).

Contrary to plaintiffs' contentions, a denial of their motion to dismiss defendants' counterclaim does not affect a substantial right entitling them to an immediate appeal. *Id.*

Finally, "under uncomplicated circumstances," where a court directs a party to pay fees or costs, no substantial right is involved that would allow an immediate appeal, *Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 194, 540 S.E.2d 324, 328 (2000); *see Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989), and absent a showing that a substantial right is involved, an order refusing to impose sanctions is not immediately appealable, *Ford Motor Credit Co. v. Dean*, 148 N.C. App. 405, 560 S.E.2d 886 (2002); *Routh v. Weaver*, 67 N.C. App. 426, 428, 313 S.E.2d 793, 795 (1984).

Reversed in part and dismissed in part.

Judges TIMMONS-GOODSON and THOMAS concur.

BLAIR GAYNOR, PLAINTIFF v. GORDON AND MARY MELVIN, INDIVIDUALLY; AND DOING BUSINESS AS MILL DIRECT SALES; AND MILL DIRECT SALES, INC., A NEW YORK CORPORATION, DEFENDANTS

No. COA02-378

(Filed 31 December 2002)

1. Reference and Referees— right to jury trial—preservation—objection at time of reference required

Plaintiff waived his right to a jury trial where he did not object to the appointment of a referee; a party must object to an order of reference at the time it is made in order to preserve the right to a jury trial. N.C.G.S. § 1A-1, Rule 53(b)(2).

2. Reference and Referees— right to jury trial—preservation—statutory procedure—conflicting trial court order

Plaintiff did not preserve his right to a jury trial after a compulsory reference where he followed a trial court order that was in conflict with N.C.G.S. § 1A-1, Rule 53. Trial court orders in conflict with statutes are void.

3. Reference and Referees— exception to report—trial court review

A trial court order modifying a referee's supplemental report was remanded where the court did not consider the evidence presented to the referee but simply relied on the arguments asserted by the parties. If a party files exceptions to a referee's report, it is the duty of the trial court to consider the evidence and give its own opinion and conclusion, both as to the facts and the law.

Appeal by plaintiff from order filed 25 October 2001 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 November 2002.

Paul L. Whitfield & Associates, PA, by Paul L. Whitfield, for plaintiff appellant.

Haynesworth Baldwin Johnson & Greaves LLC, by Stephen D. Dellinger, for defendant appellees.

GREENE, Judge.

Blair Gaynor (Plaintiff) appeals from an order filed 25 October 2001 granting judgment for Gordon and Mary Melvin, individually, and doing business as Mill Direct Sales and Mill Direct Sales, Inc. (collectively, Defendants).

Plaintiff filed a complaint claiming breach of contract, fraud, and defamation and also demanding a jury trial. The complaint alleged the parties entered into an oral agreement (the agreement) on or about April 1997, whereby Plaintiff would open and manage an office in Charlotte, North Carolina (the office) to sell lumber on behalf of Defendants. Under the agreement, Plaintiff was to receive a salary and a commission based on the sales and profits of the office. When Plaintiff resigned in September 1999, Plaintiff claimed, he was still owed salary, sales commissions, and a commission for the office's net profits. Plaintiff also alleged Defendants fraudulently induced him to maximize profits and doctored records to reduce Plaintiff's commissions.

On 1 December 1999, Plaintiff filed a motion for the appointment of a referee on the breach of contract and fraud claims, and Defendants later filed their objection to the appointment of a referee. By order dated 26 January 2000, Judge Jesse Caldwell (Judge Caldwell) granted Plaintiff's motion and appointed a referee to deter-

mine if: (1) any salary, sales commission, or commission on the net profits was owed to Plaintiff and (2) net profits had been calculated correctly, including any changes in net profits caused by reselling inferior quality lumber rejected by other customers. Judge Caldwell included in his order the following:

> [T]his compulsory reference does not deprive any of the parties of their rights to a trial by jury, which may be preserved by objecting to the order of compulsory reference at the time it is made or by filing specific exceptions to particular findings of fact made by the referee within thirty (30) days after the referee files his report . . . .

Plaintiff did not object to the order of reference. Defendants subsequently filed answers to Plaintiff's complaint and made various counterclaims against Plaintiff.

The referee filed a report dated 22 December 2000 (the original report) finding Plaintiff was owed some form of commissions in the amount of $126,819.33.[1] The referee also apparently determined the amount of loss from the resale of rejected lumber. Both parties entered a timely exception to the referee's determination on commissions. Judge Marcus L. Johnson (Judge Johnson), after considering the exceptions and arguments asserted by both parties, remanded the case to the referee for reconsideration of the calculation of the commissions and the loss attributed to the costs of the resale of rejected lumber.

The referee filed a supplemental report dated 5 September 2001 (the supplemental report) increasing the sales commissions owed to Plaintiff to $126,926.14. The supplemental report reserved for the jury the issue of the amount of loss from the resale of some rejected lumber. Plaintiff and Defendants filed exceptions to this supplemental report. Plaintiff did not, however, except to the determination by the referee that the rejected timber issue be resolved by a jury. Defendant did except to this determination. After a 25 October 2001 hearing, Judge Marvin K. Gray (Judge Gray) entered judgment for Plaintiff on the amount of commissions owed as calculated in the supplemental report but rejected the supplemental report on the issue of the rejected lumber and adopted the original report on this issue. In mak-

1. The referee's specific findings on the other issues, including salary owed and net profits, are not included in the record on appeal, and we are thus unable to address those findings. *See State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254-55 (1985) (appellate review limited to contents of the record).

ing his ruling, Judge Gray indicated "it appeared to [him] from the argument . . . [he] could simply . . . take [the Defendants'] proposed order . . . and incorporate the referee's report by reference." Judge Gray then entered judgment for Defendants on Plaintiff's remaining breach of contract and fraud claims, denied Defendants' summary judgment motion on Plaintiff's defamation claim, and did not rule on Defendants' counterclaims.

The issues are whether: (I) Plaintiff preserved his right to a jury trial on the breach of contract and fraud claims; and (II) Judge Gray erred in modifying the supplemental report without considering the evidence.[2]

I

[1] Plaintiff argues Judge Gray erred in granting judgment to Defendants on the breach of contract and fraud claims because these claims should have been submitted to a jury. We disagree.

In order to preserve the right to a jury trial where a compulsory reference has been ordered, a party must, among other things, object to the order of reference at the time it is made. *See Porter Bros., Inc. v. Jones*, 11 N.C. App. 215, 224, 181 S.E.2d 177, 182-83 (1971) (Rule 53(b)(2) sets out steps to be followed to preserve right to jury trial); N.C.G.S. § 1A-1, Rule 53(b)(2) (2001). Failure to so object results in the waiver of a party's right to a jury trial. *Id.*; *see also Bartlett v. Hopkins*, 235 N.C. 165, 167-68, 69 S.E.2d 236, 237-38 (1952) (under prior law, right to jury trial waived by a compulsory reference where party does not take the proper steps to save it).

In this compulsory reference case, Plaintiff did not enter an objection to the appointment of a referee for the purpose of preserving his right to a jury trial. Plaintiff therefore waived his right to a jury trial on the breach of contract and fraud claims and cannot now claim error on this basis.

[2] We also reject Plaintiff's alternative argument that he is entitled to a jury trial on these claims because Judge Caldwell's order of reference stated a jury trial could be preserved if Plaintiff either objected to the compulsory reference or filed exceptions to the referee's report. It follows, Plaintiff contends, that because he

2. Plaintiff also contends the referee erred by not making specific findings of fact and conclusions of law. Plaintiff, however, waived appellate review of this issue by not excepting to the referee's report on this ground or objecting at the hearing. *See* N.C.R. App. P. 10(b)(1).

filed timely exceptions to the referee's reports, he has complied with the order of the trial court and is thus entitled to a jury trial. We disagree.

A trial court may not enter orders in conflict with the statutes and to the extent they are in conflict, those orders are void. *See Prentiss v. Allstate Ins. Co.*, 144 N.C. App. 404, 407, 548 S.E.2d 557, 559 (2001) (courts do not have power to interpolate or superimpose provisions and limitations into a clear and unambiguous statute), *appeal dismissed*, 354 N.C. 220, 554 S.E.2d 343 (2001); *cf. Hunt v. Reinsurance Facility*, 302 N.C. 274, 290, 275 S.E.2d 399, 407 (1981) (under the maxim *expressio unius est exclusio alterius*, statute supplying one procedure for accomplishing an objective necessarily excludes any other procedure). In this case, the order of Judge Caldwell relating to how a party would preserve a jury trial is in direct conflict with Rule 53 and thus of no consequence.

II

[3] Plaintiff next contends Judge Gray erred in modifying the supplemental report by adopting the original report's calculation of the net loss from the costs of reselling the rejected lumber.

If a party files exceptions to a referee's report it is the duty of the trial court to consider the evidence and give its own opinion and conclusion, both as to the facts and the law. *Quate v. Caudle*, 95 N.C. App. 80, 83, 381 S.E.2d 842, 844 (1989). The trial court is not permitted to conduct a perfunctory review, but "must deliberate and decide as in other cases—us[ing its] own faculties in ascertaining the truth and form[ing its] own judgment as to fact and law." *Id.* After conducting this review, the trial court may adopt, modify, or reject the referee's report in whole or in part, remand the proceedings to the referee, or enter judgment. *Id.*; N.C.G.S. § 1A-1, Rule 53(g)(2) (2001).

In this case, Defendants excepted to the determination of the referee that the issue relating to rejected timber be decided by a jury.[3] Once this exception was entered, Judge Gray was required to consider the evidence on this issue and enter his own opinion on the merits.[4] The record reveals Judge Gray did not consider the evidence

3. Because Plaintiff did not preserve his right to a jury trial, see Part I of this opinion, he is not entitled to demand a jury resolve any issue, even if recommended by the referee.

4. We reject Defendants' argument that because Plaintiff did not enter an exception to the supplemental report on the rejected timber issue, he cannot complain if the trial court fails to conduct the necessary review mandated by Defendants' exception.

presented to the referee on this issue and instead simply relied on the arguments asserted by the parties. This was not sufficient and constitutes error. *See Quate*, 95 N.C. App. at 83, 381 S.E.2d at 844 (the only way a trial court can review a referee's findings is through the trial court's own review of the evidence).

Thus, the trial court's adoption of the original report on the issue of net loss from the resale of the rejected lumber was improper. Accordingly, this case must be remanded to the trial court for (1) the trial court's determination of any profit or loss attributable to the resale of the rejected lumber and (2) a jury trial on Plaintiff's defamation claim, and Defendants' counterclaims, including whether any loss from the resale of the rejected lumber was caused by Plaintiff's fraudulent conduct.

Affirmed in part, reversed in part, and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

Once the exception was entered, the trial court had an affirmative obligation to conduct an appropriate review and the failure to do so is an issue Plaintiff is entitled to raise on appeal. *See Thompson v. Smith*, 156 N.C. 345, 345-47, 72 S.E. 379, 379 (1911).

AMERICAN WOODLAND INDUSTRIES, INC., GATOR WOOD, INC., AND GLOBAL TIMBER, INC., INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED TAXPAYERS, PLAINTIFFS v. NORRIS TOLSON, SECRETARY OF REVENUE, THE STATE OF NORTH CAROLINA, ALAMANCE COUNTY, ALEXANDER COUNTY, ALLEGHANY COUNTY, ANSON COUNTY, ASHE COUNTY, AVERY COUNTY, BEAUFORT COUNTY, BERTIE COUNTY, BLADEN COUNTY, BRUNSWICK COUNTY, BUNCOMBE COUNTY, BURKE COUNTY, CABARRUS COUNTY, CALDWELL COUNTY, CAMDEN COUNTY, CARTERET COUNTY, CASWELL COUNTY, CATAWBA COUNTY, CHATHAM COUNTY, CHEROKEE COUNTY, CHOWAN COUNTY, CLAY COUNTY, CLEVELAND COUNTY, COLUMBUS COUNTY, CRAVEN COUNTY, CUMBERLAND COUNTY, CURRITUCK COUNTY, DARE COUNTY, DAVIDSON COUNTY, DAVIE COUNTY, DUPLIN COUNTY, DURHAM COUNTY, EDGECOMBE COUNTY, FORSYTH COUNTY, FRANKLIN COUNTY, GASTON COUNTY, GATES COUNTY, GRAHAM COUNTY, GRANVILLE COUNTY, GREENE COUNTY, GUILFORD COUNTY, HALIFAX COUNTY, HARNETT COUNTY, HAYWOOD COUNTY, HENDERSON COUNTY, HERTFORD COUNTY, HOKE COUNTY, HYDE COUNTY, IREDELL COUNTY, JACKSON COUNTY, JOHNSTON COUNTY, JONES COUNTY, LEE COUNTY, LENOIR COUNTY, LINCOLN COUNTY, MACON COUNTY, MADISON COUNTY, MARTIN COUNTY, McDOWELL COUNTY, MECKLENBURG COUNTY, MITCHELL COUNTY, MONTGOMERY COUNTY, MOORE COUNTY, NASH COUNTY, NEW HANOVER, NORTHAMPTON COUNTY, ONSLOW COUNTY, ORANGE COUNTY, PAMLICO COUNTY, PASQUOTANK COUNTY, PENDER COUNTY, PERQUIMANS COUNTY, PERSON COUNTY, PITT COUNTY, POLK COUNTY, RANDOLPH COUNTY, RICHMOND COUNTY, ROBESON COUNTY, ROCKINGHAM COUNTY, ROWAN COUNTY, RUTHERFORD COUNTY, SAMPSON COUNTY, SCOTLAND COUNTY, STANLY COUNTY, STOKES COUNTY, SURRY COUNTY, SWAIN COUNTY, TRANSYLVANIA COUNTY, TYRRELL COUNTY, UNION COUNTY, VANCE COUNTY, WAKE COUNTY, WARREN COUNTY, WASHINGTON COUNTY, WATAUGA COUNTY, WAYNE COUNTY, WILKES COUNTY, WILSON COUNTY, YADKIN COUNTY, YANCEY COUNTY, DEFENDANTS

No. COA01-1533

(Filed 31 December 2002)

Taxation— excise taxes—timber sales—refund—standing to sue

Plaintiffs lacked standing to seek refunds of excise taxes on timber deeds paid pursuant to former N.C.G.S. § 105-228.30 (following an N.C. Supreme Court decision that timber is personalty) because plaintiffs were the transferees of the deeds and paid the transferors' tax by voluntary agreement.

Appeal by plaintiffs from order entered 9 August 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 11 September 2002.

Barringer, Barringer, Stephenson & Schiller, L.L.P, by David G. Schiller and Marvin Schiller; and Thomas Edward Hodges, for plaintiff-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell and Assistant Attorney General Kay Linn Miller Hobart; J. Todd Bailey; Grainger R. Barrett; S.C. Kitchen; and Lesley F. Moxley; for defendant-appellees.

THOMAS, Judge.

Plaintiffs, American Woodland Industries, Inc., Gator Wood, Inc., and Global Timber, Inc., individually and on behalf of all similarly situated taxpayers, appeal the trial court's order dismissing their complaint.

The dismissal is based on Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court concluded that the named plaintiffs have no standing to prosecute the action and the complaint fails to state a claim upon which relief can be granted. For the reasons herein, we affirm.

Although there has been no class certification, plaintiffs purport to bring this action on behalf of themselves and all others who paid a state timber excise tax in accordance with N.C. Gen. Stat. § 105-228.30 during the years 1997, 1998, 1999, and 2000. Defendants include North Carolina's Secretary of Revenue, the State of North Carolina, and all of North Carolina's counties except New Hanover County. Plaintiffs voluntarily dismissed their claims against New Hanover County with prejudice.

In their complaint, plaintiffs contend they realized the imposition of the excise tax on their timber contracts was improper after the Supreme Court's holding in *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999). In that case, it was determined that timber, when the subject of a contract for sale, is personalty rather than realty. *See* N.C. Gen. Stat. § 105-228.30 (1999) (levying an excise tax on any instrument conveying any *interest in real property*). Section 105-228.30 has been amended so that effective 1 July 2000 the statute specifically applies to contracts for the sale of timber. 2000 N.C. Sess. Laws 2000-16, § 1.

Accordingly, plaintiffs filed suit requesting: (1) a judgment declaring section 105-228.30 null and void "insofar as it was construed to impose a tax on any conveyance of growing timber or contracts to

convey the sale of growing timber;" and (2) the establishment of a common fund for the purpose of refunding the illegally and improperly collected taxes paid by them and others during the years at issue in accordance with section 105-228.30 as it existed prior to 1 July 2000.

Plaintiffs allege that on 8 November 1999, Gary and Patsy Tillotson executed a timber deed in Vance County, North Carolina, conveying timber to plaintiff Gator Wood for $282,000. On 1 February 2000, Charles and Nancy Hardy executed a timber deed in Beaufort County, North Carolina, conveying timber to plaintiff Global Timber for $100,000. On 16 February 2000, Norwood and France Whitehurst executed a timber deed in Pitt County, North Carolina, conveying timber located in Beaufort County, North Carolina, to plaintiff American Woodland for $200,000.

Although section 105-228.30, both before and after its amendment, puts the duty on the transferor to pay the tax, plaintiffs state in their complaint that for each transaction they purchased the required amount of excise stamps "[p]ursuant to an agreement entered into prior to the execution of the deed." Plaintiffs then presented the deeds with the stamps affixed to the registers of deeds in the counties where the transactions took place.

Plaintiffs filed a complaint in Wake County Superior Court seeking a refund of "the illegally and improperly collected taxes . . . on behalf of themselves and all other taxpayers who paid the excise tax . . . to Defendants for the tax years 1997, 1998, 1999, and 2000."

In response, defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendants' motion was granted and plaintiffs now appeal.

By their first assignment of error, plaintiffs contend the trial court erred in granting defendants' motion to dismiss under Rule 12(b)(6). Specifically, plaintiffs argue the trial court erred in concluding they are not "taxpayers" within the purview of section 105-228.30, and therefore lack standing to institute the action.

Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter. *See Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636

(1972)). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). Accordingly, defendants' standing argument to the trial court implicated Rule 12(b)(1), and not, as plaintiffs contend, Rule 12(b)(6). *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) We review *de novo* the trial court's decision to dismiss a case for lack of standing. *Id.* Additionally, plaintiffs have the burden of proving that standing exists. *Neuse*, 155 N.C. App. at 113, 574 S.E.2d at 51 (reviewing whether plaintiffs sufficiently alleged injury in fact and proper forms of relief for damage caused by defendants' pollution).

Prior to its amendment, section 105-228.30 provided:

> (a) An excise tax is levied on each instrument by which any *interest in real property* is conveyed to another person. The tax rate is one dollar ($1.00) on each five hundred dollars ($500.00) or fractional part thereof of the consideration or value of the interest conveyed. *The transferor must pay the tax* to the register of deeds of the county in which the real estate is located before recording the instrument of conveyance. If the instrument transfers a parcel of real estate lying in two or more counties, however, the tax must be paid to the register of deeds of the county in which the greater part of the real estate with respect to value lies.

N.C. Gen. Stat. § 105-228.30 (1999) (emphasis added).

Plaintiffs here acknowledge they were not required by section 105-228.30 to pay the tax because they were transferees, not transferors. Additionally, they note they are not "taxpayers" for purposes of the remedies provisions of Chapter 105 of the General Statutes. *See* N.C. Gen. Stat. §§ 105-228.37, 105-266.1, and 105.267 (2001). Plaintiffs claim, however, to be taxpayers within the ordinary meaning of the word. The purported timber tax was not a valid tax as a matter of fact and law, they argue, and their payment of it constitutes "injury in fact." Plaintiffs contend the injury can be redressed by a favorable decision in this action, thus conferring standing. For these reasons, plaintiffs did not exhaust available administrative remedies.

In their complaint, plaintiffs assert: "Pursuant to an agreement entered into prior to the execution of the deed, [plaintiffs] agreed that [they] would purchase excise stamps[.]" Plaintiffs then presented the timber deeds to the registers of deeds with the excise tax stamps

affixed in accordance with section 105-228.30. Accordingly, plaintiffs concede that they paid the tax *by voluntary agreement.* As a result, plaintiffs have not suffered any "injury in fact" by operation of section 105-228.30. *See Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 180-81 (1993) (examining injury in fact as a necessary prerequisite to standing). In *Dunn*, the Court held that deprivation of property resulting from enforcement of a statute gives a party standing to challenge the constitutionality of the statute. *Id.* at 119, 431 S.E.2d at 180. Any injury suffered by plaintiffs here, however, was the result of their own voluntary agreements with the transferors, not by operation of a statute. Moreover, to have standing, plaintiffs must belong to the class which is prejudiced by the statute. *Id.* at 119, 431 S.E.2d at 181. As set forth above, plaintiffs do not contend they are "taxpayers" under section 105-228.30. Accordingly, this assignment of error has no merit.

Based on our holding that plaintiffs lack standing, it is not necessary to reach plaintiffs' second assignment of error regarding Rule 12(b)(6). It is likewise unnecessary to address defendants' cross-assignments of error concerning the trial court's failure to include sovereign immunity or the six-month statute of repose in section 105-228.37 as additional bases for dismissal.

We affirm the trial court's order dismissing plaintiffs' complaint.

AFFIRMED.

Judges WALKER and McGEE concur.

MALCOLM M. MALLOY, III AND PIONEER WELDING SUPPLY, PETITIONERS v. THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF ASHEVILLE RESPONDENT

No. COA02-318

(Filed 31 December 2002)

1. Zoning— new structure—above-ground storage tank

There was sufficient evidence that a welding supply company's new above-ground liquid oxygen storage tank was a new structure as defined by the City's Unified Development Ordinance, and the trial court did not err in reaching that conclusion, where petitioners poured a concrete slab, placed the tank

on the slab with cranes, and then affixed it there with three one-inch bolts.

2. Zoning— nonconforming use—expansion—larger above-ground storage tank

The trial court did not err by concluding that a welding supply company's new liquid oxygen storage tank constituted an expansion of a nonconforming use where the new tank was larger, had a higher capacity, and enabled additional or faster service, even though petitioners contended that their customer base had not increased as a result of the new tank.

Appeal by petitioners from judgment entered 4 January 2002 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 30 October 2002.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus and Albert L. Sneed, Jr., for petitioner-appellants.

City Attorney's Office, by Assistant City Attorney Martha Walker-McGlohon, for respondent-appellee.

HUDSON, Judge.

Petitioners appeal from an order entered by Superior Court Judge Ronald K. Payne affirming the decision of the Zoning Board of Adjustment of the City of Asheville.

Petitioner Malloy owns real property located at 100 Park Avenue ("the Property") within the zoning jurisdiction of the City of Asheville ("the City"). Petitioner Pioneer Welding Supply leases the Property for the operation of a welding and gas supply business. For more than thirty years, the Property has been used for commercial-industrial purposes. In 1997, the City re-zoned the property to RM-8, Residential Multi-Family Medium Density District, and thereafter, Pioneer was allowed to continue to operate their business on the Property as a grandfathered nonconforming use.

In addition to an office building and a storage warehouse, petitioners kept a 3,000 gallon above ground storage tank ("the old tank") on the Property to use for storing liquid oxygen. This tank was on the Property when the City adopted its Unified Development Ordinance ("UDO") in 1997, and thus allowed it to remain on the Property. In October, 1999, petitioners replaced the old tank with a 9,000 gallon tank ("the new tank"). To facilitate the installation of the new tank,

petitioners had poured a three foot thick concrete slab, thirteen feet by ten feet, approximately ten feet from the location of the old tank. The new tank was anchored to the concrete slab and stabilized with three bolts.

After neighbors of the Property complained, on 2 November 1999 the City sent petitioners a Violation Notice, which informed them that the new tank constituted the prohibited expansion of a nonconforming use. Scott Shuford, the City's Planning and Development Director, followed up the Violation Notice with a letter ruling that the new tank violated the City's UDO. On 2 December 1999, petitioners filed an appeal with Respondent Zoning Board of Adjustment ("BOA"). On 27 March 2000, the BOA conducted a hearing on petitioners' appeal. By a 3 to 2 vote, the BOA upheld the City's ruling. Petitioners then sought review in the superior court by writ of certiorari. Following a hearing, Judge Payne affirmed the BOA's decision. Petitioners appealed to this court.

[1] In their first argument, petitioners contend that the superior court erred as a matter of law by concluding that the new tank is a "structure" as defined by the City's UDO. "Where the Petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined." *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999). In addition, petitioners argue that the whole record does not contain substantial, competent and material evidence in the record to support the BOA's finding that the new tank is a structure. Although this is petitioners' last argument, we address it with the first issue since they are so closely related. On review of the sufficiency of the evidence, this Court applies the "whole record" test. *Id.* at 468, 513 S.E.2d at 73. Under the "whole record" test, we must determine "whether the Board's findings are supported by substantial evidence contained in the whole record." *Id.* Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* Applying both the whole record test and *de novo* review, we find no error in the board's decision or the superior court's order affirming that decision.

Section 7-2-5 of the City's UDO defines "structure" as "that which is built or constructed." City of Asheville, N.C. Unified Development Ordinance sec. 7-2-5 (2002). Where the language of an ordinance is plain and unambiguous, "it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the

guise of construction." *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1976). In addition, "[w]ords in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning." *Kilpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000). Petitioner argues that the terms "built" and "constructed" are given an alternative meaning in section 7-2-5 of the UDO, which defines the terms "building" and "construction." As these terms are not the precise terms used to define structure, we decline to accept petitioners' contention. The plain meaning of "built," is "[formed] by combining materials or parts; to erect; construct." *The American Heritage Dictionary of the English Language* 174 (1978) Likewise, the plain meaning of "constructed" means "[formed] by assembling parts; build; erect." *Id.* at 288.

Here, before placing the new tank, petitioners first had a concrete slab poured, per specifications determined by a licensed engineer as suitable to accommodate the new tank. The concrete slab was poured to a depth of three feet, covering an area 10 feet by 13 feet, approximately 10 feet from the location of the old tank. The new tank was then brought to the Property, placed on the concrete slab with two cranes, and affixed there with three one-inch diameter bolts. This evidence leads us to conclude that the new tank was "form[ed] by combining materials or parts" and was "erected" on the Property and thus constituted a "structure" under the City's UDO.

[2] Petitioners next argue that the superior court erred as a matter of law in concluding that the placement of the new tank on the Property constituted an enlargement or expansion of a nonconforming use. We disagree.

In its "Decision Affirming Interpretation," the BOA concluded as a matter of law that the "relocation" and "replacement of the liquid oxygen tank constituted an expansion of the non-conforming use of a structure as defined under Section 7-17-6(b)(2) of the UDO." Section 7-17-6 of the City's UDO governs nonconforming uses of structures. Specifically, section 7-17-6(b)(2) provides that:

> A nonconforming use of a structure may be enlarged or extended only into portions of the structure which existed at the time that the use became nonconforming. No structural alterations are allowed to any structure containing a nonconforming use except (1) *where such alteration does not enlarge the structure*, or (2) where such alteration is required by law or an order from the

> building safety director, fire chief or the planning and development director to ensure the safety of the structure.

City of Asheville, N.C. Unified Development Ordinance sec. 7-17-6(b)(2) (2002) (emphasis added).

In *Kilpatrick v. Village Council*, this Court addressed the question of whether the creation of additional campsites on a nonconforming parcel of land was a violation of a Village of Pinehurst ordinance that prohibited the expansion or enlargement of a nonconforming use. In analyzing the ordinance, we noted that "[t]he plain meaning of 'enlarge' is 'to become bigger'; 'to widen in scope.' A nonconforming use is, therefore, 'enlarged' when the scope of the use is increased." *Kilpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000) (citations omitted).

Here, it is not disputed that the new tank is physically larger than the old tank. The old tank was approximately 96 to 100 inches in diameter, approximately 16 to 17 feet tall, with a 3,000 gallon capacity, but the new tank was 110 inches in diameter, approximately 25-26 feet tall, with a 9,000 gallon capacity. Though petitioners contend that its customer base has not increased as a result of the placement of the new tank, the increased storage capacity provides more volume and will enable them to provide additional or faster service. Indeed, petitioners admit that returning to the 3,000 gallon tank will slow down business. From this evidence, we conclude that petitioners' placement of the new tank physically enlarges the structure and also increases the scope of the nonconforming use.

For the foregoing reasons, the order of the superior court is affirmed.

Affirmed.

Judges McGEE and THOMAS concur.

UNITED CAROLINA BANK, PLAINTIFF v. KEVIN T. BROGAN AND OAKWOOD HOMES CORPORATION, DEFENDANTS

KEVIN T. BROGAN, PLAINTIFF v. DONALD DRAGGOO INTERIORS, INC. D/B/A STATE STREET INTERIORS; MELIA CARDWELL DESIGNS, INC. D/B/A STATE STREET INTERIORS; MARION WESLEY INTERIORS, LTD. D/B/A STATE STREET INTERIORS; AND STATE STREET INTERIORS, A PARTNERSHIP, DEFENDANT

No. COA01-1540

(Filed 31 December 2002)

1. Trusts— embezzlement—constructive trust on recovered funds

The trial court properly placed a constructive trust in favor of an embezzlement victim on embezzled funds recovered by the embezzler in a breach of contract action against an interior design partnership with whom he had deposited a portion of the embezzled funds, rather than permitting the funds to be used to pay the embezzler's attorney fees in a prior action in which the victim obtained a judgment against the embezzler for the embezzled funds, where the embezzler's attorneys represented to the court that any judgment obtained in the action against the interior design partnership would be applied to the judgment in the victim's embezzlement case, and the trial court denied the victim's motion to intervene in the action against the interior design partnership based upon the representation.

2. Attorneys— fees—attorney's lien

The issue of whether a law firm perfected an attorney's lien was not reached where a constructive trust was impressed on the funds which had priority over any attorney's lien which may have been created.

Appeal by plaintiff, Kevin T. Brogan, from order entered 24 July 2001 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 12 September 2002.

Hicks, McDonald & Noecher, L.L.P., by David W. McDonald, for plaintiff-appellant, Kevin T. Brogan.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Derek J. Allen, for defendant-appellee, Oakwood Homes Corporation.

Moss, Mason & Hill, L.L.P., by William L. Hill, for defendant-appellees, Donald Draggoo Interiors, Inc., et. al.

CAMPBELL, Judge.

Kevin T. Brogan ("Brogan") was an employee of Oakwood Homes Corporation ("Oakwood"). From November 1996 through May 1997, Brogan forged the signature of his supervisor on purchase orders and submitted those purchase orders to Oakwood's accounts payable department causing Oakwood to issue checks payable to vendors that had not actually supplied services to Oakwood. Brogan further forged the endorsements of the fictitious payees, endorsed the checks on his own behalf, and deposited the checks in a United Carolina Bank ("UCB") checking account in his own name. The embezzled funds totaled $554,020.67. Brogan used some of these funds to place deposits with Donald Draggoo Interiors, Inc. d/b/a State Street Interiors, and related entities (collectively referred to as "State Street Interiors").

Brogan hired Hicks, McDonald, Allen, & Noecher, L.L.P., predecessor to Hicks, McDonald, & Noecher, L.L.P. ("Hicks McDonald"), to represent him in two civil matters. First, Hicks McDonald was hired to defend Brogan in a civil action initiated by UCB ("the embezzlement litigation"). Second, Hicks McDonald was hired to pursue a breach of contract claim for Brogan against State Street Interiors to recover some of the embezzled funds ("State Street Interiors litigation"). Since UCB had frozen his bank accounts and his property, Brogan did not have funds available to pay for legal services. In a written agreement, Brogan agreed to pay his attorneys for their representation in both cases from any recovery he might receive from the State Street Interiors litigation.

On 11 July 1997, the embezzlement litigation began. UCB sought a declaratory judgment that it was not indebted to Brogan or Oakwood as a result of any actions that UCB took with respect to Brogan's deposit of the embezzled funds. UCB also asked the court to find Brogan liable to Oakwood for the total amount of the embezzled funds. In response, Oakwood filed an answer, counterclaim, and cross-claim asking the trial court to find UCB and Brogan liable to Oakwood in the amount of $554,020.67. UCB voluntarily dismissed its claims against Brogan, but a default judgment was entered against Brogan in favor of Oakwood in the amount of $554,020.67. The default judgment was subsequently modified by consent of the parties, but the principal amount of the judgment remained the same.

On 2 February 2000, Hicks McDonald filed a complaint on behalf of Brogan, commencing the State Street Interiors litigation. On 12 December 2000, Oakwood moved to intervene, but its motion was denied because the court found as a fact that Oakwood's interest was adequately represented by Hicks McDonald, and that "[t]he purpose of [the State Street Interiors litigation] is to claim and collect money judgment in favor of Brogan against defendants, for application toward the judgment in [the embezzlement case] in favor of Oakwood." The dispute was settled, and a judgment against State Street Interiors was entered in the amount of $26,934.98. A consent order disbursed money in the following way: Hicks McDonald received fees and costs for its representation in this case totaling $9,992.18; Oakwood received $7,572.80. The remaining $9,370.00 of the State Street Interiors settlement is in question. The trial court ordered that this money be turned over to Oakwood in partial satisfaction of Oakwood's judgment against Brogan.

Hicks McDonald asserts that it is entitled to the money because it has a valid attorney's lien against the proceeds recovered as a result of the attorneys' efforts and that this lien is superior to the claims of Oakwood, a judgment creditor. In contrast, Oakwood argues that the funds are Oakwood's rightful property, alternatively, a constructive trust should be imposed by the court to return these funds to Oakwood.

[1] First, we address Oakwood's argument of a constructive trust. Hicks McDonald asserts that this Court may not impose a constructive trust because Oakwood did not ask the trial court for a constructive trust. "It is true that a claimant may expressly sue to establish a constructive trust, based on a legal theory justifying its creation. It is not necessary, however, for a claimant to expressly seek the creation of a constructive trust for a court to do equity." *Weatherford v. Keenan*, 128 N.C. App. 178, 179, 493 S.E.2d. 812, 813 (1997). Therefore, we address whether a constructive trust is proper in the case at bar.

"[A] constructive trust 'arises when one obtains the legal title to property in violation of a duty he owes to another. Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship.' " *Patterson v. Strickland*, 133 N.C. App. 510, 521, 515 S.E.2d 915, 921 (1999) (quoting *Fulp v. Fulp*, 264 N.C. 20, 22, 140 S.E.2d 708, 711 (1965)).

> [A] constructive trust is ' . . . imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.'

Graham v. Martin, 149 N.C. App. 831, 835, 561 S.E.2d 583, 586 (2002) (quoting *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988)).

The circumstances of this case warrant recovery for Oakwood through a constructive trust. Brogan embezzled money from Oakwood and used part of the funds to make a deposit with State Street Interiors. Hicks McDonald represented to the trial court that they would present to the trier of fact "that the money deposited with State Street Interiors was money of Oakwood Homes Corporation" and that any judgment obtained by Brogan would be transferred to Oakwood for application toward the judgment against Brogan in the embezzlement suit. Relying on this representation, the trial court denied Oakwood's motion to intervene in the State Street Interiors litigation. After deducting attorneys fees and costs, rather than applying the remaining judgment in favor of Oakwood, Hicks McDonald seeks payment for their defense of Brogan in the embezzlement lawsuit. In other words, Hicks McDonald is asking Oakwood to pay for their defense of Brogan's embezzlement with the embezzled money. Here, since Brogan obtained the money through fraud, it would be inequitable to permit him to pay the debt he owes his attorney with these embezzled funds. Instead, equity demands that these funds be impressed with a constructive trust in favor of Oakwood.

[2] Hicks McDonald also asserts that they have a perfected attorney's lien that takes priority over all other claims to the remaining funds. However, since the constructive trust arose when Brogan embezzled the funds, the constructive trust has priority over any attorney's lien which may have been created by Hicks McDonald. *See Patterson*, 133 N.C. App. at 521, 515 S.E.2d at 921. Therefore, we need not reach the issue of whether Hicks McDonald had, in fact, perfected an attorney's lien.

In summary, we hold that the trial court was correct in ordering that the embezzled funds be returned to Oakwood, in that the funds were impressed with a constructive trust in favor of Oakwood.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

BESSEMER CITY EXPRESS, INC., AND MIKE'S FOOD STORE, INC., PLAINTIFFS V. CITY OF KINGS MOUNTAIN, NORTH CAROLINA, A MUNICIPAL CORPORATION, DEFENDANT

No. COA02-41

(Filed 31 December 2002)

Appeal and Error— appealability—denial of preliminary injunction—interlocutory

Plaintiffs' appeal was dismissed as interlocutory where they attempted to appeal from the denial of a preliminary injunction against a zoning ordinance amendment restricting video game machines. The denial of the injunction did not deprive plaintiffs of any rights (much less a substantial right) because the amendment was not in effect at the time plaintiffs moved for the injunction, and because the ordinance simply limited use of video games but did not restrict plaintiffs' other business functions.

Appeal by plaintiff from order entered 4 June 2001 by Judge Jesse B. Caldwell, III in Cleveland County Superior Court. Heard in the Court of Appeals 9 October 2002.

Kenneth T. Davies for the plaintiffs-appellants.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and D. Kevin Joyce; Corry & Luptak, by Clayward C. Corry, Jr., for defendant-appellee City of Kings Mountain.

THOMAS, Judge.

Plaintiffs, Bessemer City Express, Inc., and Mike's Food Store, Inc., initiated this declaratory judgment action in an attempt to invalidate a zoning ordinance amendment restricting their use of video gaming machines.

Prior to deciding the case on its merits, the trial court denied plaintiffs' motion for a preliminary injunction. Plaintiffs appeal, but for the reasons herein, we dismiss the appeal as interlocutory.

On 25 July 2000, defendant, City of Kings Mountain, North Carolina, a municipal corporation, passed an amendment to its zoning ordinance, number Z-3-6-00, restricting the location, design and use of video gaming machines. Arcades that do not comply with the restrictions are prohibited from having video gaming machines unless they apply for and obtain a conditional use permit. Any arcade "not having a valid conditional use permit as of 31 January 2001 must immediately cease to operate." Thus, the amendment included a grace period for nonconforming uses of approximately six months.

Plaintiff Bessemer City Express, Inc. operates seven video game arcades. Plaintiff Mike's Food Store, Inc. operates two. All of their arcades were in operation prior to the passage of the amendment.

On 25 September 2000, plaintiffs filed a complaint for declaratory judgment, contesting the validity of the amendment and seeking preliminary and permanent injunctions. They claimed the amendment would force them to close their businesses. In its answer filed 22 November 2000, defendant asserted the following defense: "That the time within which [plaintiffs'] uses, which were lawful uses prior to 25 July 2000 and which thereafter became non-conforming uses, would have to cease to operate, has not expired." Defendant further claimed that since plaintiffs had not applied for any conditional use permits, they failed to exhaust the available administrative remedies. The action, according to Kings Mountain, was premature.

Although the record does not indicate the exact date, sometime after the enactment of the ordinance plaintiffs submitted conditional use permit applications for each of the arcades. Plaintiffs also requested variances from certain restrictions in the ordinance. However, none of the permit or variance requests were granted by defendant. Defendant began issuing ordinance violation citations to plaintiffs for operating video game arcades without conditional use permits with penalties of $50.00 per day for each location.

On 21 May 2001, the trial court heard plaintiffs' motion for a preliminary injunction. In the order denying the request, the trial court found that plaintiffs had not shown a likelihood of prevailing on the merits and it did not appear plaintiff would suffer immediate and irreparable injury if the preliminary injunction were not issued.

Plaintiffs appeal to this Court, alleging three assignments of error.

By their first two assignments of error, plaintiffs contend the trial court erred in denying their motion because: (1) plaintiff's evidence shows a likelihood of success on the merits and a reasonable apprehension of irreparable loss unless injunctive relief is granted; and (2) such relief is reasonably necessary to protect plaintiffs' rights during litigation, specifically, their vested right to continue the nonconforming uses and their substantive due process rights. By a third assignment of error, plaintiffs argue the trial court erred in admitting into evidence an affidavit containing prejudicial hearsay.

However, we first turn to the interlocutory nature of this appeal. A trial court's ruling on a motion for preliminary injunction is interlocutory. *Rug Doctor, L.P. v. Prate*, 143 N.C. App. 343, 345, 545 S.E.2d 766, 767 (2001). For appellate review to be proper, the trial court's order must: (1) certify the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) have deprived the appellant of a substantial right that will be lost absent review before final disposition of the case. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2001). Here, the trial court did not certify its order for immediate appeal. Moreover, the order does not affect a substantial right.

The substantial right test for appealability of interlocutory orders is more easily stated than applied. Generally, it is necessary to consider the particular facts of the case as well as the procedural context in which the trial court's order was entered. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Despite the case-by-case approach to the substantial right test, our Supreme Court has set forth two general criteria for determining whether an appeal from an interlocutory order is warranted: (1) "the right itself must be substantial[;]" and (2) "the deprivation of that substantial right must potentially work injury to [the party] if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

Here, we need not determine whether the use or operation of video gaming machines by plaintiffs in their businesses constitutes a substantial right, because the trial court's denial of the preliminary injunction did not deprive them of that, or any other, right. At the time plaintiffs moved for the injunction, the amendment was not in effect. They were still operating as conforming uses. Plaintiffs can make no argument that the trial court's order deprived them of a vested right

to continue as nonconforming uses, or some other substantial right, that will work injury to them if not corrected before appeal from final judgment.

Although our courts have recognized the inability to practice one's livelihood and the deprivation of a significant property interest to be substantial rights, the ordinance does not restrict plaintiffs from operating their businesses' other functions such as selling food and supplies. *See, e.g., Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 571 S.E.2d 8 (2002); *City of Fayetteville v. E&J Investments, Inc.*, 90 N.C. App. 268, 368 S.E.2d 20, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 105 (1988); *Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986). Plaintiffs simply are limited in their use of video machines.

In *City of Fayetteville*, this Court noted no substantial right was affected because there was no injunction preventing the defendant in that case from operating its lounge, serving alcohol and having dancers. *City of Fayetteville*, 90 N.C. App. at 270, 368 S.E.2d at 21. The dancers simply could not be topless. Therefore, no irreparable harm was foreseen.

In *Consolidated Textiles, Inc. v. Sprague*, 117 N.C. App. 132, 450 S.E.2d 348 (1994), this Court held no substantial right was affected when it upheld a non-compete clause restricting the defendant from contacting the plaintiff's customers actively solicited within the year prior to the defendant's resignation or disclosing to third persons information identified as plaintiff's trade secrets. *Id.* at 134, 450 S.E.2d at 349. This restriction kept the defendant from contacting approximately 300 customers out of thousands of customers that remained available. *Id.*

Likewise, in the instant case, plaintiffs are not prohibited from operating their businesses as a whole. They are merely subject to new rules regarding the use of video machines within those businesses, pending final judgment on the merits.

Accordingly, we dismiss this appeal as interlocutory.

DISMISSED.

Judges WALKER and BIGGS concur.

BENEFICIAL MORTGAGE COMPANY OF NORTH CAROLINA, PLAINTIFF v. NADER HAMIDPOUR, ATLANTIC MORTGAGE & INVESTMENT CORPORATION, DAVID B. CRAIG, AS SUBSTITUTE TRUSTEE, LARRY E. TAYLOR, AND ROSEMARY R. TAYLOR, DEFENDANTS

No. COA02-269

(Filed 31 December 2002)

1. **Mortgages and Deeds of Trust— notice of foreclosure—standing—junior mortgage holder**

The holder of a second mortgage did not have standing to dispute the adequacy of notice of a foreclosure sale where it had not filed a request for notice; N.C.G.S. § 45-21.17(4) provides that only those listed in N.C.G.S. § 45-21.16 and those who have filed a request for notice are entitled to notice of sale. The mortgage company also lacked standing to argue that the sale was held on a holiday.

2. **Real Property— action to quiet title—standing—disputed foreclosure sale—junior mortgagor**

A mortgage company did not have standing to bring an action to quite title arising from a foreclosure sale with a disputed notice of sale. Plaintiff was not attempting to resolve a situation where two parties claimed title to the same property.

Appeal by plaintiff from judgment entered 24 September 2001 by Judge Wade Barber in Rockingham County Superior Court. Heard in the Court of Appeals 16 October 2002.

Roberson, Haworth & Reese, P.L.L.C., by Alan B. Powell, Robert A. Brinson, and Christopher C. Finan, for plaintiff-appellant.

Adams, Kleemeir, Hagan, Hannah & Fouts, by M. Jay DeVaney and Edward P. Lord, for defendant-appellee David B. Craig.

Robert S. Griffith, II, for defendant-appellee Atlantic Mortgage & Investment Corporation.

HUDSON, Judge.

Beneficial Mortgage Company ("Beneficial") held a deed of trust on a parcel of real property in Rockingham County that was sold at a foreclosure sale. Beneficial did not know of the sale and, therefore, did not bid on the property. Beneficial then sued to quiet title and to

collaterally attack the sale. All parties moved for summary judgment. The superior court granted summary judgment in favor of the appellees, and Beneficial now appeals.

BACKGROUND

On April 26, 1986, Larry Taylor acquired by deed a parcel of property located in Rockingham County, North Carolina, On April 30, 1986, Taylor executed a deed of trust ("Citizens Deed of Trust") in favor of Citizens Savings Mortgage Company ("Citizens") in the amount of $48,450.00, which was recorded in the office of the register of deeds in Rockingham County on May 2, 1986. Citizens subsequently assigned the deed of trust to Atlantic Mortgage and Investment Corporation ("Atlantic").

On September 10, 1998, Taylor and his wife executed a promissory note in the amount of $50,000.00 in favor of Beneficial. The note was secured by a deed of trust on the property ("Beneficial Deed of Trust"). The Beneficial Deed of Trust was recorded on September 16, 1998, second in priority to the Citizens Deed of Trust.

David Craig ("Craig") was appointed substitute trustee of the Citizens Deed of Trust on May 3, 1999. On July 2, 1999, at Atlantic's request, Craig instituted a special proceeding in Rockingham County to foreclose upon the Citizens Deed of Trust. The clerk of court entered an order that Atlantic was entitled to foreclose on the property and, after giving notice, Craig proceeded to sell the property at public sale on October 13, 1999. Atlantic was the high bidder at that sale, with a bid of $16,461.99. However, on October 25, 1999, Household Finance Corporation ("Household") filed an upset bid, raising Atlantic's bid by five percent.

On the same day that the upset bid was filed, the Taylors filed a voluntary petition in bankruptcy under Chapter 13 of the Bankruptcy Code. The proceedings relating to the foreclosure of the Citizens Deed of Truest were placed on inactive status in accordance with the automatic stay provisions of the Bankruptcy Code pending the outcome of the Taylors' bankruptcy case.

The Taylors' bankruptcy case was later dismissed, and Craig obtained an order reopening the foreclosure proceedings. A new notice of sale was posted at the Rockingham County courthouse on October 18, 2000, setting the date of the sale for November 7, 2000. Beneficial did not receive notice of the sale. As set forth in Craig's brief, Craig was not aware that Household, who had filed an upset bid

at the first sale, was the parent company of Beneficial, nor did Household provide an address on the notice of upset bid filed with the court. Had Beneficial been notified of the sale, it would have been ready, willing, and able to bid $68,979.69 for the property.

At the November 7, 2000 sale, Atlantic again was the high bidder. Third parties, however, filed four upset bids on November 9, November 13, November 15, and November 27. Nader Hamidpour was the highest bidder, with a final bid of $22,918.90. The period for upset bids closed on December 7, 2000. On December 13, 2000, a trustee's deed conveying the property to Hamidpour was recorded in the Rockingham County register of deeds, and the final report of the trustee was filed January 10, 2001.

Beneficial filed suit in January 2001 to quiet title and to collaterally attack the foreclosure. All parties moved for summary judgment. On September 24, 2001, the superior court granted summary judgment in favor of the appellees. Beneficial now appeals.

ANALYSIS

Beneficial argues on appeal that the trial court erred in granting summary judgment for the appellees. In Beneficial's view, the November 7, 2000 foreclosure sale was improper because (1) the notice of foreclosure sale was not posted for 20 days as required by N.C. Gen. Stat. § 45-21.17(1)(a) and (2) the sale was conducted on a legal holiday in contravention of N.C. Gen. Stat. § 45-21.23. Further, Beneficial argues that these material irregularities resulted in the property being sold for a grossly inadequate price.

[1] Before we address these issues, however, we must determine whether Beneficial, as holder of a second mortgage, has standing to challenge a foreclosure sale once it is completed. Appellee Craig has argued that Beneficial does not have standing to challenge the sale under Chapter 45 since Beneficial is not a mortgagor. Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). Thus, if Beneficial does not have standing, we must dismiss this appeal. *Id.* at 326, 560 S.E.2d at 880.

In *Gore v. Hill*, the purchaser of property sold at a foreclosure proceeding argued that the foreclosure was invalid because the trustee had failed to satisfy the notice requirements set forth in N.C. Gen. Stat. § 45-21.21 governing the postponement of foreclosure sales. 52 N.C. App. 620, 620, 279 S.E.2d 102, 103 *disc. review denied*,

303 N.C. 710 (1981). The Court rejected this claim. In the Court's view, section 45-21.21 provided procedural protections only for the mortgagor; the "procedural requirements of notice and hearing are designed to assure mortgagors that property which they have used to secure an indebtedness will not be foreclosed without due process of law." *Id.* at 622, 279 S.E.2d at 104. Therefore, the "plaintiff herein, purchaser of the property, was not a party protected by G.S. § 45-21.21 and . . . has no basis on which to assert that the sale was invalid because the sale was postponed in a manner not consistent with the statute." *Id.*

Likewise, here, Beneficial, as junior mortgagee, is not a party protected by the notice requirements in Chapter 45 of our General Statutes. Section § 45-21.17(4) provides that only those persons listed in N.C. Gen. Stat. § 45-21.16 and those who have filed a request for notice under § 45-21.17A are entitled to notice of sale. Section § 45-21.16(b)(3) specifically excludes holders of deeds of trust—Beneficial—from those entitled to notice. Thus, Beneficial was entitled to notice only if it had filed a request for notice, which it did not. Because Beneficial is not entitled to notice of sale, as set forth in section 45-21.16, Beneficial has no standing to dispute the adequacy of that notice on appeal. Moreover, our logical conclusion must be that because Beneficial does not have standing to contest the adequacy of notice given in this case, it does not have standing to argue that the sale was held on a holiday in contravention of § 45-21.23.

[2] Beneficial also argues that it has standing to bring an action to quiet title pursuant to N.C. Gen. Stat. § 41-10 because it claims a competing current interest in the property via the Beneficial Deed of Trust and that the improperly conducted foreclosure sale had not extinguished its interest. We disagree. Section 41-10 allows a person with a claim or interest in real property to bring an action to resolve that claim against others who assert rights or interest in the same real estate. Here, however, Beneficial is not attempting to resolve a situation where both it and Hamidpour have title to the same property. Rather, Beneficial is using § 42-10 to make the same claim that it has been making all along, and we conclude that it does not have standing to do so.

CONCLUSION

For the reasons set forth above, we dismiss this appeal.

Dismissed.

Judges McGEE and BIGGS concur.

STATE OF NORTH CAROLINA v. JERMAINE DEREK BIVENS

No. COA02-265

(Filed 31 December 2002)

1. **Criminal Law— continuance—motion on day of trial—denied**

The trial court did not abuse its discretion by denying a cocaine defendant's motion for a continuance to find witnesses, made on the day of trial, where the defendant had been released on bond for five months and had met with his attorney the day before trial, but did not mention the witnesses until the day of trial.

2. **Criminal Law— guilty pleas—factual basis—type of supporting information**

The trial court did not err when accepting pleas of guilty to possession of cocaine and to being an habitual felon by permitting the State to orally provide the evidence necessary to support the guilty plea. A judge must find that a factual basis exists for a guilty plea, but the information upon which the judge depends is not limited.

3. **Sentencing— mitigating factors—presumptive sentence**

The trial court did not abuse its discretion by sentencing a cocaine possession defendant within the presumptive term even though the court found that mitigating factors existed and outweighed aggravating factors. Judges have the discretion to impose a sentence within the mitigated range, and likewise have the discretion to decline to do so and sentence within the presumptive term. N.C.G.S. § 15A-1340.16(b).

Appeal by defendant from judgment entered 30 October 2001 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 31 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

McCotter, McAfee & Ashton, P.L.L.C., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted by the Richmond County Grand Jury on 25 June 2001 for possession with intent to manufacture, sell and deliver cocaine and on 6 August 2001 for habitual felon status. The case was called for trial on 30 October 2001, at which time defendant moved for a continuance to enable him to obtain necessary witnesses. Judge Michael E. Beale ("Judge Beale") inquired and learned that defendant had been free on bond since 25 May 2001, had met with his attorney the previous day, but had not mentioned the witnesses to his attorney before that morning. Judge Beale denied the motion, finding "this is not a Constitutional issue, and that he is not being denied the opportunity and right to subpoena witnesses; . . . any failure to obtain his witnesses has been his own fault, and not the result of any violation of his Constitutional rights." Defendant pled guilty to possession of cocaine and being an habitual felon. The court took the pleas in open court. The court found no aggravating factors, but found "the defendant has accepted responsibility for the defendant's criminal conduct" and "the defendant admitted responsibility as to pleading guilty to this charge" as mitigating factors. The court held the "factors in mitigation outweigh the factors in aggravation." The court then sentenced the defendant to 90 months to 117 months, within the presumptive range.

Defendant appeals and asserts the trial court erred by denying defendant's motion for a continuance, permitting the prosecutor to recite defendant's prior convictions for the purpose of proving habitual felon status, and sentencing defendant to the presumptive term after finding the factors in mitigation outweigh the factors in aggravation.

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002) (citations omitted). A defendant who pled guilty may appeal on the basis of: (1) "whether his or her sentence is

supported by evidence . . . if the minimum sentence of imprisonment does not fall within the presumptive range" and whether the sentence imposed results from (2) an incorrect finding of the defendant's prior record or conviction level, or (3) a type of sentence disposition not authorized, or (4) a term of imprisonment not authorized. N.C. Gen. Stat. § 15A-1444(a1)-(a2) (2001). A defendant who pled guilty may also appeal the denial of a pre-trial motion to suppress, if he gives the prosecutor and court notice before entering his plea. N.C. Gen. Stat. § 15A-979 (2001). An appeal of right exists for denial of a motion to withdraw a guilty plea. N.C. Gen. Stat. § 15A-1444(e) (2001).

Defendant asserts the trial court erred by denying defendant's motion for a continuance and permitting the State to prove habitual felon status by orally reciting defendant's prior convictions. Neither of these issues are properly before the Court pursuant to a statutory appeal of right, therefore defendant asks the Court to consider his brief as a petition for a writ of certiorari. We decline to consider defendant's appeal on this issue on a petition for writ of certiorari.

[1] We note, however, the movant bears the burden of showing sufficient grounds to justify the continuance. *Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac,* 109 N.C. App. 352, 356, 427 S.E.2d 629, 631 (1993). The question on appeal is whether the trial court abused its discretion in denying the motion. *Id.* Judge Beale, in his discretion, determined defendant had ample opportunity, while released on bond for the five months next preceding the court date, and during his meeting with his lawyer the day before trial, to advise his attorney of the witnesses. We find no merit to defendant's assertion that Judge Beale abused his discretion in denying his motion for a continuance.

[2] Additionally, North Carolina law provides that a judge, before accepting a guilty plea, must find a factual basis exists for the plea, but the information upon which the judge depends is not limited by the statute. N.C. Gen. Stat. § 15A-1022(c) (2001). Therefore, we find no merit to defendant's claim the trial court erred by permitting the State to orally provide the evidence necessary to support the guilty plea.

[3] Defendant asserts the trial court erred in sentencing defendant within the presumptive rather than the mitigated range since the mitigating factors outweighed the aggravating factors. Defendant does

not have an appeal as a matter of right, and asks the Court to consider his appeal as a petition for writ of certiorari. We agree, in our discretion, to consider defendant's appeal by way of a writ of certiorari to answer this important question regarding the extent of the trial court's discretion under the Structured Sentencing Act.

North Carolina law provides: "[t]he court may deviate from the presumptive range of minimum sentences of imprisonment . . . if it finds, pursuant to G.S. 15A-1340.16, that aggravating or mitigating circumstances support such a deviation." N.C. Gen. Stat. § 15A-1340.13(e) (2001). "The court shall consider evidence of aggravating or mitigating factors . . . but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a) (2001).

> If the court finds that aggravating or mitigating factors exist, it *may* depart from the presumptive range of sentences. . . . If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it *may* impose a sentence that is permitted by the mitigated range.

N.C. Gen. Stat. § 15A-1340.16(b) (2001).

Judge Beale, in the case at bar, found that mitigating factors existed, and that they outweighed the aggravating factors, but, in his discretion, sentenced defendant within the presumptive term. Since subsection(b) provides that if a judge finds that mitigating factors are present and outweigh any aggravating factors, he has the discretion to impose a sentence in the mitigated range, he *ipso facto*, likewise may in his discretion decline to do so and sentence in the presumptive range. Thus, the decision of the trial court is affirmed.

Affirmed.

Judges WALKER and McCULLOUGH concur.

FLORENCE AMELIA SMITH, PLAINTIFF v. L. OLIVER NOBLE, JR., ET ALS., DEFENDANTS

No. COA02-66

(Filed 31 December 2002)

Appeal and Error— assignments of error—lack of supporting arguments and authority

An appeal by a pro se plaintiff alleging violation of her rights by multiple judicial officials was dismissed where she did not present arguments or cite authority for her assignments of error and did not provide a statement of the case and a statement of the facts. N.C. R. App. P. 28(b)(3), (5) and (6).

Appeal by plaintiff from orders entered 31 July 2000 and 17 August 2001 by Judge James E. Lanning in Cleveland County Superior Court. Heard in the Court of Appeals 9 October 2002.

Florence Amelia Smith, plaintiff-appellant, pro-se.

Roy Cooper, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

Per Curiam.

Plaintiff, Florence Amelia Smith, appeals from two trial court's orders.

The first, entered 31 July 2000, dismissed her claims against defendants based on Rules 12(B)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. Those rules address motions to dismiss based on lack of jurisdiction over the subject matter, lack of jurisdiction over the person, and failure to state a claim upon which relief can be granted. Plaintiff then filed three motions for a new trial or hearing, to amend and make additional findings and for relief from the order. The second order, entered 17 April 2001, denied all three motions. For the reasons discussed herein, we dismiss this appeal.

On 12 June 2000, plaintiff filed a complaint against defendants, L. Oliver Noble, et al. Defendants are officials of the State of North Carolina, including judges, attorneys, law enforcement officers, and clerks of court. Plaintiff alleged defendants conspired to violate a wide range of her rights through their actions in adjudicat-

ing, defending, or processing civil actions in which plaintiff was a *pro se* party.

Defendants filed a motion to dismiss based on absolute immunity, lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to allege facts supporting any genuine claim of wrongful conduct on the part of defendants. They also claimed that the action was captious, frivolous, and utterly without merit. The trial court granted the motion and also entered a pre-filing injunction that stated:

> IT IS FURTHER ORDERED that plaintiff's obsessive bent toward repetitive, vexatious, and baseless litigation must be brought to an end. Plaintiff is therefore ENJOINED as of this date by the entering of a pre-filing injunction on all future actions and lawsuits of whatever description in any state court, whereby no lawsuit may be filed by plaintiff without prior approval, upon review of the merits of the lawsuit, by the Senior Resident Court Judge of the county in which plaintiff desires to file the action.

Plaintiff appeals. Her assignments of error include contentions that the trial court erred in: (1) finding sanctions against plaintiff when no Rule 11 Motion for Sanctions was filed or served upon her and no Notice of Hearing on Sanctions was given to her; (2) incorporating sanctions which severely chilled plaintiff's open court rights pursuant to Article II of the North Carolina Constitution; (3) incorporating sanctions which severely chilled plaintiff's freedom of speech as guaranteed by the First Amendment to the United States Constitution; (4) incorporating sanctions which severely chilled plaintiff's right to access the full judicial process guaranteed by the Fourteenth Amendment to the U.S. Constitution; (5) using sanctions as an undue force as prohibited by the Fourth Amendment to the U.S. Constitution; (6) its findings of fact and conclusions of law which were not congruous with the evidence presented by defendants; (7) its determination that even though plaintiff had not been properly noticed on the hearing that it would not have mattered to the outcome; and (8) not recusing.

However, plaintiff presents no arguments for these assignments of error nor does she cite any authority. Assignments of error not addressed in the brief are deemed abandoned under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. N.C. R. App.

28(b)(6) (2002) (formerly N.C. R. App. P. 28(b)(5)). Further, plaintiff failed to give a statement of the case and a statement of the facts, in contravention of Rules 28(b)(3) and (5) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 28(b)(3) and (5) (2002). Accordingly, we dismiss the appeal.

DISMISSED.

Panel Consisting of:

Judges WALKER, THOMAS, BIGGS

CAROLYN CAMPBELL, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION—DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA02-81

(Filed 21 January 2003)

1. **Administrative Law— jurisdiction of Office of Administrative Hearings—termination of state employee—Americans with Disabilities Act**

A de novo review revealed that the trial court erred by concluding that the Office of Administrative Hearings lacked jurisdiction to consider a contested case regarding the termination of petitioner state employee whose asthma and severe allergies were worsened by her work conditions even though petitioner was not a career state employee under N.C.G.S. § 126-34.1(a)(1) and the American with Disabilities Act was not added as a basis for jurisdiction in the list provided under N.C.G.S. § 126-34.1(a)(11) until 1 October 2001, because: (1) petitioner properly alleged that respondent terminated her employment based on plaintiff being unable to return to work without reasonable accommodations; (2) petitioner properly alleged she is a person with a disability within the meaning of N.C.G.S. § 168A-3(7a) based on her asthma, severe allergies, and physical impairments affecting her respiratory system and substantially limiting her major life activities of breathing and working; and (3) petitioner properly alleged that she was a qualified person with a disability within N.C.G.S. § 168A-9a.

2. **Public Officers and Employees— termination of state employee—constructive discharge—contested case**

The State Personnel Commission erred in concluding that a state employee had voluntarily resigned her position and had not been terminated as required to establish jurisdiction in the Office of Administrative Hearings under N.C.G.S. § 126-34.1(a)(2)b where the employee sufficiently alleged a constructive discharge in that she was informed that she could either return to work in conditions that violated the law or be deemed to have voluntarily resigned. When an employee is deemed to have voluntarily resigned by a state agency for being unable or unwilling to work in conditions that may constitute discrimination, such resignation can constitute a constructive discharge entitling the employee to file a contested case alleging termination.

3. Public Officers and Employees— termination of state employee—findings of fact—disability

The whole record test revealed that the trial court did not err in an action regarding the termination of a state employee whose asthma and severe allergies were worsened by her work conditions by concluding that most of the State Personnel Commission's findings of fact were unsupported by substantial evidence and arbitrary and capricious, because: (1) the evidence supports the conclusion that petitioner is a person with a disability under N.C.G.S. Ch. 168A; (2) petitioner established that she is a qualified person with a disability under N.C.G.S. § 168A-3(9)a since the fact that petitioner's solution for a clean work environment was a job transfer does not support a conclusion that petitioner did not properly prove that she could perform her job with reasonable accommodations; and (3) petitioner did not abdicate her right to reasonable accommodations either by refusing to accept respondent's offers or by failing to offer respondent additional suggestions for what she would consider a reasonable accommodation.

4. Public Officers and Employees— termination of state employee—findings of fact—doctor examination

The trial court erred in an action regarding the termination of a state employee whose asthma and severe allergies were worsened by her work conditions by determining that there was no substantial evidence to support the State Personnel Commission's finding of fact and conclusion of law that a doctor examined petitioner and instructed that she increase her inhaler medication, monitor her peak flow measurements, use a HEPA filter, and wear a face mask, because the evidence supports two reasonably conflicting views.

5. Public Officers and Employees— termination of state employee—reasonable accommodations

The trial court did not err in an action regarding the termination of a state employee whose asthma and severe allergies were worsened by her work conditions by determining that there was no substantial evidence to support the State Personnel Commission's finding of fact and conclusion of law that respondent made reasonable accommodations under N.C.G.S. § 168A-3(10)a to enable petitioner to return to work, because: (1) the pertinent dust report did not provide adequate informa-

tion regarding the dust level of petitioner's work environment when the dust level testing was not performed in petitioner's desk area; and (2) respondent did not provide evidence regarding how a doctor came to the conclusion that a HEPA filter, face mask, increased asthma medication, and petitioner's monitoring of her peak flow measurements would be reasonable accommodations.

Appeal by respondent from an order entered 30 October 2001 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 19 September 2002.

Edmisten & Webb, by William Woodward Webb, Sr., for petitioner-appellee.

Attorney General Roy Cooper, by Associate Attorney General Kimberly P. Hunt and Special Deputy Attorney General Hal F. Askins, for respondent-appellant.

CAMPBELL, Judge.

Respondent, the North Carolina Department of Transportation Division of Motor Vehicles, appeals from an order of the Superior Court reversing the decision of the State Personnel Commission and adopting the recommended decision of the Administrative Law Judge.

Petitioner was employed by respondent from 5 October 1998 until 8 April 1999 as a Processing Assistant IV. Petitioner's job duties required her to work with stolen vehicle records kept in open files. The files were kept on shelves, not in filing cabinets, with some filed in boxes on the shelves. Petitioner has suffered from asthma since childhood and has severe allergies to dust and paint fumes. In late October 1998, petitioner noticed her conditions were aggravated, apparently by the dust in the open files. Petitioner sought medical care for asthma attacks in November and December 1998.

In early January 1999, while painters worked on her floor, petitioner was assigned to purge the open files. On 11 January 1999, petitioner suffered a severe asthma attack and was hospitalized for five days. Dr. Josephine Brown, M.D. ("Dr. Brown"), petitioner's physician, testified that upon arrival "this woman was very close to death in the emergency room. She was close to being what we call intubated, having to put in a tube for artificial respiration." On 15

January 1999, Dr. Brown, wrote to Respondent explaining that petitioner is "severely allergic to dust and paint fumes. . . . She will not be able to return under her present working conditions, which exposed her to dust and also to paint fumes." On 25 January 1999, petitioner returned to work. Respondent offered petitioner a mask to protect her from the dust in the records and offered to remove her from the area when painting was scheduled. Petitioner left work since Dr. Brown had not approved of her working with only a mask to prevent another attack.

On 28 January 1999, petitioner met with Mr. Ronald Oates ("Mr. Oates"), the State of North Carolina Department of Transportation's Americans with Disabilities Act (ADA) coordinator. Mr. Oates recommended that respondent, as a reasonable accommodation, search for another placement for petitioner where the environment is well ventilated, there are no open paper files or excessive dust, and no paint or other fumes. On 15 February 1999, Dr. Brown again wrote to respondent and recommended that petitioner "not be exposed to dust and fumes in the workplace, as this will exacerbate her asthma."

In relation to a workers' compensation claim petitioner filed in January, petitioner's work area was tested for respirable dust levels and petitioner was examined by another doctor for a second opinion. The dust level test revealed the respirable dust levels were very low. The report recommended that petitioner "not be allowed to open up old file boxes that appear to be dusty or have visible water damage or signs of dampness" without a face mask. On 3 March 1999, petitioner met with Dr. Craig LaForce, M.D. ("Dr. LaForce") an allergy specialist. Dr. LaForce recommended petitioner increase use of her inhaler, monitor her peak flow meter measurements and utilize a HEPA filtration system. In response to this recommendation, Dr. Brown wrote to respondent opposing Dr. LaForce's solution, explaining that "[t]he HEPA filtration system and mask may decrease the amount of dust, but judging from the severity of the last asthma attack, I recommend she be placed in another environment."

As a result of Dr. LaForce's recommendations, respondent wrote to petitioner on 19 March 1999 offering to purchase the HEPA filter and requiring that she return to work within seven days. Petitioner did not return to work on the advice of Dr. Brown, who explained "the [HEPA] machine is like a miniature air conditioner that is cold. . . . [it] could enhance the probability of another asthma attack." Therefore, petitioner wrote to respondent requesting again that Dr. Brown's recommendation be followed, that "I be transferred into

another position in a different building at the same grade level. I will also accept a position at a lower grade."

Respondent and petitioner met on 5 April 1999 to discuss possible solutions. Respondent firmly maintained that its willingness to provide a HEPA filtration system and face mask constituted a reasonable accommodation. Petitioner firmly maintained that a reasonable accommodation would be assistance in seeking another placement. Lieutenant Colonel Brinson ("Lt. Col. Brinson") testified that he could not follow petitioner's request, as recommended by respondent's ADA coordinator, and assist in placing petitioner in a well-ventilated environment without excessive dust because "I did not have another position that does not work with files." Petitioner's testimony sheds light on this exchange:

> Q: . . . what, if any, efforts did they make to secure you another position away from this work site in another part of the building or another building or wherever?
>
> A: Well, they didn't because on the 5th of April of '99 when I had the meeting with, you know, several people [from DOT], you know, I was told that there was dust everywhere and they didn't have anything—any position for me to go into because there was dust everywhere.
>
> Q: And to your knowledge, is that correct? I mean, is there dust everywhere throughout all the buildings that—
>
> A: Well, there is dust all over the place, but it's not open files in every office that you work in. I have worked in several offices that, you know, I worked with files, but they was in a file cabinet and the dust was more contained than being open.

The meeting ended without compromise. Respondent explained to petitioner that if she did not return to work by 8 April 1999 she would be deemed to have voluntarily resigned her position. Following Dr. Brown's advice petitioner did not return to work.

On 9 June 1999, petitioner filed a petition for a contested case hearing alleging she was discriminated against due to her asthmatic condition and was unlawfully terminated. On 3 December 1999, Administrative Law Judge Robert Roosevelt Reilly, Jr. issued a recommended decision finding that petitioner was a handicapped person who had been unlawfully discriminated against, and respondent failed to make a reasonable accommodation. On 16 May 2000, the

State Personnel Commission ("Commission") issued a decision rejecting the recommended decision and finding that jurisdiction was lacking, but that even if it existed, respondent had made reasonable accommodations for petitioner. On 30 October 2001, Wake County Superior Court Judge Abraham Penn Jones reversed the decision of the Commission, holding that the Commission's findings of fact and conclusions of law were unsupported by substantial evidence and were arbitrary and capricious, and the conclusions of law were also affected by errors of law. The Superior Court adopted the recommended decision of the Administrative Law Judge.

Respondent appeals to this Court asserting there is competent evidence to support the Commission's decision, the decision was not arbitrary and capricious, and there was no error of law. Respondent asserts the decision of the superior court should be reversed and the Commission's decision should be reinstated.

This Court's review is governed by N.C. Gen. Stat. § 150B-51 (2001). "Our review of a superior court order regarding an agency decision consists of: '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 3, 541 S.E.2d 750, 752, *aff'd*, 354 N.C. 209, 552 S.E.2d 162 (2001) (citations omitted). "The proper standard of review depends upon the particular issues presented on appeal." *Employment Security Comm. v. Peace*, 122 N.C. App. 313, 317, 470 S.E.2d 63, 67 (1996).

> Where the petitioner alleges that the agency decision was either unsupported by the evidence, or arbitrary and capricious, the [reviewing] court applies the 'whole record test' to determine whether the agency decision was supported by substantial evidence contained in the entire record. Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.

Souther, 142 N.C. App. at 3-4, 541 S.E.2d at 752 (citation omitted). "[I]t appears uncontroverted that the foregoing rule should not be interpreted to mean the manner of our review is governed merely by the label an appellant places upon an assignment of error; rather, we first determine the actual nature of the contended error, then proceed with an application of the proper scope of review." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114,

118 (1994). Therefore, we address each issue on appeal with the appropriate standard of review set forth in N.C. Gen. Stat. § 150B-51.

The issues presented to the Court on appeal are whether or not the superior court was correct in determining that: (I) the Commission committed an error of law concluding that the Office of Administrative Hearings lacked jurisdiction; and (II) the Commission's conclusions of law were affected by errors of law, unsupported by substantial evidence, and arbitrary and capricious; and (III) the Commission's findings of fact were unsupported by substantial evidence and arbitrary and capricious.

I. Jurisdiction

[1] Respondent asserts the superior court erred in reversing the Commission's decision that the Office of Administrative Hearings lacked jurisdiction. "When the petitioner contends the agency decision was affected by an error of law, G.S. § 150B-51(b)(1)(2)(3) & (4), *de novo* review 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 Office of Administrative Hearings has limited jurisdiction to consider contested cases. N.C. Gen. Stat. § 126-34.1 (2001). The Commission determined the Office of Administrative Hearings lacked jurisdiction because: (A) the petitioner was not a career State employee as required by N.C. Gen. Stat. § 126-34.1(a)(1); (B) no jurisdiction exists for complaints regarding violation of the Americans with Disabilities Act (ADA) and; (c) petitioner does not have a handicapping condition, is not a qualified handicapped person, and was not terminated as required by N.C. Gen. Stat. § 126-34.1(a)(2)b.

A. Jurisdiction as a Career State Employee

The Commission determined the Office of Administrative Hearings lacked jurisdiction because the petitioner is not a career State employee. The Commission was correct. Jurisdiction exists for a career State employee to file a contested case in the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 126-34.1(a)(1). A " 'career State employee' means a State employee who: . . . (2) [h]as been continuously employed by the State of North Carolina . . . for the immediate 24 preceding months." N.C. Gen. Stat. § 126-1.1 (2001). There is no evidence that petitioner is a career State employee, therefore the Office of Administrative Hearings did not have jurisdiction over this claim pursuant to N.C. Gen. Stat. § 126-34.1(a)(1).

B. Jurisdiction under the Americans with Disabilities Act

The Commission determined the Office of Administrative Hearings lacked jurisdiction based upon an alleged violation of the ADA. The Commission was correct. Jurisdiction for the Office of Administrative Hearings is limited to those bases listed in the statute, N.C. Gen. Stat. § 126-34.1(a)(11). The ADA was not added to the list until 1 October 2001. N.C. Gen. Stat. § 126-34.1(a)(11). Therefore the Commission was correct in its determination that the Office of Administrative Hearings lacked jurisdiction to consider this claim.

C. Jurisdiction for discrimination against a "qualified person with a disability"

The Commission determined that the Office of Administrative Hearings lacked jurisdiction pursuant to N.C. Gen. Stat. § 126-34.1(a)(2)b, which provides jurisdiction for: "[a]n alleged unlawful State employment practice constituting discrimination, as proscribed by G.S. 126-36, including: . . . termination of an employee in retaliation for the employee's opposition to alleged discrimination on account of the employee's . . . handicapping condition as defined by Chapter 168A of the General Statutes." Here, the Commission was incorrect. Respondent asserted that jurisdiction was lacking because: the petitioner does not have a "handicapping condition as defined by Chapter 168A of the General Statutes;" the petitioner is not a "qualified person with a disability;" and the petitioner was not "terminated."

Petitioner properly alleged that Respondent terminated her employment. Though Respondent asserts it considers Petitioner to have voluntarily resigned her position and therefore she was not terminated within the meaning of the statute, Petitioner properly alleged she was unable to return to work without reasonable accommodations and therefore was terminated.

Petitioner further alleged she is a "person with a disability" within the meaning of N.C. Gen. Stat. § 168A-3(7a) (2001). A "person with a disability" is "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. Gen. Stat. § 168A-3 (7a). A physical or mental impairment "means (i) any physiological disorder or abnormal condition . . . caused by . . . illness, affecting one or more of the following body systems: . . . respiratory." N.C. Gen. Stat.

§ 168A-3(7a)a. A major life activity means "functions such as . . . breathing . . . and working." N.C. Gen. Stat. § 168A-3 (7a)b. Petitioner alleged that she has asthma and severe allergies, physical impairments affecting her respiratory system. Petitioner further alleged her asthma and allergies substantially limit her major life activities of breathing and working.

Finally, petitioner properly alleged that she was a "qualified person with a disability" within N.C. Gen. Stat. 168A-9a. (2001). A "qualified person with a disability" means "[w]ith regard to employment, a person with a disability who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation." N.C. Gen. Stat. § 168A-3(9)a. Petitioner alleged that she asked for reasonable accommodations to enable her to be able to perform her job duties. Respondent asserts jurisdiction is lacking because petitioner's requests for accommodations were unreasonable, and she rejected respondent's offers for reasonable accommodations. However, whether the accommodations offered to petitioner were "reasonable accommodations" or whether petitioner's requests constituted "reasonable accommodations" is not at issue in determining jurisdiction. Jurisdiction rests on the allegations of the petitioner. In this case, petitioner's allegations sufficiently establish jurisdiction pursuant to N.C. Gen. Stat. § 126-34.1(a)(2)a. Therefore, the superior court was correct in finding the Commission erred by determining jurisdiction did not exist.

In addressing the remaining issues presented on appeal, we note that the Commission's conclusions of law and findings of fact are often mixed findings of fact and law or were mislabeled. Therefore, we address the pure conclusions of law in the "conclusions of law" section and then address the mixed findings and pure findings of fact in the "findings of fact" section.

II. Conclusions of Law—Errors of Law

[2] The superior court determined that all the Commission's conclusions of law were affected by errors of law. Since errors of law are reviewed *de novo* by the reviewing court, we review each conclusion of law *de novo*. *Souther*, 142 N.C. App. at 4, 541 S.E.2d at 752.

Conclusion of law number one found that jurisdiction was lacking because petitioner did not prove she was a career State employee. For the reasons discussed in section (I) (A) of this opinion, we hold the superior court was incorrect in finding this portion of conclusion

of law number one was affected by an error of law. A portion of conclusion of law number one and conclusion of law number seven also found that petitioner had voluntarily resigned her position and therefore had not been "terminated," as required to establish jurisdiction under N.C. Gen. Stat. § 126-34.1(a)(2)b. Regarding this contention, we hold that when an employee is "deemed to have voluntarily resigned" by the State agency for being unable or unwilling to work in conditions that may constitute discrimination, such resignation can constitute a constructive discharge entitling the employee to file a contested case alleging termination pursuant to N.C. Gen. Stat. § 126-34.1(a)(2)b. Petitioner was informed that she could either return to work in conditions she alleges were in violation of the law or be "deemed to have resigned." We hold a constructive discharge constitutes a termination for the purpose of interpreting N.C. Gen. Stat. § 126-34.1. Therefore, we hold the superior court correctly determined that this portion of conclusion of law number one, and conclusion of law number seven were affected by errors of law.

III. Findings of Fact

[3] The superior court, in its order, determined that most of the Commission's findings of fact, and all the conclusions of law were "unsupported by substantial, competent evidence, and are arbitrary and capricious considering the record as a whole." We address the determination that the Commission's findings of fact are unsupported by substantial, competent evidence.

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Joyce v. Winston-Salem State University*, 91 N.C. App. 153, 158, 370 S.E.2d 866, 869 (1988) (quoting *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E.2d 882 (1977)). "[S]ubstantial evidence 'is more than a scintilla or a permissible inference.' " *Id.*, (quoting *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 293 S.E.2d 171 (1982)). To review whether the findings of fact are supported by substantial evidence, our standard of review is the whole record test. *Souther*, 142 N.C. App. at 3-4, 541 S.E.2d at 752.

> The 'whole record' test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached.

Floyd v. N.C. Dept. of Commerce, 99 N.C. App. 125, 128, 392 S.E.2d 660, 662 (1990) (quoting *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987)). "[T]he 'whole record' test 'gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706-07, 483 S.E.2d 388, 392 (1997) (quoting *Bennett v. Bd. of Educ*ation, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915). "If an agency decision is not supported by substantial evidence in view of the entire record as submitted, it may be reversed." *Joyce*, 91 N.C. App. at 157-58, 370 S.E.2d at 869 (citation omitted).

In finding of fact number twenty, the Commission found that "[a]s a Processing Assistant IV, Petitioner was required to maintain files pertaining to stolen vehicles. The files were centrally located within Respondent's offices on New Bern Avenue in Raleigh, N.C." Since this is a pure finding of fact, our review is the whole record test. We find there is ample evidence to support this undisputed finding of fact.

Finding of fact number twenty-one states that petitioner failed to establish a *prima facie* case that she is a person with a disability under N.C. Gen. Stat. § 168A because she failed to establish that her asthma substantially limits a major life activity. This is a mixed finding of fact and law. Conclusion of law number two is also a mixed finding in which the Commission determined that jurisdiction was lacking because petitioner had not established that she is a "person with a disability." A "person with a disability" includes any person who has any "abnormal condition . . . caused by illness, affecting [the] . . . respiratory [system]" that "substantially limits one or more" "functions such as . . . breathing . . . and working." N.C. Gen. Stat. § 168A-3(7a). Respondent, and the Commission, assert petitioner failed to establish her illness "substantially" limits her breathing or working. The evidence petitioner offered was evidence of her five-day hospitalization in January 1999, and her inability to return to work thereafter without reasonable accommodations of her asthma and allergies. Reviewing the whole record, there is no evidence to support the conclusion that these limitations are not "substantial" within the meaning of N.C. Gen. Stat. § 168A. Moreover, Dr. Brown testified that on the night petitioner was admitted to the emergency room,

> [s]he had something called a peak flow which was less than 200, and that's where we can evaluate the severity of the asthma attack. And a peak flow under 200 is extremely severe. They

> [the hospital workers present at the time] informed me that they tried to break this lady's asthma attack for several hours in the emergency room with oxygen, Albuterol, treatments which are standard for asthma, and steroids and she just wasn't going to get any better.

"[T]his woman was very close to death in the emergency room." Moreover, following this attack, it is uncontested that petitioner was unable to return to work without reasonable accommodations. Therefore, we hold the superior court correctly reversed this mixed finding by the Commission as it was unsupported by substantial evidence. We find the evidence supports the conclusion that petitioner is a "person with a disability."

Finding of fact number twenty one and conclusion of law number two further conclude that petitioner failed to establish that she is a "qualified person with a disability." These are mixed findings of fact and conclusions of law. A "qualified person with a disability" means "[w]ith regard to employment, a person with a disability who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation." N.C. Gen. Stat. § 168A-3(9)a. First, Respondent asserts that the clause "with or without reasonable accommodation" requires the person to be capable of performing the job both with *and* without accommodations. Under this reading an employee would have to be capable of performing the job duties without reasonable accommodations. Once the employee had satisfactorily performed the job without accommodation, the employee would be a "qualified person with a disability." We reject this interpretation. The plain language of the statute requires the disabled person be able to satisfactorily perform the job, *either* "with *or* without" reasonable accommodation. Therefore to be classified as a "qualified person with a disability" the employee must be capable of performing the job duties with reasonable accommodations. The term reasonable accommodations, in the context of employment, is:

> making reasonable physical changes in the workplace, including, but not limited to, making facilities accessible, modifying equipment and providing mechanical aids to assist in operating equipment, or making reasonable changes in the duties of the job in question that would accommodate the known disabling conditions of the person with a disability seeking the job in question by enabling him or her to satisfactorily perform the duties of that job.

N.C. Gen. Stat. § 168A-3(10)a. (2001).

Under whole record review of the facts, we do not find substantial evidence to support the finding that "[petitioner's] evidence showed that she could not perform the job duties under any circumstances." Presumably this conclusion stems from petitioner's repeated requests for assistance with a job transfer and her doctor's statements that she should not return to her previous work environment. However, petitioner was clear in her requests for reasonable accommodations that she needed a work environment that would not provoke an asthma attack. The fact that her solution for a clean work environment was a job transfer does not support a conclusion that petitioner did not properly prove that she could perform her job with reasonable accommodations. Petitioner requested a well-ventilated environment without paint fumes, open paper files or excessive dust. She asserted that with such accommodations she could return to work. Petitioner offered to accept, as likely the easiest solution to providing such an environment, a transfer to a job in a less dusty, better ventilated building using a closed filing system. Since the accommodations to her workplace would be classified as "reasonable physical changes in the workplace," petitioner's evidence established that she is a qualified person with a disability because she could perform the job with reasonable accommodations. Moreover, we note that reasonable accommodations include a change in job duties, therefore even if petitioner had testified that she could not perform some of her job duties, for example working with the old files in the open boxes, she still would be capable of performing her job with reasonable accommodations and therefore be considered a "qualified person with a disability."

In finding of fact number 19, the Commission found that

> [p]etitioner at no time offered any possible or suggested accommodations for Respondent to make to her position as Processing Assistant IV. The only suggestions she made was for Respondent to find her another position. However, at no time did Petitioner provide any information concerning an available position which she would find acceptable.

Upon considering the whole record, we find substantial evidence to support this finding of fact. Though petitioner presented evidence that she researched and applied for other jobs, there is substantial evidence that petitioner's repeated requests were for a transfer to a well-ventilated, low-dust environment without open files.

Respondent asserts that since petitioner did not make additional suggestions for reasonable accommodations, petitioner breached her duty under N.C. Gen. Stat. § 168A-4 and thereby lost her right to reasonable accommodations. The Commission agreed in conclusion of law number three:

> [p]etitioner here failed to provide Respondent with any 'suggestions for such possible accommodations' which would have allowed her to return to her position as Processing Assistant IV with Respondent. Instead, when Respondent proposed their reasonable accommodations, based on the suggestions of Dr. LaForce, Petitioner consistently rejected the proposed accommodations as insufficient, and made no additional proposed accommodations for Respondent to implement, other than finding her another position. Petitioner clearly failed to comply with the duties imposed upon her by the HPPA, and is not entitled to its protection.

We hold this conclusion of law is affected by an error of law. "A qualified person with a disability requesting reasonable accommodation must:" (1) apprise her employer of the condition; (2) "submit any necessary medical documentation;" (3) "make suggestions for possible accommodations as are known to such person with a disability;" and (4) "cooperate in any ensuing discussion and evaluation aimed at determining possible or feasible accommodations." N.C. Gen. Stat. § 168A-4(a) (2001). Once the person has requested accommodation, the employer "shall investigate whether there are reasonable accommodations that can be made and make reasonable accommodations." N.C. Gen. Stat. § 168A-4(b) (2001). In this case, Patricia Hawkins, ("Hawkins"), the manager of employee relations for respondent, testified that upon rejecting respondent's offer of a filter and a mask that "Ms. Campbell should have come up with something else if there was anything else." Petitioner testified that she didn't make a counteroffer to respondent of other reasonable accommodations because "I didn't know of anything else to do." While respondent may have preferred for petitioner to make "additional proposed accommodations for Respondent to implement, other than finding her another position," petitioner's duty was merely to "make suggestions for such possible accommodations as are known to such person with a disability" and "cooperate" in the discussion aimed at determining reasonable accommodations. N.C. Gen. Stat. § 168A-4(a). The duty of investigating reasonable accommodations falls squarely upon respondent. N.C. Gen. Stat. § 168A-4(b). Therefore, we hold that

conclusion of law number three was affected by an error of law, and petitioner did not abdicate her right to reasonable accommodations either by refusing to accept respondent's offers or by failing to offer respondent additional suggestions for what she would consider a reasonable accommodation.

Finding of fact number ten details the 25 January 1999 meeting between petitioner and respondent, noting a letter

> informed [p]etitioner that Respondent was 'prepared to reasonably accommodate her medical needs in order to allow her to perform the duties of her job.' Specifically, Lt. Col. Brinson [petitioner's supervisor] indicated that Petitioner would be removed from the workplace if painting was to occur within the vicinity of her workplace. Petitioner would also be provided a facemask to wear to reduce exposure to dust.

Upon whole record review, we find substantial evidence supports this finding of fact. However, since these accommodations were not the final accommodations offered by respondent, we next address those accommodations respondent contends constitute reasonable accommodation of petitioner's disability.

[4] Finding of fact number fourteen and conclusion of law number five both conclude that Dr. LaForce "examined" petitioner and instructed that she increase her inhaler medication, monitor her peak flow measurements, use a HEPA filter, and wear a face mask. The supporting evidence is the report from Dr. LaForce. Conflicting evidence is the testimony of petitioner stating that Dr. LaForce did not examine her in any respect, but "just asked me questions" for approximately thirty minutes. Since the evidence here supports two "reasonably conflicting views," we must conclude that the superior court erred in determining there was not substantial evidence to support this finding of fact and conclusion of law by the Commission.

[5] The parties agree that the recommendations of Dr. LaForce, as delineated above, were the final accommodations offered to petitioner by respondent. The parties disagree as to whether these accommodations constitute reasonable accommodations, as defined by N.C. Gen. Stat. § 168A-3 (10)a. Regarding this matter, the superior court concluded that the Commission's finding of fact number two, "[r]espondent responded with reasonable accommodations," and number twenty-two, "[r]espondent did make reasonable accommodations for Petitioner as required by law," were unsupported by sub-

stantial evidence and arbitrary and capricious. The superior court also concluded that the Commission's conclusion of law number six, that "[b]ased on the recommendations of Dr. LaForce, Respondent did make reasonable accommodations," was unsupported by substantial evidence, arbitrary and capricious and affected by an error of law. All of these statements are mixed findings of fact and conclusions of law, and as such are review, in respective parts, by whole record review and *de novo*.

We previously set forth the definition of reasonable accommodations provided by N.C. Gen. Stat. § 168A-3(10)a. Generally, the term means those physical and job duty modifications that would accommodate the disabling conditions to enable the qualified person with a disability to return to work. N.C. Gen. Stat. § 168A-3(10)a. Reasonable accommodations do not require an employer to: hire additional employees; reassign duties to other employees without assigning the disabled employee compensable duties; reassign duties away from the disabled employee that would increase "the skill, effort or responsibility" of the other employees; alter seniority policies; provide personal accommodations (for example hearing aids or eyeglasses); make physical changes that would cost more than required by the statutory formula. N.C. Gen. Stat. § 168A-3(10)a. 1-7.

Having defined reasonable accommodations, we now consider whether the accommodations offered complied with the statutory obligation. The superior court found the Commission's conclusion that respondent had provided reasonable accommodations was unsupported by substantial evidence. The supporting evidence consists of a dust report and a report of Dr. LaForce's conclusions from Carolina Case Management.

First, we address the dust report. The report concludes that the dust level in petitioner's former office space was "very low." However, the dust level testing was performed in the break room and another desk located near Petitioner's desk, but Petitioner's desk area was not tested. Despite the fact that the main cause for concern was excessive dust from the open files, "at the time of sampling, boxes were not being opened to retrieve files." Therefore, this report does not provide adequate information regarding the dust level of petitioner's work environment.

Second, we address Dr. LaForce's report. Respondent did not provide Dr. LaForce's testimony, nor other evidence regarding how Dr. LaForce came to the conclusion that a HEPA filter, face mask,

increased asthma medication, and petitioner's monitoring of her peak flow measurements would be reasonable accommodations to enable petitioner to return to work. Petitioner testified:

> Q: Did he [Dr. LaForce] tell you on that occasion that he was going to recommend that you stay in the work site and you receive a mask and that a HEPA filtration system be installed? Did he [Dr. LaForce] tell you that?
>
> A: Yes, he—you know, he said he was basing it on what the—the dust report that was done through DOT and the recommendation that they had made, you know. And he also recommended for me to increase my medication, you know, to help me, you know, get back into the, you know, work environment and, you know, whatever the—you know, the people had said in the dust report, you know, to wear a mask and the HEPA filtration system.

This is the only evidence of why Dr. LaForce recommended these accommodations. Moreover, the report reads: "Dr. LaForce was cognizant of Ms. Campbell's fear of reoccurrence upon returning to this environment and stated he could give no guarantees that this would not happen again." Considering that the last asthma attack brought petitioner close to death and required a five-day hospitalization, this statement is less than reassuring of Dr. LaForce's position that his recommendations constitute reasonable accommodations to enable petitioner's return to work.

In addition to these concerns are the questions raised by Dr. Brown. Dr. Brown treated petitioner's January asthma attack and repeatedly recommended to respondent that petitioner "not be exposed to a work environment with paint fumes or excessive dust" and "not return to work to her old environment under any circumstances." Dr. Brown explained that the dust and fumes would exacerbate petitioner's asthma. Moreover, Dr. Brown wrote to respondent stating "I do not feel that the mask and the filtration system would help." Dr. Brown testified:

> [T]his statement wasn't taken lightly and this letter wasn't written lightly. This came after research of the literature. Based on people [with disabilities like those of petitioner], . . . it basically states that these air filtration systems can decrease the amount of allergens in the air, but basically it's transient and the person can still have an aggravated asthma attack. It does not have to always

be an allergen as to dust or dust mites per se, but the particulate matter coming from old records can be an irritant. . . . Based on the review of the literature, it basically could not tell me 100 percent that this would help this lady and she would not have a severe asthma attack. Based on that and based on the severity of her asthma attack when I saw her, based on my 12 years of seeing patients and seeing many, many, many asthmatics, this woman was very close to death in the emergency room. She was close to being what we call intubated, having to put in a tube for artificial respiration. So in my search of the literature, I did not find anything that would tell me 100 percent that a filtration system would prevent her from having an asthma attack. And, in my opinion, I didn't think it would be unreasonable to put her in another environment that did not have the particulate matter that would be coming from old records.

Moreover, Dr. Brown explained to petitioner that the "HEPA filtration system would not benefit me unless the whole area is filtered. . . . the machine is like a miniature air conditioner that is cold . . . it could enhance the probability of another asthma attack." There is no response presented from Dr. LaForce to address the concerns of Dr. Brown. Moreover, petitioner expressed the following concerns to Dr. LaForce regarding his recommended treatment:

THE COURT: So, did the doctor ask you what medications you were taking?

A: Yes, he asked me what medications I was taking. He asked me to, you know, increase it. And I let him know that asthma medicine, you know, causes you to be nervous. And, you know, kind of hinders you from even performing your job the way you need to whenever you're real nervous and tense.

. . .

Q: Did you express to him [Dr. LaForce] reservations about the filtration system and the mask?

A: Yes. For the mask, it's the problem like I said to, you know, breathe all day in the mask because they have—depending on what kind of mask it is, you can still smell stuff coming through the mask because I've tried several, you know, kind of masks, and that would be hard to do all day. And the HEPA filter, it was just to be put at my desk, and that was confining me to one

> area. You know, it would just eliminate the dust in the area, not all over the building.[1]

Again, there is no evidence that Dr. LaForce's recommendation addressed the concerns of petitioner. Without an explanation for why Dr. LaForce's treatment constitutes reasonable accommodations despite these concerns, we cannot find upon review of the whole record that substantial evidence supports the conclusion that his recommendations would have enabled petitioner to return to work. Therefore, we hold the superior court was correct in determining that these findings of fact and conclusions of law were not supported by substantial evidence.

Having found the Commission's decision was supported by substantial evidence in part, and unsupported by substantial evidence in part, we affirm in part and reverse in part the superior's court's order and remand to the superior court for subsequent remand to the Commission with direction to order the reinstatement of petitioner and such other relief to which petitioner may be entitled consistent with this opinion.

Affirmed in part, reversed in part, remanded.

Judges TIMMONS-GOODSON and HUDSON concur.

Judges TIMMONS-GOODSON and HUDSON concurred in this opinion prior to 31 December 2002.

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1. Petitioner testified on cross examination that she spoke to her case manager at Carolina Case Management regarding the option that respondent filter the entire building, but she said "she had already talked to people within DOT and they said that they was not going to get a filtration system for the whole building. It's not in writing, but that's what I was told on the phone, that they were only getting one for my desk because it cost too much." Respondent clarified that she never spoke to anyone from DOT directly, and petitioner admitted that she only spoke to the case manager, who "was hired by DOT," but not a DOT employee.

REBECCA M. FRIDAY, PLAINTIFF v. UNITED DOMINION REALTY TRUST, INC., T/A AND D/B/A NORTHWINDS APARTMENTS, DEFENDANT

No. COA02-283

(Filed 21 January 2003)

1. Landlord and Tenant— apartment rental—late fee—administrative fee

Although the trial court did not err by finding defendant apartment complex violated N.C.G.S. § 42-46 by charging plaintiff tenant a late fee in excess of five percent of the rental cost, the trial court erred by concluding defendant's $75.00 administrative fee charged if legal papers are filed against the tenant was a violation of the statute, because: (1) even though defendant only charged and plaintiff only paid a $30.00 late fee each time her rent was late, the $31.00 late fee provision of the lease agreement is contrary to the provisions of N.C.G.S. § 42-46(a) by charging a fee in excess of five percent of the rental cost and is therefore void and unenforceable as against public policy; and (2) a lease providing for a fee such as the $75.00 administrative fee reasonably related to an additional expense incurred and not solely relating to rent being late does not violate N.C.G.S. § 42-46.

2. Landlord and Tenant— apartment rental—debt collection—unfair trade practices—attorney fees

Although the trial court did not err by finding that certain actions of defendant apartment complex violated the Unfair and Deceptive Trade Practices Act and the North Carolina Debt Collection Act under N.C.G.S. § 75-54(4), N.C.G.S. § 75-54(6), and N.C.G.S. § 75-55 when it was acting as a debt collector to recover past due rent and related charges against plaintiff tenant, the trial court erred by concluding that the $45.00 defendant sought to recover for the filing of a summary ejectment action was a violation of N.C.G.S. § 75-54(4) and N.C.G.S. § 75-54(6) even though defendant stated in a letter dated 23 March 2000 to plaintiff that the $45.00 was for attorney fees, because the $45.00 is a court cost to be imposed by the trial court and not a debt under N.C.G.S. § 75-50.

3. Landlord and Tenant— apartment rental—unfair and deceptive trade practices—damages

The trial court erred by finding that defendant apartment complex's actions of sending notices to plaintiff tenant regarding

past due rent and allegedly telling tenant's prospective landlord that the tenant still owed it money constituted an unfair and deceptive trade practice; by awarding plaintiff damages for injury to reputation, mental suffering, humiliation, inconvenience, and embarrassment; and by awarding plaintiff damages based on the fact that she had to live with her sister.

4. Costs— attorney fees—new findings and conclusions required

The trial court's award of attorney fees in the amount of $9,000 to plaintiff tenant in an action alleging unfair and deceptive trade practices, a violation of the North Carolina Debt Collection Act, abuse of process, and slander is remanded to the trial court to make new findings and conclusions consistent with the Court of Appeals' opinion.

Appeal by defendant from judgment entered 20 November 2001 by Judge Melzer A. Morgan, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 31 October 2002.

Johnson, Younce, Moore & Moseley, L.L.P., by J. Sam Johnson, Jr., for plaintiff-appellee.

Smith Moore, LLP, by Stephen P. Millikin and Lisa M. Kaminski, for defendant-appellant.

CAMPBELL, Judge.

Northwinds Apartments ("Northwinds") appeals from an order awarding plaintiff, Rebecca Friday, ("Ms. Friday" or "tenant") treble damages and attorney's fees after a bench trial held 8 October 2001. On appeal, Northwinds contends that the trial court erred in five ways: I. By finding that Northwinds violated N.C. Gen. Stat. § 42-46; II. By finding that Northwinds violated the Unfair and Deceptive Trade Practices Act ("UDTPA"); III. By finding that Northwinds violated the North Carolina Debt Collection Act ("NCDCA"); IV. In its findings of fact relating to: the notices tenant received; tenant's appearance at the May 25 2000 magistrate hearing; Northwinds' communications with Wind Lake Apartments; damages assessed for injury to reputation, mental suffering, humiliation, inconvenience and embarrassment; and damages assessed for tenant living with her sister; and V. By awarding plaintiff attorney's fees. We vacate the trial court's judgment and remand to the trial court for an assessment and award of damages consistent with this opinion.

Background Information

Ms. Friday began renting from Northwinds in August 1998. She signed a rental agreement that had the following terms: the rent is due on the first of each month; a $31 late charge will be applied if the rent is paid after the 5th day of the month; reasonable costs of collection will be charged to the tenant; no personal check will be accepted for late payments; an administrative fee of $75 will be added to court costs if legal papers are filed against tenant.

Ms. Friday experienced no problems for the first year that she resided at Northwinds from August 1998 through August 1999. In September 1999, she moved into a larger apartment, which increased her monthly rent to $610. In late 1999, Northwinds increased its $75 administrative fee to $100 for new tenants. Since Ms. Friday had lived there for one year, this increase did not apply to her. In February 2000, however, a rental agent mistakenly applied this increase to Ms. Friday's lease. This then caused a $100 fee to be charged to Ms. Friday's account when Northwinds initiated ejectment actions against her in March 2000, May 2000, and July 2000.

Ms. Friday's rent was late multiple times between December 1999 and July 2000. She would eventually pay the rent and all the $30 late charges and administrative fees that applied. Although the lease stated that a $31 late fee would apply, Northwinds only charged Ms. Friday $30 each time, except for once in May 2000 when a magistrate judge entered a money judgment including a $31 late fee.

On 6 June 2000, a $30 late fee was charged to Ms. Friday. On 16 June 2000, a $1,425 payment was received by Northwinds from White Oak Missionary Baptist Church, causing Ms. Friday's account balance to be $0. She made no rent payment for July. On 13 July 2000, Northwinds filed a complaint against tenant for summary ejectment, including rent due. On 31 July 2000, judgment for possession and $45 in court costs was entered on behalf of Northwinds.

Between December 1999 and July 2000, Northwinds had sent a number of notices regarding overdue rent and other charges. Northwinds obtained three summary ejectment judgments against tenant, two for possession, which Northwinds did not enforce and one which included an award of money damages. Northwinds did not initiate any legal proceeding against Ms. Friday after 13 July 2000. On 5 August 2000, Ms. Friday submitted a personal check to Northwinds for $760. On 7 Aug. 2000, Northwinds returned the check because it

did not represent the total amount due on Ms. Friday's account. Ms. Friday testified that she vacated her apartment "[i]n August." In August 2000, Ms. Friday submitted an application and a $99 administrative fee to Wind Lake Apartments ("Wind Lake"). Upon Wind Lake's rejection of Ms. Friday's application for an apartment, she asked Northwinds what information it had given to Wind Lake. Northwinds said that the only information it gave to Wind Lake was that Ms. Friday had a delinquent balance on her account. On 18 September 2001, Ms. Friday filed a complaint against Northwinds, alleging violations of the UDTPA, violations of the NCDCA, abuse of process and slander. She requested treble and punitive damages. Northwinds answered and counterclaimed for unpaid rent for July and August.

After unsuccessful attempts to settle the case, the parties appeared for a non-jury trial on 8 October 2001. In a final judgment entered 20 November 2001, plaintiff was awarded treble damages in the amount of $26,679 and attorney's fees of $9,000. Since defendant assigns error to the findings of fact and conclusions of law in the final judgment, we will review the trial court's rulings under a non-jury trial standard of review. In light of our decision we need not consider defendant's post-trial motions.

Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 567 S.E.2d 174 (2002), *review denied*, 356 N.C. 434, —— S.E.2d —— (2002) (quoting *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)). We will consider the applicable findings and conclusions according to defendant's assignments of error.

Damages Awarded to Plaintiff

The trial court found as a fact that the following damages should be awarded to plaintiff:

> [N]ine late fees assessed at $30, six being collected ($270); two administrative fees collected ($200); one administrative fee charged ($100); five months rent at $465 [](232[5]); injury to her reputation, and mental suffering, humiliation, inconvenience, and embarrassment ($6,000); total damages $8,893.

The trial court then ordered:

> [T]hat [p]laintiff shall have and recover of the [d]efendant the full sum of $26,679.00, the Court having trebled damages found in the sum of $8,893.00, together with the costs of court as taxed by the Clerk, which costs shall include attorneys fees for plaintiff, in the further sum of $9,000.00, pursuant to GS 75-1.1 et seq. . . . The [p]laintiff shall not recover for abuse of process, for slander, nor for punitive damages, and those actions are dismissed.

After reviewing the record, we conclude that the evidence presented at trial does not support many of the findings of fact made by the trial court as contained in its final judgment. Further, we conclude that the trial court's conclusions are not in accordance with law with respect to certain statutes discussed below. For the reasons stated herein, we hold that the trial court erred in ordering certain damages and in trebling those damages.

I. N.C. Gen. Stat. § 42-46

[1] Defendant first contends that the trial court erred in its finding that Northwinds violated N.C. Gen. Stat. § 42-46 by charging a late fee in excess of 5% of the rental cost by stating in its lease that a late fee of $31 will be charged and by charging an administrative fee of $75 as being a "type of 'late charge,' which would exceed the 5% limitation in GS 42-46(a)." We disagree with respect to the lease provision for a $31 late fee. We agree with respect to the $75 administrative fee.

Late fee

N.C. Gen. Stat. § 42-46 provides:

> (a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the rental payment, whichever is greater, to be charged by the lessor if any rental payment is five days or more late.
>
> . . .
>
> (c) Any provision of a residential rental agreement contrary to the provisions of this section is against the public policy of this State and therefore void and unenforceable.

N.C. Gen. Stat. § 42-46(a) and (c) (2001). Northwinds adopted a computer program that calculates a 5% late payment amount for each tenant. Northwinds' rental agents include a late payment charge

in each tenant's lease agreement. In this case, the computer's calculation of 5% of plaintiff's $610 rent equaled $30.50. The rental agent dealing with Ms. Friday's account rounded the $30.50 charge up to $31.00. Thus, plaintiff's lease agreement stated: "A $31.00 late charge, together with all reasonable costs of collection, including legal fees, shall be payable with any rent not received on or before the fifth day of each calendar month." Despite this statement in the lease, Ms. Friday was never charged and never paid more than $30 for her late rent payment fees. On all the notices that Northwinds sent to Ms. Friday regarding her rent being overdue, the late fee was stated as $30.

We cannot, however, ignore the clear language of the statute that "any provision of a residential rental agreement contrary to the provisions of this section," which includes the provision that a late fee cannot exceed five percent of the rental payment, "is against the public policy of this State and therefore void and unenforceable." N.C. Gen. Stat. § 42-46(c) (2001). We hold that although Northwinds only charged and Ms. Friday only paid a $30 late fee each time her rent was late, the $31 late fee provision of the Northwinds lease agreement is contrary to the provisions of G.S. § 42-46(a) and therefore void and unenforceable as against North Carolina public policy. Thus, plaintiff's account status should reflect a credit of the amount paid, i.e., $30 for each time Ms. Friday submitted a late payment to Northwinds.

Administrative Fee

In addition, Northwinds' lease agreements provide in a "Special Clauses" section: "If legal papers are filed against you, there will be an additional $75.00 administrative fee included to any court cost and rent due." Ms. Friday initialed this provision in her lease agreement dated 1 September 1999. The trial court found as a fact that the $75 administrative fee in the special clauses section of the lease agreement is "a type of 'late charge,' which would exceed the 5% limitation in GS 42-46(a)." We disagree. The $75 administrative fee is not a further type of late fee. The evidence in the record shows that Northwinds' lease agreement provides for a late fee of $31. The $75 fee is designated as an "administrative fee" that is only applied upon legal papers being filed against the tenant. The sole charge for rent being paid after the fifth of the month is $31. Only upon a filing of legal papers will the administrative fee be applied. Thus, the $31 late fee is charged if Ms. Friday does not pay her rent by the fifth of the

month, but the $75 administrative fee is only charged if legal papers are filed against a tenant. A lease providing for a fee reasonably related to such an additional expense incurred and not solely relating to rent being late does not violate G.S. § 42-46. Such a fee is not a subterfuge, as implied by the trial court's ruling, for allowing a lessor to collect a late fee exceeding 5% of the rent payment. Ms. Friday initialed the administrative fee provision in the lease, indicating she agreed to this provision being added into the lease. By signing the lease agreement, she assented to the terms therein, including the administrative fee.

Having decided that the $75 administrative fee is lawful, the issue remains as to Northwinds' liability for the three times it mistakenly charged Ms. Friday $100 instead of $75 when ejectment actions were filed against her. We will consider this issue in our discussion of G.S. §§ 75-54 and -55 below.

II. UDTPA and III. NCDCA

[2] In its next two assignments of error, defendant argues that the trial court erred in finding that Northwinds violated the UDTPA and that it violated the NCDCA. We disagree with respect to certain actions found to be violations by defendant.

The UDTPA is found in N.C. Gen. Stat. Chapter 75. Article 1, § 75-1.1, states:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

N.C. Gen. Stat. § 75-1.1(a) (2001). Article 2 sets out prohibited acts by debt collectors. We hold that defendant, in seeking to recover past due rent and related charges, is a debt collector as defined under the NCDCA, Article 2, § 75-50. This Court has previously held that, "Chapter 75 applies to residential rentals because the rental of residential housing is commerce pursuant to § 75-1.1." *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 446 S.E.2d 826 (1994) (citing *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977)); *see also Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981); *Davis Lake Community Ass'n, Inc. v. Feldmann*, 138 N.C. App. 292, 530 S.E.2d 865 (2000); *Reid v. Ayers*, 138 N.C. App. 261, 531 S.E.2d 231 (2000). Thus, defendant is subject to all provisions of Chapter 75, including Article 2, § 75-56, which states *inter alia*:

> The specific and general provisions of this Article [Article 2 Prohibited Acts by Debt Collectors] shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2 and G.S. 75-16, in private actions or actions instituted by the Attorney General, civil penalties in excess of two thousand dollars ($2,000) shall not be imposed, nor shall damages be trebled for any violation under this Article.

N.C. Gen. Stat. § 75-56 (2001). Thus, for any "unfair or deceptive acts or practices proscribed by" § 75-1.1 that are covered by Chapter 75, Article 2, civil penalties are limited to $2,000 and any damages assessed cannot be trebled. *Id.* If a conclusion of law is made that a debt collector violates a provision of Article 2, then that violation can be "also a violation of GS 75-1.1," as the trial court found in this case with respect to Northwinds' charge for attorney's fees. However, a debt collector who violates a provision of Article 2 and thereby violates G.S. § 75-1.1, is only subject to the damages and penalty provided for in Article 2, § 75-56 and is not subject to the damages provisions in Article 1.

An attempt by a debt collector to collect a late fee for past due rent falls under Article 2 of Chapter 75, the debt collection statute, as a late fee comes within the definition of "debt" under § 75-50. We have concluded that the $31 late fee stated in plaintiff's lease agreement with Northwinds is void as being in violation of G.S. § 42-46. Therefore, because Northwinds is a debt collector under Chapter 75, Article 2, the evidence could support a conclusion that Northwinds violated certain Article 2 provisions by a lease provision that violates G.S. § 42-46 by stating a late fee that exceeds 5% of the rent payment. The evidence supports a finding that Northwinds may have violated the following Article 2 provisions: §§ 75-54(4),(6) and 75-55(2).

§ 75-54(4)

This section provides:

> No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following: . . .
>
> (4) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding[.]

N.C. Gen. Stat. § 75-54(4) (2001).

Over the course of the nine months during which these events occurred, Northwinds filed three summary ejectment actions against Ms. Friday. The first complaint, filed 17 March 2000, requested a total amount of $685 consisting of past due rent of $610 and a $30 late fee and $45 for court costs. On 3 April 2000, the magistrate entered a judgment for possession in Northwinds' favor. On 14 May 2000, Northwinds filed a complaint requesting a total of $785, which included past due rent of $610, a $30 late fee, a $100 administrative fee, and $45 for court costs. The magistrate entered a money judgment of $539, which included a prorated amount of rent from the beginning of May until the date of the judgment plus a $31 late fee. The money judgment did not include the administrative fee or court costs. On 13 July 2000, Northwinds filed a complaint requesting $785, which included the same fees as stated above in reference to the 14 May 2000 complaint. The magistrate entered a judgment in Northwinds' favor for possession only and taxed $45 to Ms. Friday for court costs.

By providing for a late fee that violates G.S. § 42-46, the evidence could support a finding that Northwinds violated G.S. § 75-54(4) by "[f]alsely representing the . . . amount of a debt" against Ms. Friday when defendant requested the late fee in all three of the summary ejectment complaints, or "legal proceeding[s]," against plaintiff.

In addition, the section may be violated by defendant representing to the magistrate court in the latter two summary ejectment complaints that Ms. Friday owed Northwinds a $100 administrative fee when the lease provides for a $75 administrative fee.

With respect to the $45 sought to be recovered when defendant files a summary ejectment action, we note that the trial court found as a fact:

> Defendant designated court costs as attorneys fees because the accounting codes on the computer it uses applied in several states. However, the effect on an unsophisticated debtor of the March 23, 2000 letter was that an attorney fee was being charged where no lawyer had been involved in their dealings to that point. Claiming an attorney fee in the March 23 letter violated GS 75-5[4](4), by falsely representing the character and extent of the debt.

This finding is unsupported by the evidence presented. The notices Northwinds sent to Ms. Friday regarding her past due rent and the other charges incurred stated:

> If you have not paid all money due by [applicable date], eviction papers will be filed and an additional $100.00 administrative fee and $45.00 court cost will be added to any balance that is due.

The $45 is a court cost to be imposed by the trial court and not a "debt" under Article 2, § 75-50. Defendant did not make a false representation in representing to Ms. Friday that the $45 was a court cost that would be added to her balance due. Of all the notices sent to Ms. Friday regarding her overdue charges, only the 23 March 2000 letter lists the $45 as an "Attorney's Fee[]." Our conclusion that the $45 sought as a recovery of court costs is not a "debt" under Chapter 75, Article 2, prevents the finding that defendant violated G.S. § 75-54(4) by referring to the $45 as an "Attorney's Fee" in the 23 March letter. Additionally, the paragraph below the list of transaction descriptions on the notices states that the $45 is a court cost. The character of the $45 court cost is clear and defendant was not in violation of G.S. § 75-4(4) with respect to this item.

§ 75-54(6)

The $31 late fee provision may also be a violation of G.S. § 75-54(6) by defendant "[f]alsely representing that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges." N.C. Gen. Stat. § 75-54(6) (2001). We do not, however, find that the $45 designated as an "attorney fee" in the 23 March 2000 letter or on the account ledger violates Article 2. As stated above, it is a court cost to be imposed by the trial court as part of its judgment and not a "debt" under Article 2, § 75-50. Thus, on remand, Northwinds' late notice regarding a $45 attorney's fee should not be concluded to be in violation of G.S. § 75-54(6).

Again the evidence may support that this section was violated by defendant representing to Ms. Friday through the notices that she owed Northwinds an administrative fee increased to $100 when her lease provides for a $75 administrative fee.

§ 75-55

This section prohibits a debt collector from using unconscionable means to collect or attempt to collect any debt. Subsection (2) states that such means include:

> (2) Collecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services ren-

> dered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge.

N.C. Gen. Stat. § 75-55(2) (2001). The trial court found that, "The false representations by letters of Defendant to Plaintiff violate GS 75-55(2), as attempts to collect a debt by unconscionable means." The evidence could support a conclusion that Northwinds violated this section by "collecting or attempting to collect" a charge "incidental to the principal debt" to which it is not legally entitled by charging void late fees and by twice overstating the administrative fee by $25. *Id.*

IV. Trial court's findings of fact

[3] Defendant next assigns error to the trial court's findings of fact relating to: the notices tenant received; tenant's appearance at the 25 May 2000 magistrate hearing; Northwinds' communications with Wind Lake Apartments; damages assessed for injury to reputation, mental suffering, humiliation, inconvenience and embarrassment; and damages assessed for tenant having to live with her sister. We agree.

The notices tenant received

The trial court found:

> Under the totality of the circumstances here, it is an unfair and deceptive trade practice for a residential landlord to send a series of letters, and engage in a series of summary ejectment filings, over a period of at least five months, seeking not only to recover rent and court costs, but seeking unjustified administrative fees and void late fees, . . .

Although we have concluded that the $31 fee is void as violating G.S. § 42-46, we do not conclude that the evidence supports the above finding. Sending notices to a tenant regarding past due rent is a debt collection practice covered by Article 2 and this Article "exclusively constitute[s] the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article." N.C. Gen. Stat. § 75-56 (2001). The evidence presented is not sufficient to support a finding that Northwinds' notices regarding overdue rent sent to Ms. Friday violate any Article 2 provision, other than as we have already concluded and discussed. Thus, on these facts, sending the notices does not constitute an unfair and deceptive trade practice.

Northwinds' communications with Wind Lake Apartments

The trial court found that "it is an unfair and deceptive trade practice for a residential landlord . . . to tell the tenant's prospective landlord that she still owes it money, and urge the prospective landlord not to rent to plaintiff because she still owes defendant money." After a careful review of the record, we find no evidence to support a finding that Northwinds "urged" Wind Lake Apartments not to rent to plaintiff. This finding is erroneous as unsupported by the evidence.

Even if, at Wind Lake's request, Northwinds stated that Ms. Friday's account with Northwinds was delinquent, this does not, in and of itself, amount to an unfair and deceptive trade practice. The question remains whether or not Ms. Friday was actually delinquent when Wind Lake conferred with Northwinds. Considering the $30 charges void under G.S. § 42-46 and the overcharge of $25 for each $100 administrative fee unlawful, then Ms. Friday's account balance may have been different from what defendant calculated when Wind Lake called Northwinds in August 2000. Our calculations show that from December 1999 through August 2000, Ms. Friday owed Northwinds a total of $5,850 consisting of nine months' rent at $610 per month; three $45 court cost fees; and three $75 administrative fees. Through July 2000, Ms. Friday paid Northwinds a total of $4,740 for the following charges: seven months of rent ($4,270); six $30 late fees ($180); two $45 court cost fees; and two $100 administrative fees. Thus, applying all that she paid to the total she owed for rent in July and August, her balance due was $1,110. If Northwinds had accepted the $760 payment she brought to Northwinds on 5 August 2000, Ms. Friday would still have a $350 outstanding balance remaining on her account. In spite of the charges that defendant wrongfully charged to plaintiff, Northwinds responded correctly and in good faith to Wind Lake's inquiry, that plaintiff's account was delinquent. We conclude that Northwinds did not violate the UDTPA by doing so.

Damages assessed for injury to reputation, mental suffering, humiliation, inconvenience and embarrassment

There is no evidence in the record that supports the trial court's finding that plaintiff suffered "injury to her reputation, and mental suffering, humiliation, inconvenience, and embarrassment." The trial court awarded Ms. Friday $6,000 in damages for these injuries. Plaintiff's complaint filed against defendant included allegations of

slander, which, if proven, would have included a finding of damage to her reputation. However, the trial court specifically found: "Plaintiff has not maintained an action for Slander [sic], as words spoken or published by the participants in a judicial proceeding are absolutely privileged."

The only possible damage to plaintiff's reputation is that the failure to remove the magistrate's judgments against plaintiff could have affected her credit reputation. The trial court found:

> It is an unfair and deceptive trade practice for a residential landlord, who owns some 1500 apartments in the central Piedmont of N.C., to regularly and repeatedly take judgments against delinquent tenants for money damages and court costs, and to fail to notify the clerk to mark those judgments satisfied, as required by GS 1-329(c). . . .

We conclude, however, that defendant did not violate G.S. § 1-239. N.C. Gen. Stat. § 1-239 states:

> (c) Upon receipt by the judgment creditor of any payment of money upon a judgment, the judgment creditor shall within 60 days after receipt of the payment give satisfactory notice thereof to the clerk of the superior court in which the judgment was rendered, . . . If the judgment creditor fails to file the notice required by this subsection within 30 days following written demand by the debtor, he may be required to pay a civil penalty of one hundred dollars ($100.00) in addition to attorneys' fees and any loss caused to the debtor by such failure.

N.C. Gen. Stat. § 1-239(c) (2001). Nothing in this section requires a creditor to file a notice that the judgment has been satisfied until a written demand has been made. There is no finding of fact and no evidence to support a finding that plaintiff ever submitted such a request.

In addition, there is absolutely no evidence in the record that supports the trial court's finding that United Dominion Realty Trust, Inc., d/b/a Northwinds Apartments is engaged in a practice of "regularly and repeatedly" failing to notify the clerk to mark judgments taken against delinquent tenants satisfied.

Finally, there are no allegations that plaintiff suffered from intentional or negligent infliction of emotional distress and there are no facts to support such a conclusion. Nonetheless, the trial court

awarded plaintiff $6,000 for injury to her reputation, mental suffering, humiliation, inconvenience, and embarrassment. This award is not supported by the evidence and not in accordance with law.

Damages assessed for tenant living with her sister

Plaintiff presented evidence that the rent she would have been charged if she rented an apartment with Wind Lake was $465 per month. Upon finding that Northwinds urged Wind Lake "not to rent to plaintiff because she still owes defendant money," the trial court found that plaintiff's damages include "five months rent at $465 [](232[5])." We find no evidence to support such a finding, which then led to an erroneous assessment of damages in the order. Plaintiff paid no rent for five months to her sister, at whose house she resided for five months. Plaintiff presented no evidence that she suffered any injury or is entitled to any damages for living rent free for five months. Thus, the $2325 assessed as damages for five months' rent at $465 is erroneous.

V. Awarding tenant attorney's fees

[4] The trial court awarded plaintiff attorney's fees of $9,000 to be paid by defendant. An award of an attorney's fee is appropriate for a violation of Article 2 in the same manner as any other part of Chapter 75. G.S. § 75-56 does not limit the award of an attorney's fee as allowed by § 75-16.1. However, it will be necessary for the trial court to make new findings and conclusions consistent with this opinion to support an award of an attorney's fee.

We vacate the trial court's order and remand for the trial court to: (1) make findings of fact supported by the evidence; (2) make conclusions of law based on those findings; and (3) reassess and award the appropriate amount of damages in accordance with this opinion.

Vacated and remanded.

Judges WALKER and McCULLOUGH concur.

Judges WALKER and McCULLOUGH concurred in this opinion prior to 31 December 2002.

CAROLYN G. SALTER, PLAINTIFF v. E & J HEALTHCARE, INC., D/B/A GREYSTONE MANOR, DEFENDANTS

No. COA02-88

(Filed 21 January 2003)

1. Employer and Employee— wrongful discharge—voluntariness—failure to sign letter

Plaintiff employee was terminated from her employment and did not voluntarily resign from her employment even though she failed to sign a letter given to her by defendant employer on 23 August 1999 giving plaintiff the options of signing the letter requiring her to take a leave of absence while her foot was injured with the hope that her job would be open when she returned or the option of not signing the letter and be fired.

2. Employer and Employee— wrongful discharge—retaliation for filing workers' compensation claim

The trial court did not err in a wrongful discharge action by granting summary judgment in favor of defendant employer even though plaintiff employee contends there was a genuine issue of material fact as to whether defendant took retaliatory action against her in violation of N.C.G.S. § 95-240 based on plaintiff filing a workers' compensation claim, because: (1) there is no close temporal connection between plaintiff's instituting a workers' compensation claim and her termination; (2) plaintiff offers little more than mere speculation that defendant gave her a letter requiring her to sign the letter and take a leave of absence or be terminated based on her filing a workers' compensation claim; (3) plaintiff was allowed to return to work after filing her workers' compensation claim, and defendant filed all necessary paperwork for plaintiff to receive benefits and plaintiff received them; and (4) it was not until the second injury occurred and plaintiff was out of work for a full week following a sustained period of light duty was she offered the letter, and plaintiff's assertions that one of defendant's employees was less than cordial does not raise a triable material issue of fact.

3. Employer and Employee— wrongful discharge—public policy violation—advocacy of Adult Care Home Residents' Bill of Rights

The trial court did not err by granting summary judgment in favor of defendant employer on plaintiff's claim for wrongful dis-

charge in violation of public policy under N.C.G.S. § 131D-21 based on plaintiff's contention that she was fired due to her activities in advocating the rights of patients at defendant's nursing homes under the Adult Care Home Residents' Bill of Rights, because: (1) there is no causal connection between plaintiff's alleged advocation and her termination; and (2) there must be something more than mere speculation that an employee was fired for an improper purpose.

4. Employer and Employee— wrongful discharge—public policy violation—filing of workers' compensation claim

The trial court did not err by granting summary judgment in favor of defendant employer on plaintiff employee's claim for wrongful discharge in violation of public policy under N.C.G.S. § 97-1 based on plaintiff's filing of a workers' compensation claim, because there must be something more than mere speculation that an employee was fired for an improper purpose.

Appeal by plaintiff from judgment entered 2 November 2001 by Judge Jack A. Thompson at the 15 October 2001 Civil Term of Robeson County Superior Court. Heard in the Court of Appeals 18 September 2002.

Distefano & Erca, by Alison A. Erca, for plaintiff appellant.

Hopper & Hicks, LLP, by William L. Hopper, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Carolyn G. Salter appeals from an order granting summary judgment to defendant E & J Healthcare, Inc., d/b/a/ Greystone Manor entered 2 November 2001. Plaintiff filed suit on 12 July 2000 setting forth three claims: (1) wrongful discharge in violation of public policy based on N.C. Gen. Stat. § 97-1; (2) wrongful discharge in violation of public policy based on N.C. Gen. Stat. § 131D-19; and (3) retaliatory discharge in violation of the Retaliatory Employment Discrimination Act (REDA). The facts surrounding the parties and the complaint follow.

Defendant operates four rest home facilities in eastern North Carolina. One of these facilities is Greystone Manor, located in Red Springs, Robeson County.

Plaintiff holds a B.S. Degree in Psychology with a minor in gerontology. Plaintiff had been employed by defendant at the Greystone Manor as the activities coordinator since late 1996 or early 1997. She was also a member of the management team and did public relations for the facility.

While at work on 2 June 1999, plaintiff was exiting some offices when she slipped and fell on a wet floor. As a result of the fall, plaintiff broke her foot. While at the hospital following the accident, plaintiff attempted to give her insurance information to the hospital. She was informed by the hospital staff that she would be covered by workers' compensation, and that the hospital had no use for her own insurance information. Thus, it was at this time that plaintiff apparently learned that she was entitled to workers' compensation from defendant.

The facts surrounding plaintiff's workers' compensation claim differ between the parties. Plaintiff contends that on 3 June 1999, she returned to work and began filling out workers' compensation forms. In her deposition, plaintiff testified that her supervisor at Greystone Manor, Frances Ivey, believed that the slip and fall was plaintiff's fault. Plaintiff further testified that Ms. Ivey informed her "that it was very hard to get workman's comp, that it was hard to prove and that it was just a hassle; and that it was just going to be a very difficult situation." In addition, plaintiff alleged in her complaint that Ms. Ivey informed a coworker not to report to the company president that warning signs were not visible at the place where plaintiff fell. Plaintiff accuses Ms. Ivey of having a general aversion to her after the workers' compensation incident.

Frances Ivey denied making any such statements or having any such aversion toward plaintiff. Ms. Ivey testified in her deposition to the fact that she was in charge of filing workers' compensation claims at Greystone Manor, and that she did in fact fill out the paperwork for plaintiff. Throughout it has never been contested that plaintiff has failed to get all the workers' compensation to which she was entitled.

After plaintiff's injury, she continued to work at Greystone Manor, although she only performed light duty. Plaintiff has alleged that Ms. Ivey continued to be skeptical of the extent of her injury, while Ms. Ivey denied such. After two and one-half months of light duty, on 16 August 1999, plaintiff reinjured her foot while away from work when she tripped at her home. Her physician prescribed

one week of inactivity, spanning from 16 August to 23 August 1999. Plaintiff had a scheduled appointment with her physician on 24 August 1999, and planned to return to work after this appointment.

Prior to August 24th, however, plaintiff was summoned to work to pick up her check and discuss some things with Frances Ivey. On 23 August 1999, Ms. Ivey gave plaintiff her check along with a letter that had been faxed to her from defendant's head office. The letter stated:

> We acknowledge that you have been out of work for a period of time due to a foot injury. Our company will consider your leave of absence appropriate regarding the nature of the injury.
>
> Any leave of absence granted shall be without pay.
>
> You will be given first consideration for the position which was left, but cannot guarantee a job when the leave of absence is over. If such is available, you will be reinstated with no loss of seniority or pay status. If such a position is not available, re-instatement at a lessor position with a corresponding decrease in pay may be necessary. Eligibility for re-instatement is solely dependent upon availability of appropriate job openings, and the employer has no obligation beyond this.
>
> . . . .
>
> This release shall be binding upon and inure to the benefit of the parties, their successors, assigns, personal representatives, and heirs, and without limiting the generality of the foregoing officers, directors, employees and agents of the Company.
>
> Refusal to follow this procedure shall be considered insubordination and immediate dismissal.

Plaintiff claimed that Ms. Ivey demanded that she sign the letter, and that refusal to sign it immediately would result in termination. Ms. Ivey, after the fact, claims that the letter was intended for plaintiff to sign and take an unpaid leave of absence until she was able to work full-time. However, plaintiff submits that the letter is clear that she was to take a leave of absence with no assurances of a job when she returned if she signed, or she was to be immediately terminated if she refused to sign. Plaintiff refused to sign the letter. Instead, plaintiff asked to be allowed to remove her belongings from the premises. She was allowed to do so, as long as she told no one what had transpired. Ms. Ivey testified that plaintiff informed her that she had talked to a

lawyer about a potential suit and had decided against it, but now had changed her mind after receiving the letter.

In addition to her workers' compensation dispute with defendant's management, plaintiff also alleged in her complaint that throughout her employment with defendant, she was an advocate for the residents at the facility. According to plaintiff, this caused a great deal of resentment between her and Ms. Ivey, independent from the workers' compensation incident. Plaintiff alleged in her complaint that "Ms. Ivey, by her words and conduct, implied to plaintiff that plaintiff's advocacy of residents' rights was a threat to plaintiff's continued employment with defendant." Indeed, plaintiff testified that Ms. Ivey informed her that the nursing home business "was all about money and not residents, and if [plaintiff] cared more for the residents, [she] wouldn't have a future in this business."

It is on all these facts that plaintiff filed her complaint. Defendant filed its answer on 14 September 2000, and its motion for summary judgment on 26 June 2001, on the ground that there was no genuine issue as to any material fact. Judge Jack Thompson heard the motion and granted defendant summary judgment on 2 November 2001. Plaintiff appeals on the ground that there are genuine issues of material fact.

> Summary judgment is proper where there is no genuine issue as to any material fact. An issue is genuine where it is supported by substantial evidence. A genuine issue of material fact is of such a nature as to affect the outcome of the action. The moving party bears the burden of establishing the lack of a triable issue of fact. The motion must be denied where the non-moving party shows an actual dispute as to one or more material issues. As a general principle, summary judgment is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue.

Johnson v. Trustees of Durham Tech. Cmty. Coll., 139 N.C. App. 676, 680-81, 535 S.E.2d 357, 361 (citations omitted), *appeal dismissed, disc. review denied*, 353 N.C. 265, 546 S.E.2d 102 (2000).

I.

[1] Prior to addressing plaintiff's causes of action, there is an initial point of contention between the parties as to whether plaintiff voluntarily resigned or was in fact terminated as a result of the events on 23 August 1999. Plaintiff claims that she was terminated

because she did not sign the letter, while defendant maintains that plaintiff voluntarily ceased her employment by failing to comply with defendant's policies.

It appears to this Court that the letter given to plaintiff on 23 August 1999 left her with two options: (1) sign the letter, and be put on leave of absence and get better, then hope she can get her job back since it was clearly not promised that it would be held open; or (2) not sign the letter and be fired. While defendant appears to claim that it was prepared to immediately take plaintiff back as a full-time employee as soon as she was ready to return to work, nothing in that letter sustains this assertion. By the letter's terms and Ms. Ivey's explanation of the terms, failure to sign meant immediate dismissal. Plaintiff failed to sign. While the decision not to sign was voluntary on her part, defendant was the party who dictated the result here by the language in the letter. Coming into court and now contending that by voluntarily failing to sign the letter plaintiff has somehow foregone any potential rights is disingenuous.

Plaintiff was terminated from her employment with defendant when she did not sign the letter, as dictated by its terms. Thus, we address the balance of plaintiff's appeal.

II.

[2] Plaintiff contends that the trial court erred in granting summary judgment to defendant because genuine issues of material fact existed as to whether defendant took retaliatory action against her because she filed a workers' compensation claim, in violation of REDA, N.C. Gen. Stat. § 95-240, *et. seq.* (2001).

> The North Carolina Retaliatory Employment Discrimination Act ("REDA"), enacted in 1992, prohibits discrimination against an employee who has filed a workers' compensation claim. In pertinent part, the Act provides:
>
> > (a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:
> >
> > (1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
> >
> > a. Chapter 97 of the General Statutes.

> REDA replaced North Carolina General Statutes section 97-6.1, the purpose of which was to promote an open environment in which employees could pursue remedies under the Workers' Compensation Act without fear of retaliation from their employers. The former law merely protected employees against discharge and demotion. By enacting REDA, however, the General Assembly expanded the definition of retaliation to include "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment."
>
> In a claim brought pursuant to the former provision, section 97-6.1(a), this Court stated that an employee bears the burden of proof in retaliatory discharge actions. "The statute does not prohibit all discharges of employees who are involved in a workers' compensation claim, it only prohibits those discharges made *because* the employee exercises his compensation rights." Furthermore, our appellate courts indicated in applying the former provision that a plaintiff fails to make out a case of retaliatory action where there is no close temporal connection between the filing of the claim and the alleged retaliatory act.

Johnson, 139 N.C. App. at 681-82, 535 S.E.2d at 361 (citations omitted).

Plaintiff submits that she had filed a workers' compensation claim which her employer tried to discourage, and was working light duty and receiving benefits when she was presented with a release of claims to sign, or, alternatively, with dismissal. It is noted that plaintiff has complied with procedural requirements with the N.C. Commission of Labor, as required by REDA.

It is undisputed that plaintiff filed a workers' compensation claim and received benefits. Plaintiff then returned to work on light duty for two and one-half months. After that period of time, she reinjured her foot away from work, and was out for a week before being given the option of being placed on administrative leave.

Several things are wrong with plaintiff's claim. First, there is no close temporal connection between plaintiff's instituting a workers' compensation claim and her termination. *Johnson*, 139 N.C. App. at 683, 535 S.E.2d at 362 (no close temporal connection between claim and adverse action after one year); *Shaffner v. Westinghouse Electric*

Corp., 101 N.C. App. 213, 216, 398 S.E.2d 657, 659 (1990), *disc. review denied*, 328 N.C. 333, 402 S.E.2d 839 (1991) (no close temporal connection between claim, 18 April 1987, and termination, 29 June 1987, approximately two and one-half months). Second, plaintiff offers little more than mere speculation that defendant gave her the letter because she filed a workers' compensation claim. Nothing in the letter refers to workers' compensation. Plaintiff was allowed to return to work after filing her workers' compensation claim. Defendant filed all necessary papers for plaintiff to receive benefits, and plaintiff indeed received them. It was not until the second injury occurred and plaintiff was out of work for a full week following a sustained period of light duty was she offered the letter. To recover, plaintiff "must show that her discharge was caused by her good faith institution of the workers' compensation proceedings . . . ." *Abels v. Renfro Corp.*, 108 N.C. App. 135, 143, 423 S.E.2d 479, 483 (1992), *aff'd in part, rev'd in part*, 335 N.C. 209, 436 S.E.2d 822 (1993). This she fails to do. Despite plaintiff's assertions that one of defendant's employees was less than cordial, her allegations do not raise a triable, material issue of fact. *See Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882, *disc. review denied*, 325 N.C. 704, 388 S.E.2d 449 (1989) ("This Court is not unmindful that circumstantial evidence is often the only evidence available to show retaliation against protected activity. Nevertheless, the causal connection must be something more than speculation . . . ."). Thus, summary judgment on plaintiff's REDA claim is affirmed.

III.

Plaintiff's final assignments of error contend that the trial court erred by granting summary judgment on its other two causes of action: Wrongful discharge in violation of public policy based on N.C. Gen. Stat. § 131D-21 (2001); and wrongful discharge in violation of public policy based on N.C. Gen. Stat. § 97-1 (2001).

> North Carolina is an employment-at-will state. Our Supreme Court "has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." Limited exceptions have been adopted to this bright-line rule.
>
> > First, as stated above, parties can remove the at-will presumption by specifying a definite period of employment con-

> tractually. Second, federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer. Finally, this Court has recognized a public-policy exception to the employment-at-will rule.
>
> Public policy is defined as "the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." There is no specific list of what actions constitute a violation of public policy. However, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer[']s request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy[.]

Ridenhour v. IBM Corp., 132 N.C. App. 563, 568-69, 512 S.E.2d 774, 778 (citations omitted), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999). Under this public policy exception, the employee has the burden of pleading and proving that the employee's dismissal occurred for a reason that violates public policy.

> To establish a *prima facie* case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action.

Brewer v. Cabarrus Plastics, Inc., 130 N.C. App. 681, 690, 504 S.E.2d 580, 586 (1998), *disc. review denied*, 350 N.C. 91, 527 S.E.2d 662 (1999).

[3] Plaintiff's first argument under the public policy exception is that she was fired because of her activities in advocating the rights of patients at defendant's nursing homes in accordance with the Adult Care Home Residents' Bill of Rights, N.C. Gen. Stat. § 131D-19, *et. seq.* (2001).

The intent behind the Adult Care Home Residents' Bill of Rights is clearly set forth in N.C. Gen. Stat. § 131D-19 (2001). The Bill of Rights is to "promote the interests and well-being of the residents in adult care homes," to see that the residents' civil and religious liberties are not infringed, and ensure that the "facility shall encourage and assist the resident in the fullest possible exercise of these rights."

N.C. Gen. Stat. § 131D-19. This statute also expresses its intent to develop rules, through the Social Security Commission, to "encourage every resident's quality of life, autonomy, privacy, independence, respect, and dignity" and provide the resident's diverse housing opportunities, freedom from "abuse, neglect, and exploitation," care that focuses more on the individual, with state and county oversight. *Id.* N.C. Gen. Stat. § 131D-21 provides the rights that every person shall have while a resident of an adult care facility. N.C. Gen. Stat. § 131D-21.

It appears clear to this Court that a situation could easily arise in which an employee could base a public policy exception to the employment at-will doctrine upon violations of the Adult Care Home Residents' Bill of Rights. *See Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 319-22, 551 S.E.2d 179, 183-84, *aff'd*, 354 N.C. 568, 557 S.E.2d 528 (2001) (A plaintiff must identify a specified North Carolina public policy that was violated by an employer in discharging the employee.). If an employee participated in advocating patient's rights under the Adult Care Home Resident's Bill of Rights and suffered retaliation from the employer, a cause of action could presumably be maintained.

However, plaintiff in the present case is unable to do so because there is no causal connection between her alleged advocation and her termination. Plaintiff alleged that residents were banned from receiving food from outside the facility, some residents had their water intake limited, and that Ms. Ivey was overly controlling the patients, informing plaintiff that the adult care facility business was all about money and not the residents. While we abhor the alleged callousness of plaintiff's supervisor, there is no evidence that any violations of the Bill of Rights occurred. Indeed, plaintiff admitted not knowing the dietary needs and requirements of the patients, nor knowing of any incident where defendant failed to meet such requirements. There are no substantiated violations on the record. "Any exception to the at will employment doctrine 'should be adopted only with substantial justification grounded in compelling considerations of public policy.' " *Considine*, 145 N.C. App. at 321, 551 S.E.2d at 184 (quoting *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 334, 493 S.E.2d 420, 423 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998)).

Further, there is still nothing connecting these actions to her termination. Again, we note that there must be something more before us than mere speculation that an employee was fired for an

improper purpose. *See Brooks*, 95 N.C. App. at 237, 382 S.E.2d at 882; *see also Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 571, 515 S.E.2d 438, 441 (1999) ("[S]omething more than a mere statutory violation is required to sustain claim . . . . An employer wrongfully discharges an at-will employee if the termination is done for 'an *unlawful reason* or *purpose* that contravenes public policy.' "). *Id.* (citation omitted). Even when taken in the light most favorable to plaintiff, the evidence does not sustain a violation of the Adult Care Home Resident's Bill of Rights, nor does it show that plaintiff's advocacy was a substantial factor in her termination. Thus, plaintiff's argument fails on this point.

[4] Plaintiff's second argument under the public policy exception is that she was fired because she filed a workers' compensation claim under N.C. Gen. Stat. § 97-1, *et seq.*, the North Carolina Workers' Compensation Act, and that it is against the public policy of North Carolina to retaliate against an employee for filing a workers' compensation claim.

The public policy to which plaintiff relies upon in this argument is the very public policy behind REDA when it was created by the General Assembly, as discussed above in section II, and of its predecessor, N.C. Gen. Stat. § 97-6.1. In light of this fact, defendant contends that North Carolina does not recognize a public policy exception to the employment at-will doctrine distinct from a retaliatory discharge claim under REDA. Defendant argues that because the General Assembly "has expressed its intent to supplant the common law with exclusive statutory remedies, then common law actions, such as wrongful discharge, will be precluded." *See Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 356, 416 S.E.2d 166, 171 (1992).

Defendant's argument overlooks the portion of REDA in N.C. Gen. Stat. § 95-244, entitled "Effect of Article on other rights." N.C. Gen. Stat. § 95-244 (2001). It provides:

> Nothing in this Article shall be deemed to diminish the rights or remedies of any employee under any collective bargaining agreement, employment contract, other statutory rights or remedies, or at common law.

Id. It appears that our General Assembly not only did not expressly supplant common law remedies, it expressly allowed them. Thus, it would be possible for a plaintiff to maintain a REDA claim *and* a claim for wrongful discharge for filing a workers' compensation suit

based on the public policy exception to employment at-will doctrine *if* such a claim was tenable at common law. *See Amos*, 331 N.C. at 357, 416 S.E.2d at 171 ("The availability of alternative common law and statutory remedies, we believe, supplements rather than hinders the ultimate goal of protecting employees who have been fired in violation of public policy.").

In 1978, this Court issued its decision of *Dockery v. Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *disc. review denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). The plaintiff filed a complaint against defendant, his former employer, alleging that he "was fired from his job in retaliation for his pursuit of remedies made available to him by the North Carolina Workmen's Compensation Act after receiving injuries on the job." *Id.* at 293, 244 S.E.2d at 273. The question before this Court was "whether the plaintiff's complaint sets forth a claim upon which relief can be granted[.]" *Id.* at 294, 244 S.E.2d at 273. This Court rejected the plaintiff's theory of "retaliatory discharge" as a device to avoid statutory workers' compensation obligations under N.C. Gen. Stat. § 97-6, which is the same today as it was then. It held that in the absence of a statutory provision allowing such a suit, being indicative of the General Assembly's intent, the employment at-will doctrine overcomes a claim for retaliatory discharge. Essentially, the *Dockery* holding is that there is no common law right to retaliatory discharge as an exception to the at-will employment doctrine.

Since the courts in *Dockery* left the problem to the General Assembly to fix, *see id.* at 298-99, 244 S.E.2d at 276-77, it did so the next year in 1979 by enacting N.C. Gen. Stat. § 97-6.1.[1] (Later, after a disastrous fire at a plant in Hamlet, N.C., the General Assembly repealed § 97-6.1 and strengthened the cause of action by creating REDA in 1992.)

After § 97-6.1 was enacted, this Court revisited the area in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review*

1. § 97-6.1 **Protection of claimants from discharge or demotion by employers.**

(a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

(b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

denied, 314 N.C. 331, 333 S.E.2d 490 (1985), *overruled on other grounds*, 347 N.C. 329, 493 S.E.2d 420 (1997). *Sides* broke with the *Dockery* strict adherence to the employment at-will doctrine, noting the General Assembly's willingness to alter the General Statutes to protect the rights which it had established. Thus, *Sides* assumed that the General Assembly favored the enforcement of the law by "all legitimate and customary means," and held that:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Id. at 342, 328 S.E.2d at 826.

This reasoning was adopted by our Supreme Court in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). Thus, the wrongful discharge cause of action and public policy exception to the employment at-will doctrine became part of the common law of North Carolina. *See Amos*, 331 N.C. 348, 416 S.E.2d 166. Plaintiffs are now allowed to maintain suits under narrow exceptions to the at-will doctrine grounded in public policy. *See, e.g. Deerman v. Beverly California Corp.*, 135 N.C. App. 1, 518 S.E.2d 804 (1999), *disc. review denied*, 351 N.C. 353, 542 S.E.2d 208 (2000); *Vereen v. Holden*, 121 N.C. App. 779, 468 S.E.2d 471 (1996), *disc. review allowed and remanded*, 345 N.C. 646, 483 S.E.2d 719 (1997); *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992).

Thus, it arguably appears that a claim of wrongful discharge based upon North Carolina public policy of not punishing employees for exercising their statutory rights under the Workers' Compensation Act was tenable at common law. However, we do not decide that issue definitively here, because even if such a cause of action exists, plaintiff's evidence would still fail. As is the problem with plaintiff's other claims, mere speculation will not survive summary judgment.

This assignment of error is overruled.

Affirmed.

Judges TYSON and BRYANT concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER QUINN EARWOOD

No. COA02-48

(Filed 21 January 2003)

1. Confessions and Incriminating Statements— custody—voluntariness—motion to suppress

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress his statements made to various police officers, because: (1) the statements were voluntarily made as either spontaneous or excited utterances when defendant came to the police looking for help after he had shot himself and spontaneously and voluntarily informed the officers that defendant had killed his mother; (2) defendant was not in custody at any time during these statements, and even if he had been, it is not an interrogation by officers to ask an individual to clarify volunteered spontaneous utterances; and (3) there were no circumstances of compulsion or of coercive police practices.

2. Search and Seizure— warrantless search—motion to suppress—plain view

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress the evidence taken by officers from the home of the victim on 13 August 1998 without a search warrant, because: (1) officers were responding to information provided to them by the eventual defendant; (2) the officers' entry into the house was lawful since officers are authorized to enter buildings when they believe it reasonably necessary to save a life or prevent serious bodily harm; (3) it was not an illegal search and seizure for the detectives to come into the house later while it was still secure to collect the evidence that had already been seized; and (4) defendant did not object to anything that was seized as not being in plain view.

3. Evidence— hearsay—state of mind exception—victim afraid of defendant

The trial court did not err in a first-degree murder case by allowing under the state of mind exception of N.C.G.S. § 8C-1, Rule 803(3) the testimony of two witnesses that the victim was afraid that her son would kill her based upon their conversations with the victim, because the witnesses adequately described the emotional state of the victim.

4. Homicide— first-degree murder—felony murder—robbery with a dangerous weapon—sufficiency of evidence

The trial court did not err by submitting to the jury the issue of first-degree murder under the felony murder theory even though defendant contends there was insufficient evidence of the underlying felony of robbery with a dangerous weapon, because: (1) the State introduced sufficient evidence to give a reasonable inference that defendant killed his victim mother to take her vehicle since defendant was not going to get a vehicle of his own; and (2) it is irrelevant that defendant stole the car after killing the victim.

5. Homicide— felony murder—armed robbery—jury instruction—doctrine of recent possession

The trial court did not err in a first-degree felony murder case based upon the felony of armed robbery by submitting to the jury the instruction on the doctrine of recent possession based on defendant's possession of the victim's car after the victim was murdered, because the evidence showed that defendant wanted a car, argued with the victim about purchasing one for him, killed the victim, and drove off with her car before wrecking it.

Appeal by defendant from judgment entered 16 February 2001 by Judge James R. Vosburgh in Davidson County Superior Court. Heard in the Court of Appeals 18 September 2002.

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

Charles H. Harp, II, for defendant appellant.

McCULLOUGH, Judge.

Defendant Christopher Quinn Earwood was indicted for first-degree murder of his mother, Lori Earwood, on 31 August 1998. Defendant was tried before The Honorable James R. Vosburg at the 5 February 2001 Criminal Session of Davidson County Superior Court.

At trial, the evidence for the State tended to show that at approximately 1:25 a.m. on 13 August 1998, two officers from the Kannapolis Police Department were sitting in their respective vehicles when defendant approached them. The officers noticed that defendant's shirt had bloodstains on it. Defendant stated that he had shot himself

and that he needed help. They informed defendant to continue approaching with his hands raised. One of the officers asked about the location of the gun to determine if defendant was armed. Defendant replied that he left it in a vehicle that he had abandoned on I-85. While one officer was tending to his wounds, defendant informed the other officer that he had shot his mother. While questioning defendant, the officer got her address in Lexington and sent it to the authorities in Davidson County. Rowan County EMS arrived shortly thereafter, treated defendant, and took him to the hospital without a police escort. At this point, the officer who had been speaking with defendant set off to locate the abandoned vehicle.

A trooper of the North Carolina State Highway Patrol had located the vehicle, a white Nissan Altima, shortly after midnight. It was wrecked in the median of I-85. When it was found, the doors were open, the lights were on, the engine was warm and blood splatters were on the interior. The trooper was dispatched to the location where the Kannapolis police officers were talking with defendant. The trooper arrived as defendant was in the ambulance, and spoke with him about the vehicle. Defendant informed him that the vehicle was his mother's, and he had been traveling at a high rate of speed, about 100 m.p.h., in an attempt to kill himself. He told the trooper that he had killed his mother.

At 1:54 a.m. on the same morning, a deputy of the Davidson County Sheriff's Department arrived at the home of Lori Earwood, defendant's mother, to perform a check on the premises and the occupant because of the reported shooting. A lieutenant arrived on the scene to assist. The officers received no response from inside the home after knocking on the front and back doors. The officers returned to the front porch and found what appeared to be blood. The officers then entered the house presumably to assist anyone who may have been inside. This was at approximately 2:32 a.m. Inside they found the body of Lori Earwood lying on the floor, apparently deceased. Handcuffs were attached to her left wrist. Davidson County EMS later confirmed that the victim was dead.

At 3:10 a.m., a detective from the Davidson County Police Department arrived on the scene to collect evidence. The detective knew the victim, as she was a deputy in the Davidson County Sheriff Department. The detective found evidence of a struggle, fired shell casings near the body, wounds on the hands of the victim, and the handcuffs. The detective also searched the wrecked Altima after

obtaining a search warrant. That search produced a .25 caliber Beretta, $175 in cash, and three checks made out to the victim.

Around 3:30 a.m., defendant was placed in custody for the murder of the victim while at the hospital receiving treatment.

The victim was determined to have five gunshot wounds, one of which was to the head. The wounds to her hands were noted as defensive wounds.

The State Bureau of Investigation (SBI) matched bullets from the victim's body and the shell casings found at the scene to the gun found in the vehicle. The SBI also matched blood samples from the inside of the victim's home, the victim's clothes and vehicle to defendant.

Witnesses for the State testified that defendant came to live with the victim on 2 August 1998. The victim feared her son and kept a deadbolt lock on her bedroom door. The victim also owned two handguns. In addition, the victim had informed one of her friends that she and defendant had an argument on the morning of 12 August 1998, and that it was her belief that defendant would kill her. The victim arrived home at approximately 11:20 p.m. on that day, shortly after which the next door neighbor heard loud noises described as "boom, boom, boom" from within the home.

Defendant did not present any evidence. The jury found him guilty of first-degree murder under the felony murder rule on 15 February 2001. He was sentenced to life without parole on 16 February 2001.

Defendant presents the following questions on appeal: The trial court committed reversible error by (I) denying its motion to suppress statements made by defendant and by allowing testimony of those statements into evidence; (II) denying its motion to suppress evidence obtained from his residence without a warrant and by allowing testimony and the introduction of evidence from said warrantless search; (III) allowing the testimony of Lisa Kaufman and Judy Lawrence regarding conversations with the victim pursuant to Rule 803(3); (IV) instructing and submitting to the jury the issue of first-degree murder under the theory of felony-murder; and (V) instructing the jury on the doctrine of recent possession; and (VI) denying its motion for mistrial based on the introduction of inadmissible evidence.

I.

[1] In his first assignment of error, defendant contends that the trial court erred by denying his motion to suppress his statements made to the various police officers.

> "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.' " " However, the determination of whether a defendant was in custody, based on those findings of fact, is a question of law that is fully reviewable by this Court. Likewise, a trial court's conclusion that a defendant's statements were voluntary is a conclusion of law that is fully reviewable on appeal.
>
> It is well established that *Miranda* warnings are required only when a defendant is subjected to custodial interrogation. In *Miranda*, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." "[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.' "

State v. Patterson, 146 N.C. App. 113, 120-21, 552 S.E.2d 246, 253 (citations omitted), *disc. review denied*, 354 N.C. 578, 559 S.E.2d 548 (2001).

Defendant argues that his statements to the Kannapolis police officers and the state trooper should be suppressed because they were not voluntarily made and he was in their custody at the time. As to the officers, defendant stresses that he was in the officers presence, was asked to approach the vehicle with his hands above his head, and was seated on the ground in front of a police vehicle when he was questioned by the officers. They continued to question him after he admitted that he had done "something bad" and had "shot someone" without giving him the benefit of a *Miranda* warning. As to the trooper, defendant points out that he was in the back of the ambulance while being questioned, again without the benefit of any *Miranda* warnings. Defendant contends that at no time was he free to leave.

The trial court ruled that the statements were voluntarily made, being "either spontaneous or excited utterances," and that defendant was not in custody. We agree.

The key here is that defendant came to the police looking for help because he had shot himself. When officers attempted to ascertain what happened to him, defendant spontaneously and voluntarily informed them that he killed his mother. The same thing happened while defendant was in the ambulance, when he volunteered the same information to the trooper. We agree with the trial court that the record shows that defendant was not in custody at any time during these statements. Even if defendant had been in custody, it is not an interrogation by police officers to ask an individual to clarify volunteered spontaneous utterances. *See State v. Porter*, 303 N.C. 680, 692, 281 S.E.2d 377, 385-86 (1981) ("[T]o constitute an 'interrogation' within the meaning of *Miranda*, the conduct of the police must involve a measure of compulsion."); *see also State v. Sykes*, 285 N.C. 202, 205, 203 S.E.2d 849, 851 (1974) (*Miranda* warnings are not required when police activity is limited to a "general on-the-scene investigation."). There are no circumstances of compulsion nor of coercive police practices present in this case.

The trial court's findings are based on competent evidence, and this assignment of error is overruled.

II.

[2] Defendant's second assignment of error contends that the trial court erred by denying his motion to suppress the evidence taken from the home of the victim on 13 August 1998.

In this case, the police did not obtain a search warrant at any time during the investigation of the house of the victim on 13 August 1998. This investigation started around 2:30 a.m. with the entry by police and lasted until almost noon of 13 August 1998. Defendant argues that the investigation was an illegal search because there was no warrant, nor are any of the exceptions for the warrant requirement met as defendant had been staying at the home since 2 August 1998 and never gave consent nor were there any exigent circumstances.

The trial court denied defendant's motion based on *State v. Jolley*, 312 N.C. 296, 321 S.E.2d 883 (1984), *cert. denied*, 470 U.S. 1051, 84 L. Ed. 2d 816 (1985). In that case, our Supreme Court held:

> We hold that when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain view which the officer has probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the fourth amendment. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a search warrant.

Id. at 300-01, 321 S.E.2d at 886.

In *Jolley*, officers were responding to a call made by the defendant that she had shot her husband in the home. When the officers entered the home, they did so lawfully "reasonably believing that a person inside was in need of immediate aid." *Id.* at 303, 321 S.E.2d at 887. The officers saw a rifle in plain view, and "had probable cause to associate the rifle with criminal activity." *Id.* at 303, 321 S.E.2d at 888. Thus, by securing the scene at the house, the officers had lawfully seized the rifle.

Defendant attempts to distinguish on the basis that the officers in *Jolley* were responding to a call for help from inside the home. However, this is unavailing as nothing in the *Jolley* opinion suggests that the holding is limited to such facts. In both cases, the police were responding to information provided to them by the eventual defendants. In the present case, the initial officer arrived at the scene because of a reported possible shooting. He inspected the outside of the house, looked in windows, and knocked on the door. He never got any response. A lieutenant arrived at the scene, and the officers again tried to get a response to no avail. After returning to the front porch, they spotted what appeared to be blood on the front porch. They then entered the premises and found the victim. The officer's entry into the house was lawful, as officers are authorized to enter buildings when they believe it reasonably necessary to save a life or prevent serious bodily harm. N.C. Gen. Stat. § 15A-285 (2001); *State v. Braswell*, 312 N.C. 553, 556, 324 S.E.2d 241, 244 (1985). Once the officers were lawfully in the house, they secured the scene by taping off the perimeter. This, according to *Jolley*, was also the point in which all evidence was seized. Therefore, it was not an illegal search and seizure for the detectives to come into the house later while it was still secure to collect the evidence, for it had already been seized. We note that at the motion to suppress hearing, de-

fendant did not object to anything that was seized as not being in plain view.

We therefore hold that *Jolley* is controlling in the case *sub judice* and overrule defendant's assignment of error.

III.

[3] Defendant's next assignment of error contends that the trial court erred by allowing the testimony of two witnesses that knew the victim to be afraid that her son would kill her. Defendant argues that the trial court should not have allowed the testimony because there was insufficient foundation presented as to the demeanor of the victim. *See State v. Lathan*, 138 N.C. App. 234, 530 S.E.2d 615, *disc. review denied*, 352 N.C. 680, 545 S.E.2d 723 (2000).

Lisa Kaufman testified at trial that she had worked with the victim for 11 years, they were very close friends and spoke everyday. She testified that the victim told her that she had put a deadbolt lock on her bedroom because she was afraid of defendant. She further testified that she spoke with the victim over the phone on 12 August 1998 six different times. She testified that the victim told her that she and defendant had an argument that morning. As to these conversations, Ms. Kaufman testified that the victim was very sad and was crying, and that she said she was scared because she thought that defendant was going to kill her.

Judy Lawrence testified at trial that she was the victim's cousin, close friend and next-door neighbor. She also spoke daily with the victim and knew of the deadbolt lock. Ms. Lawrence testified that she spoke with the victim over the phone on the evening of 12 August 1998. The victim was upset because of an argument she had with defendant over buying him a vehicle. Ms. Lawrence also stated that the victim had been upset at work a week before her death as she was afraid to go home because of defendant.

The trial court admitted this testimony over defendant's objections pursuant to the state of mind exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 803(3) (2001).

> Under Rule 803(3), hearsay evidence may be admitted to show the declarant's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." This exception permits the introduction of hearsay evidence that tends to "indicate the

> victim's mental condition by showing the victim's fears, feelings, impressions or experiences[.]"

Lathan, 138 N.C. App. at 236, 530 S.E.2d at 618. *Lathan* noted that there are limitations on this exception to the hearsay rule, notably that statements which only relate factual events are not indicative of the speaker's state of mind.

> Thus, where a statement was made in isolation, unaccompanied by a description of emotion, courts have tended to find that hearsay testimony relating that statement falls outside the scope of Rule 803(3). Conversely, where the witness described the victim's demeanor or attitude when making the statement, the courts have tended to admit the testimony pursuant to 803(3).

Id. at 240, 530 S.E.2d at 621.

After examining the testimony of the witnesses complained of, we are of the opinion that the statements were properly admitted as the witnesses adequately described the emotional state of the victim. Therefore, the trial court was correct in allowing the testimony to come in under Rule 803(3), and this assignment of error is overruled.

IV.

[4] Defendant's next assignment of error contends that the trial court erred by submitting the issue of first-degree murder under the felony-murder theory to the jury. A murder committed in the perpetration of any robbery is murder in the first degree. N.C. Gen. Stat. § 14-17 (2001). Defendant objected to the trial court's instructing the jury on this theory and was overruled.

Initially, defendant appears to argue that the State should have been required to indict defendant on the underlying felony. As the State points out, this issue has been decided against defendant in *State v. Carey*, 288 N.C. 254, 274-75, 218 S.E.2d 387, 400 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1209 (1976); *State v. Dudley*, 151 N.C. App. 711, 716, 566 S.E.2d 843, 847 (2002).

The crux of defendant's argument, however, is that there was insufficient evidence of the underlying felony, which was armed robbery with a dangerous weapon, to support its submission to the jury. The State is required to present "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 perpe-

trator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Whether the evidence presented is substantial is a question of law for this Court. *State v. Stephens*, 244 N.C. 380, 93 S.E.2d 431 (1956).

Under N.C. Gen. Stat. § 14-87 (2001), an armed robbery or robbery with firearms is defined as the taking of the personal property of another in his presence or from his person without consent by endangering or threatening his life with a firearm or other deadly weapon with the taker knowing that he is not entitled to the property and intending to permanently deprive the owner of the property. *State v. May*, 292 N.C. 644, 649, 235 S.E.2d 178, 182, *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288 (1977). The evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

At trial, the evidence showed that defendant, who had access to the victim's home, and victim had an argument about the purchasing of a vehicle for defendant by the victim on the morning of 12 August 1998. Loud noises described as "boom, boom, boom" were heard from the victim's residence late that night. Defendant approached police officers after wrecking the victim's vehicle. Soon after, the victim was found dead in her home, shot five times, including once in the head. Defendant was shown to have the murder weapon in his possession.

Defendant relies on the *Powell* case, which at first glance appears to have similar facts. *Id.* at 95, 261 S.E.2d at 114. In that case, the Supreme Court held that there was no evidence and no reasonable inference to be taken therefrom that the defendant took the objects from the victim by force while she was alive. *Id.* at 102, 261 S.E.2d at 119. The defendant raped the victim, killed her, and then took possessions of the victim, including her automobile. The felony murder theory was employed in that case based upon rape and robbery with a dangerous weapon. *Powell* stressed that the "gist" of the offense of robbery with a dangerous weapon was the "taking by force" rather than merely the taking. *Id.* Even though the defendant had with him the victim's automobile after the crime, this only raised an inference that he stole the vehicle, and not to the element that he took the vehicle by force. *Id.* Thus, the Supreme Court held that, while construing

the evidence in a light most favorable to the State, the evidence indicated "only that the defendant took the objects as an afterthought once the victim had died." *Id.*

We hold that the State introduced sufficient evidence to give a reasonable inference that defendant killed the victim to take the vehicle. Unlike the *Powell* case, the taking of the vehicle in the case *sub judice* does not appear to be an afterthought. The two had argued about the purchasing of a vehicle for defendant 24 hours prior to the murder.

Viewed in a light most favorable to the State, the inference can be drawn that defendant was not going to get a vehicle of his own, and thus killed his mother to take her vehicle. It is irrelevant that defendant stole the car after killing the victim. A homicide victim is still a "person," within the meaning of a robbery statute, when the interval between the fatal blow and the taking of property is short. *State v. Pakulski*, 319 N.C. 562, 572, 356 S.E.2d 319, 325 (1987). He then wrecked the vehicle soon after the crime.

Thus, it was proper for the trial court to instruct the jury on first-degree murder under the felony murder theory. This assignment of error is overruled.

V.

[5] Defendant assigns error to the trial court's submitting of the instruction on the doctrine of recent possession to the jury.

> The doctrine of recent possession allows the jury to infer that the possessor of certain stolen property is guilty of larceny.
>
> > For this doctrine to apply, the state must prove three things beyond a reasonable doubt. First that the property was stolen; second, that the defendant had possession of this same property. Now, a person has possession when he is aware of its presence and has, either by himself or together with others, both the power and intent to control its disposition or use. Third, that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly.

State v. Pickard, 143 N.C. App. 485, 487-88, 547 S.E.2d 102, 104 (quoting *State v. Barnes*, 345 N.C. 184, 240, 481 S.E.2d 44, 75, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *cert. denied*, 523

U.S. 1024, 140 L. Ed. 2d 473 (1998)), *disc. review denied*, 354 N.C. 73, 553 S.E.2d 210 (2001).

Defendant contends that the giving of this instruction was improper because it assumed facts of which the State did not present evidence, namely that defendant stole the car, and amounted to a definitive indication of such by the trial court.

On this point, the State reiterates the evidence and the inferences therefrom that were espoused in section IV. We do not believe that the instruction was wrongfully given by the trial court or that it indicated to the jury that defendant had stolen the car. The evidence showed that defendant wanted a car, argued with the victim about purchasing one for him, killed the victim, and drove off with her car before wrecking it. The evidence was sufficient for the submission of the instruction on the doctrine of recent possession. This assignment of error is overruled.

VI.

We have reviewed the remainder of defendant's arguments and find them wholly without merit.

No error.

Judges TYSON and BRYANT concur.

JACK WALKER, EMPLOYEE, PLAINTIFF v. LAKE RIM LAWN AND GARDEN, EMPLOYER; AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE CO., CARRIER; DEFENDANTS

No. COA01-1525

(Filed 21 January 2003)

1. Workers' Compensation— temporary total disability— maximum medical improvement

The Industrial Commission did not err in a workers' compensation case by continuing temporary total disability benefits to plaintiff employee and by failing to find and conclude that plaintiff had reached maximum medical improvement, because: (1) whether the employee has reached the point of maximum medical improvement is not necessarily a crucial fact upon which the

question of plaintiff's right to compensation depends, and such a finding is immaterial in this case in light of plaintiff's continuing total loss of wage earning capacity; and (2) the evidence supports the Commission's finding that plaintiff has not reached maximum medical improvement since he is in need of and would benefit from both chronic pain treatment and a vocational rehabilitation program.

2. Workers' Compensation— credibility—no showing of unjustifiable refusal of suitable employment

The Industrial Commission did not err in a workers' compensation case by its finding and conclusion that there was no unjustifiable refusal on the part of plaintiff to accept suitable employment under N.C.G.S. § 97-32, because: (1) the Court of Appeals cannot revisit the Commission's credibility determinations; (2) the evidence supports the Commission's findings and conclusions that plaintiff's temporary and ultimately unsuccessful trial return to work at a gas station was insufficient to establish that plaintiff refused suitable employment and does not establish that plaintiff had regained wage earning capacity; and (3) plaintiff reported to a job at a restaurant and was told that the job was no longer available.

Appeal by defendants from Opinion and Award entered 7 September 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 September 2002.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff-appellee.

Young, Moore and Henderson, P.A., by Dawn Dillon Raynor and Zachary C. Bolen, for defendant-appellants.

HUDSON, Judge.

Defendants appeal an Opinion and Award entered 7 September 2001 by the North Carolina Industrial Commission, awarding compensation to plaintiff, Jack Walker, for a work-related injury. We affirm.

The plaintiff filed a worker's compensation claim alleging that he injured his right knee on 26 February 1998 when he fell while ascending a flight of stairs during his employment with defendant, Lake Rim Lawn and Garden ("Lake Rim").

Before plaintiff filed his claim, defendant, on 14 April 1998, filed a Form 63 agreeing to pay benefits without prejudice, pursuant to N.C. Gen. Stat. § 97-18(d). On 13 May 1998, defendants filed a Form 60 admitting plaintiff's right to temporary total disability compensation at the rate of $172.25 per week. Plaintiff filed a Form 18 Notice of Claim around 18 November 1998. Shortly thereafter, defendants assigned both medical and vocational rehabilitation counselors to plaintiff, and began attempting to place him in a job. Between February 1999, and February 2001, plaintiff made two unsuccessful attempts to return to work, and defendants filed at least four Forms 24, "Applications to Terminate or Suspend Benefits," including one filed after the Opinion and Award of the Deputy Commissioner. None were approved. The claim was heard 28 March 2000 and in an Opinion and Award filed 15 December 2000, Deputy Commissioner Theresa B. Stephenson awarded plaintiff ongoing total disability benefits as well as medical treatment and a ten percent penalty, and granted plaintiff's motion to remove the rehabilitation counselor.

In an Opinion and Award filed 7 September 2001, the Full Commission affirmed and also awarded plaintiff benefits for total disability from 28 April 1999 continuing until further order of the Commission, assessed a ten percent penalty on all compensation since 28 April 1999 that was not paid within fourteen days of when it became due, granted plaintiff's Motion to Remove Ted Sawyer as the vocational rehabilitation professional, and ordered defendants to pay plaintiff's reasonably necessary medical expenses. The Full Commission also found and concluded that the plaintiff had not "unjustifiably refused suitable employment," and that "[a]lthough there is evidence of record that plaintiff has reached maximum medical improvement, the greater weight of the evidence demonstrates that plaintiff is in need of additional pain treatment and vocational rehabilitation assistance."

Below is a summary of some of the facts found by the Full Commission. Following the injury, plaintiff was treated at Cape Fear Valley Medical Center emergency room and referred to orthopaedist Dr. James P. Flanagan. On 14 May 1998, defendant-carrier retained Sharon Tobias as the medical rehabilitation professional. An MRI performed on plaintiff's knee showed a possible medial meniscus tear, and Dr. Flanagan recommended arthroscopic surgery. Prior to approving the surgery, defendants sent plaintiff to Dr. Brian Szura in Cary for a second opinion regarding the need for surgery. Dr. Szura evaluated plaintiff and concurred with Dr. Flanagan's assessment.

On 2 June 1998, Dr. Flanagan performed a diagnostic arthroscopy on plaintiff's right knee. The post-operative diagnosis indicated Chondromalacia medial femoral condyle of Grade 3 and 4, and Chondromalacia patella medial facet of Grade 4. Plaintiff continued his post-operative treatment with Dr. Flanagan until 6 August 1998, when defendant-carrier transferred his care to Dr. Szura in Cary, a considerable distance from plaintiff's home.

Dr. Szura first saw plaintiff on 1 September 1998. Dr. Szura's treatment of plaintiff consisted of pain medications and anti-inflammatory medication as well as physical therapy and referral to pain management. On 12 December 1998, Dr. Szura opined that plaintiff was at maximum medical improvement and rated plaintiff with a ten percent permanent partial disability to the right leg as a result of the compensable injury. Dr. Szura further indicated that plaintiff had permanent restrictions of no kneeling, stooping, or lifting more than fifty pounds, no climbing stairs other than on an occasional basis, and no significant work on ladders. Dr. Szura then referred plaintiff to Dr. Sanitate for pain management.

On 11 September 1998, defendants retained Ted Sawyer of Crawford & Company to be plaintiff's vocational rehabilitation professional. Plaintiff first met with Sawyer on 19 September 1998. Sawyer then began preparing job descriptions and presenting them to Dr. Szura for approval. Mr. Sawyer testified that the job descriptions he prepared were general in nature and not necessarily prepared based on a specific job with a specific employer. Moreover, Mr. Sawyer did not have job descriptions reviewed and approved by the prospective employers for accuracy.

In February 1999, plaintiff applied for a job at an Amoco service station. Mr. Sawyer presented a generalized job description to Dr. Szura, who approved it on 9 February 1999. The actual job at Amoco required plaintiff to work two shifts: a short shift lasting four to six hours and a long shift lasting nine hours. The job also required plaintiff to kneel or stoop to stock shelves and work the safe, and either to stand or walk for a majority of his shift. After working for several weeks, plaintiff experienced an increase in pain in his knee.

Plaintiff discussed his increased pain with Dr. Szura, who advised plaintiff to discuss the problems with his employer. Plaintiff did so and as a result, he was terminated by Sharon Eason, the manager at the Amoco job.

Plaintiff continued to consult with Mr. Sawyer after Amoco terminated him. In August, 1999, plaintiff applied for and was offered a job as a dining room attendant at McDonald's. However, when plaintiff called to report to work and pick up the appropriate paperwork, McDonald's withdrew the job offer.

[1] In their first argument, defendants contend that the "Commission erred by failing to find and conclude that plaintiff had reached maximum medical improvement." 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.

Here, defendants have assigned error to the following paragraphs in the Opinion and Award:

Findings of Fact

* * *

7. On 12 December 1998, Dr. Szura found plaintiff to be at maximum medical improvement and rated plaintiff with a ten percent (10%) permanent partial disability rating to the right leg. Dr. Szura placed plaintiff under permanent restrictions of no kneeling, stooping, or lifting more than fifty (50) pounds. Dr. Szura also limited plaintiff to no significant work on ladders or climbing stairs more than occasionally.

* * *

9. In February 1999, Mr. Sawyer prepared a job description for a Cashier II position, which Dr. Szura approved. This description included running the cash register and allowed plaintiff to sit or stand as needed. The Cashier II position at Amoco paid $5.15 per hour and plaintiff would work 28 to 36 hours per week. The supervisor at Amoco did not review the job description, which Mr. Sawyer prepared.

10. Plaintiff accepted and began the job at Amoco on 12 February 1999. The position had an alternating schedule that required plaintiff to work some short shifts of four to six hours each but also required plaintiff then to work some long shifts of nine hours each. Furthermore, this job required plaintiff to kneel or stoop to stock shelves and place money in the safe. Additionally, plaintiff was responsible for mopping and cleaning bathrooms and lifting as much as 35 pounds. The job description approved by Dr. Szura did not fully enumerate all of the duties of the Amoco cashier's position. Plaintiff received temporary partial disability benefits as a result of the fact that his wages at Amoco were less than those earned while employed with defendant-employer.

11. Plaintiff's right knee pain worsened, and he developed increased atrophy and tenderness. Plaintiff related to Dr. Szura by phone that the nine-hour shifts caused increased pain. Dr. Szura informed plaintiff he could not do anything and encouraged plaintiff to discuss the work hours with Amoco.

12. Plaintiff discussed his difficulties with Sharon Eason, manager at Amoco, and informed Ms. Eason that the nine-hour shifts were causing increased knee pain. Plaintiff requested

four to six hour shifts. Ms. Eason informed plaintiff that Amoco could no longer use him at all if he was unable to work the nine-hour shifts. As a result, Amoco terminated plaintiff on 27 April 1999.

13. Ms. Eason confirmed during her deposition that the Amoco position required bending and stooping. Furthermore, during the nine-hour shift, approximately six hours on average is spent standing or walking. The position also required lifting up to 35 pounds. Ms. Eason observed plaintiff limping while working and plaintiff complained to Ms. Eason of knee pain and swelling. The actual description of the Cashier II position at Amoco is contrary to Mr. Sawyer's summary presented to Dr. Szura that stated no lifting in excess of twenty pounds, no significant climbing, stooping or kneeling.

14. Following plaintiff's termination from Amoco, defendants did not reinstate plaintiff's benefits. In May 1999, defendants filed a Form 24 requesting plaintiff's benefits be terminated and alleging plaintiff had misrepresented the physician's restrictions to Amoco.

* * *

16. In May 1999 Ted Sawyer wrote Dr. Szura inquiring whether plaintiff could perform the Cashier II duties, as enumerated through Mr. Sawyer's description, for eight hours a day. Dr. Szura replied that plaintiff was able to perform the job described full-time, eight hours per day. At the time he approved the job description, Dr. Szura had not examined plaintiff since December 1998 and based his opinion on Mr. Sawyer's inaccurate job description. Furthermore, plaintiff experienced difficulty with the nine-hour shift, which Dr. Szura did not address.

* * *

21. On 25 August 1999, plaintiff received a job offer from McDonald's for a dining room attendant position. The salary for that position was $5.15 per hour working three to five days per week, eight hours each day. Plaintiff's employment was to begin 30 August 1999. Dr. Szura approved the job duties; however, McDonald's withdrew their offer prior to plaintiff beginning work. During the application process, plaintiff expressed to McDonald's that he would have problems lifting and carrying.

* * *

26. At the 25 May 2000 visit with Dr. Sanitate, plaintiff had full knee extension and greater than 130 degrees of flexion. Plaintiff continued to experience mild warmth appreciated about the peripatellar region. Dr. Sanitate considered plaintiff at maximum medical improvement.

* * *

29. Dr. Flanagan rated plaintiff at maximum medical improvement with a twenty percent (20%) permanent partial disability of his right leg and limited plaintiff to driving no more than two hours at a time. Dr. Flanagan recommended vocational rehabilitation for plaintiff for work within restrictions of essentially sedentary work.

* * *

32. Plaintiff's termination from Amoco was directly related to his inability to work nine-hour shifts due to his knee pain and swelling. Plaintiff did not refuse to work at Amoco and attempted to work out a schedule, which he could tolerate.

33. The dining room attendant position at McDonald's required too much standing for plaintiff to perform within Dr. Flanagan's restrictions. Additionally, McDonald's withdrew their offer. There is insufficient evidence of record to determine plaintiff was ever offered any further positions, which he should have taken.

34. Although there is evidence in the record that plaintiff has reached maximum medical improvement, the greater weight of the evidence demonstrates that plaintiff has not reached maximum medical improvement or the end of the healing period. Plaintiff is in need of and would benefit from both chronic pain treatment and a vocational rehabilitation program. There is no evidence of record whether plaintiff was allowed to keep the 5 July 2000 appointment with vocational rehabilitating in Fayetteville due to defendant's over-zealousness in attempting to suspend or terminate plaintiff['s] benefits. Under the circumstances of this case, plaintiff would benefit from transferring vocational rehabilitation services to a professional other than Ted Sawyer.

Conclusions of Law

* * *

2. Plaintiff has not unjustifiably refused suitable employment. N.C. GEN. STAT. § 97-32.

3. As a result of plaintiff's compensable injury and failed attempt to work at Amoco, plaintiff is entitled to total disability from 28 April 1999 and continuing until further Order of the Commission at a weekly compensation rate of $175.48. Although there is evidence of record that plaintiff has reached maximum medical improvement, the greater weight of the evidence demonstrates that plaintiff is in need of additional pain treatment and vocational rehabilitation assistance. N.C. GEN. STAT. § 97-29.

However, their brief does not bring forward any discussion of any of these particular findings other than finding 34 and conclusion 3 (argument I), and findings 10, 12, 13, 32 and 33, and conclusion 2 (argument II). Thus, the assignments of error to the remaining findings and conclusions are deemed abandoned. N.C. R. App. P. 28(b)(6).

Defendants first argue that since all of the physicians who treated plaintiff opined that he had reached maximum medical improvement and the Commission made specific findings recognizing this, the Commission "ultimately reached an opposite and factually unsupported conclusion." Defendants further contend that since "plaintiff has reached maximum medical improvement, the Industrial Commission's award of continuing temporary total disability benefits must accordingly be reversed."

However, 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); *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).

Maximum improvement as a purely medical determination occurs when the employee's physical recovery has reached its peak. *See Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985). However, maximum medical improvement is not the point at which temporary total disability must end, if the employee has not regained his or her ability to earn pre-injury wages. *See Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *disc. review denied*, 355 N.C. 749, 565 S.E.2d 667 (2002);

Russos v. Wheaton Indus., 145 N.C. App. 164, 167-68, 551 S.E.2d 456, 459 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2002), *reh'g denied*, 355 N.C. 494, 564 S.E.2d 44 (2002). Thus, whether the employee has reached the point of maximum medical improvement is not necessarily a "crucial fact upon which the question of plaintiff's right to compensation depends." *Gaines*, 33 N.C. App. at 579, 235 S.E.2d at 859; *see also, Knight*, 149 N.C. App. at 17, 562 S.E.2d at 445 (holding that even if defendants "clearly established that plaintiff had reached [maximum medical improvement] prior to the hearing, and that, therefore, the evidence does not support the Commission's finding that plaintiff had not reached [maximum medical improvement] as of the hearing, we find such error to be immaterial at this time"). Here, as well, such a finding is immaterial in light of plaintiff's continuing total loss of wage earning capacity.

In addition, the evidence does support that part of the Commission's finding Number 34, that "plaintiff has not reached maximum medical improvement or the end of the healing period . . . [since he] is in need of and would benefit from both chronic pain treatment and a vocational rehabilitation program." Both pain treatment and vocational services are considered medical compensation as defined in N.C. Gen. Stat. § 97-2(19), and are designed to "give relief and . . . to lessen the period of disability . . . ." N.C. Gen. Stat. § 97-2(19) (2001). Therefore, until he has reached maximum vocational recovery, this plaintiff's healing period is not yet at an end. Thus, this argument is without merit.

[2] Defendants next argue that the Commission "erred by failing to find and conclude that plaintiff unjustifiably refused suitable employment pursuant to N.C. Gen. Stat. § 97-32." Defendants specifically argue that findings 12 and 32 and conclusion of law 2 were based on the Commission's incorrect assessment of plaintiff's credibility. To the extent that defendant seeks to have this Court revisit the Commission's credibility determinations, we may not do so. *See Deese*, 352 N.C. at 116, 530 S.E.2d at 553. We conclude that the evidence supports the Commission's findings and conclusions that plaintiff's temporary and ultimately unsuccessful trial return to work with Amoco is insufficient to establish that plaintiff refused suitable employment and do not establish that plaintiff had regained wage earning capacity.

Dr. Szura testified that he approved the job as within plaintiff's restrictions based upon the written description provided by Mr. Sawyer. Sharon Eason, plaintiff's supervisor at Amoco, testified that

this was not an accurate description of the plaintiff's job duties, which required bending, stooping, and lifting that exceeded the limitations imposed by Dr. Szura.

Though plaintiff attempted to work the job, he indicated that the pain became too great to continue if he had to work for more than six hours at a time. Plaintiff related this to Ms. Eason, who informed him that she could not accommodate his requests, and subsequently terminated him.

Defendants also contend that plaintiff refused suitable employment at McDonalds. The evidence shows that plaintiff was offered a job, that he accepted the job, and that when he reported to work he was informed that the job was no longer available. Thus, we believe that the Commission appropriately found and concluded that there was no unjustifiable refusal on the part of plaintiff to accept suitable employment.

Affirmed.

Judges TIMMONS-GOODSON and CAMPBELL concur.

(Judge Campbell concurred prior to 1/1/03).

STATE OF NORTH CAROLINA v. LOVETT HENDERSON

No. COA01-1501

(Filed 21 January 2003)

1. Criminal Law— denominating prosecuting witnesses as victims—no showing of undue prejudice

The trial court did not err in a first-degree sex offense and taking indecent liberties with children case by denominating the prosecuting witnesses as victims when it instructed the jury during the trial on the limitation on expert testimony and when it instructed on first-degree sexual offense, because: (1) defendant has not shown undue prejudice arising from the use of the term victim so as to justify awarding a new trial when the trial court was not intimating that defendant had committed any crime and

the word victim is included in the pattern jury instructions promulgated by the North Carolina Conference of Superior Court Judges; and (2) the statement by the trial court in the instruction was not an effort to set forth a contention of the State.

2. Jury— selection—requirement of medical finding—not improper stakeout question

The prosecutor's question to prospective jurors in a first-degree sexual offense and taking indecent liberties with children case regarding whether the jurors would require a medical finding in order to convict was not an improper stakeout question because the purpose was to secure an impartial jury rather than to commit the jurors to a future course of action.

3. Discovery— school documents—in camera review

The trial court did not err in a first-degree sex offense and taking indecent liberties with children case by failing to disclose to defendant certain documents regarding the complaining witnesses including school documents, because an in camera review of the documents by the Court of Appeals revealed that the documents do not contain information favorable to the accused and material to guilt or punishment.

Appeal by defendant from judgment entered 26 April 2001 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Miles & Montgomery, by Mark Montgomery, for defendant appellant.

McCULLOUGH, Judge.

Defendant Lovett Henderson was indicted on six counts of first-degree sex offense and seven counts of taking indecent liberties with children on 31 January 2000. Briefly, the State's evidence showed that defendant, born on 29 July 1964, had married the mother of the alleged victim. The victim was born on 26 May 1988. After the marriage, the mother and her seven children lived with defendant and his two children. According to the victim and other girls in the family, the family lived in a house together from 1993-95. During this time, defendant would sexually molest the girls, the victim in particular.

On one occasion, defendant had the victim perform fellatio upon him. Defendant also took the victim from her school while she was at recess, taking her back to the house and digitally penetrating her. Defendant digitally penetrated the victim and two other girls in the house on a different occasion, right after the girls had finished taking their baths. Defendant also got the same girls out of bed and took them into the living room, where he again digitally penetrated them while their mother was at church.

The jury found defendant guilty of one count of first-degree sex offense and three counts of taking indecent liberties with a child on 26 April 2001. Defendant was found to have a prior record level II, and was sentenced to a minimum term of 240 months and maximum term of 297 months for the first-degree sex offense, and a minimum of 14 months and maximum of 17 months for each indecent liberties offense. The indecent liberties sentences are to run concurrently with each other, but consecutively with the sex offense sentence. Defendant appeals.

Defendant makes several assignments of error, and urges on appeal that the trial court erred in (I) denominating the prosecuting witnesses as "victims"; (II) overruling the defendant's objection to the question of the prosecutor regarding whether a juror would require a medical finding in order to convict, inasmuch as this was improper "staking out" of the prospective jurors; and (III) not disclosing to defendant certain documents regarding the complaining witnesses, inasmuch as this ruling denied the defendant's state and federal constitutional rights to present a defense and to due process of law.

I.

[1] Defendant first argues that the trial court erred by referring to the prosecuting witnesses as "victims." The trial court did so when it instructed the jury during the trial on the limitation on expert testimony. This instruction included language to the effect that the "victim" exhibited certain characteristics. *See* N.C.P.I., Crim. 104.96 (1992). Defendant objected and requested the trial court to use a different term, only to be overruled. The trial court continued to follow the pattern instruction. Later, at the charge conference, defendant specifically objected to the use of the term "victim" in the instruction on first-degree sexual offense, N.C.P.I., Crim. 207.45.1 (1986). Again, defendant's objection was overruled, and the trial court used the language of the pattern instruction.

Defendant contends that this was error because the references assumed that the State had proven an element of its case, that the children had indeed been wronged by defendant.

> Section 15A-1222 of the North Carolina General Statutes provides that "[t]he judge may not express 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." Similarly, section 15A-1232 of the North Carolina General Statutes requires that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." In applying these statutes, we have stated that
>
> > "[i]n evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." Further, a defendant claiming that he was deprived of a fair trial by the judge's remarks has the burden of showing prejudice in order to receive a new trial.

State v. Anthony, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001), (citations omitted), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002).

In *State v. Allen*, 92 N.C. App. 168, 374 S.E.2d 119 (1988), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989), this Court has held the use of the term "victim" is generally harmless error.

> By his use of the term "victim," the trial judge was not intimating that defendant had committed any crime. The judge properly instructed the jury that it had to find that defendant committed all the elements of the offenses charged before they could find defendant guilty, regardless of whether the child was referred to as the "victim," the prosecuting witness, or by any other term. In order for defendant to be entitled to a new trial, he must show not only that an instruction was erroneously given, but also that the instructions as given materially prejudiced him. Assuming arguendo that the instructions were erroneous, defendant has not shown any material prejudice.

Allen, 92 N.C. App. at 171, 374 S.E.2d at 121 (citation omitted).

While it is clear from case law that the use of the term "victim" in reference to prosecuting witnesses does not constitute plain error when used in instructions, it is a matter of prejudice, as in *Allen*,

when a defendant properly objects. *See State v. Cabe*, 136 N.C. App. 510, 514-15, 524 S.E.2d 828, 832, *disc. review denied, appeal dismissed*, 351 N.C. 475, 543 S.E.2d 496 (2000); *State v. Hatfield*, 128 N.C. App. 294, 299, 495 S.E.2d 163, 165-66, *disc. review denied*, 348 N.C. 75, 505 S.E.2d 881, *cert. denied*, 525 U.S. 887, 142 L. Ed. 2d 165 (1998); *State v. Richardson*, 112 N.C. App. 58, 66-67, 434 S.E.2d 657, 663 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994). Defendant argues that the State's case was very weak at trial and offers the fact that defendant was acquitted of 9 of the 13 charges brought against him. Defendant submits that the use of the term "victim" may well have made the difference in the remaining counts.

We do not feel that defendant has shown undue prejudice arising from the use of the term "victim" so as to justify awarding a new trial. As in *Allen*, the trial court was not intimating that he had committed any crime. "The word 'victim' is included in the pattern jury instructions promulgated by the North Carolina Conference of Superior Court Judges and is used regularly to instruct on the charges of first-degree rape and first-degree sexual offense." *Richardson*, 112 N.C. App. at 67, 434 S.E.2d at 663. While defendant makes a valid point that the use of a more neutral term such as "alleged victim" or "complainant" would remove any possibility that the jury would confuse the trial court's instruction for the comments on the evidence, defendant has failed to show prejudicial error for the trial court to follow the pattern jury instructions.

Defendant also contends that the instruction sets out a contention by the State, that the children were, in fact, victims, without also setting out defendant's contention that the children were victimizing defendant with false allegations. "A trial judge does not have to state the contentions of the parties. However, when he undertakes to do so he must give equal stress to the contentions of both sides." *State v. Hough*, 299 N.C. 245, 257, 262 S.E.2d 268, 275 (1980). However, the statement by the trial court in the instruction was not an effort to set forth a contention of the State. In addition, the trial court specifically instructed that:

> I have not reviewed the contentions of the State or of the defendant. But it is your duty not only to consider all the evidence, but also consider all the arguments and the contentions and positions urged by the State's attorney and by the defense attorney in their speeches to you. And consider any other contention that

arises from the evidence and to weigh them in light of your own common sense and as best you can to determine the truth of this matter.

Therefore, this assignment of error is overruled.

II.

[2] Defendant next contends that the trial court erred in allowing certain questions by the State to prospective jurors. These questions, defendant asserts, constituted impermissible "staking out" of the jurors and should have been excluded.

The exchange took place as follows:

[State]: In the witness list that was read to you, there were a couple of different doctors that were mentioned. I do expect that those doctors are going to testify. They are going to testify about examinations that they did on [the victim]. They are going to tell you what their findings are.

Now, is there anybody, any of the five of you, who thinks that in order for you to make a decision in these cases, in order to convince you beyond a reasonable doubt, that there has to be some finding made by a physician that tells you that something definitely occurred?

[Defendant]: Objection, your Honor. That's for a jury to determine at the end of all the evidence what satisfies them.

THE COURT: Okay. Your question was—had you finished your question?

[State]: Yes, sir.

THE COURT: Or the question was—

[State]: Whether they personally would—in order to find beyond a reasonable doubt—would require medical findings that would tell them specifically that the incident occurred.

THE COURT: Overruled.

[State]: That means you can answer the question does anybody feel that? Would you have to have that kind of information in order to make a decision? [Juror], are you thinking?

[Juror]: I didn't quite understand what you're saying.

[State]: Okay.

[Juror]: You're saying that—

[State]: Go ahead.

[Juror]: You're saying that that would be 75 percent of my decision-making as far as what the doctor said in the trial as evidence? Is that what you're saying? That I would think—

[State]: Let me rephrase it. Just—the other three have given a negative response that they would not require that, if I saw everybody's head moving in the right direction. Every juror gets to make up their own mind after you deliberate about who you believe, what you believe, and whether you have had one or more offenses proved to you beyond a reasonable doubt. You all get to make up your own mind. And what I'm asking is for you personally, in order for you, with these charges, to be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?

[Defendant]: Objection.

THE COURT: What was the question? I'm going through some—

[State]: It essentially was the same question.

[Defendant]: We objected in order to find guilt.

THE COURT: All right. Sustained.

[State]: In order to be convinced beyond a reasonable doubt?

[Defendant]: Objection.

THE COURT: Well, overruled.

[Juror]: No.

Three of the five prospective jurors exposed to this line of questions ultimately wound up on the jury.

The trial court has a great deal of discretion in monitoring the propriety of questions asked by counsel during *voir dire*, and the standard of review on this issue is whether the trial court abused its discretion and whether that abuse resulted in harmful

prejudice to defendant. *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997).

> On the voir dire examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

State v. Vinson, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *vacated in part*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976).

Further,

> [c]ounsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. Counsel should not argue the case in any way while questioning the jurors. Counsel should not engage in efforts to indoctrinate, visit with or establish "rapport" with jurors. Jurors should not be asked what kind of verdict they would render under certain named circumstances. Finally, questions should be asked collectively of the entire panel whenever possible.

State v. Phillips, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980).

Defendant argues that the State has violated these principles in the reproduced exchange. The State counters by pointing out that the law does not require medical evidence to corroborate a victim's story as the victim's word alone is sufficient evidence upon which a jury can convict. *See State v. Rogers*, 322 N.C. 102, 366 S.E.2d 474 (1988). Thus, the State's question was solely seeking an impartial jury.

This Court addressed a similar situation in *State v. Roberts*, 135 N.C. App. 690, 522 S.E.2d 130 (1999), *appeal dismissed, disc. review*

denied, 351 N.C. 367, 543 S.E.2d 142 (2000). In that case, the State asked the following question:

> Does anyone here have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the Judge instructs you as to the law. Per se unreliability of eyewitness identification.

Id. at 697, 522 S.E.2d at 134-35. Defendant argued that this question was an improper "stake out" question. That Court stated that

> [while] counsel may not pose hypothetical questions intended to elicit a prospective juror's decision in advance as to a particular set of facts or evidence . . . [i]t is equally true . . . that the right to an impartial jury contemplates inquiry by each side to ensure a prospective juror can follow the law. Accordingly, "[q]uestions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection *voir dire*."

Id. at 697, 522 S.E.2d at 135 (citations omitted).

Having set out the law, the Court held that the State was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony[,] that is, treat it no differently than circumstantial evidence." *Id.* Thus, the State's question " 'tended only to "secure impartial jurors," [and did] not caus[e] them to commit to a future course of action.' " *Id.* (quoting *State v. McKoy*, 323 N.C. 1, 15, 372 S.E.2d 12, 19 (1988), *cert. granted*, 489 U.S. 1010, 103 L. Ed. 2d 180 (1989), *judgment vacated*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

We agree with the State and hold that the questions pertaining to expert testimony and the importance of the presence of physical evidence were attempts to secure an impartial jury rather than commit the jurors to a future course of action. Indeed the law does not require medical evidence that states that some incident has occurred. The question, "To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?" is not the same as asking "if there is medical evidence stating that some incident has occurred, will you find defendant guilty beyond a reasonable doubt?" The latter question would appear to be clearly impermissible, regardless of the fact that the law does not require medical evidence. This assignment of error is overruled.

III.

[3] Defendant's final assignment of error takes issue with the trial court's denial of defendant's request for certain school documents relating to the victim and other complaining witnesses.

Defendant learned from initial discovery that there was evidence that defendant took the witnesses from the school grounds, abused them at some other location, and then returned them to school without anyone knowing. To impeach such testimony, defendant subpoenaed the school records of the witnesses in hopes to use them to show that the witnesses could not have been taken from the school grounds without school authorities being aware of it and thus implying that defendant never took them from the school. Such impeachment was considered very important by defendant in that there was no physical evidence of abuse, and anticipated that the case would come down to the credibility of the witnesses.

The trial court reviewed the subpoenaed documents *in camera*. The trial court granted that defendant was entitled to discover some of the materials; and the remaining materials, namely the school records, were sealed for appellate review. Defendant asks this Court to review the sealed documents to determine whether they include exculpatory evidence.

> A defendant who is charged with sexual abuse of a minor has a constitutional right to have [certain government records] as they pertain to the prosecuting witness, turned over to the trial court for an *in camera* review to determine whether the records contain information favorable to the accused and material to guilt or punishment. If the trial court conducts an *in camera* inspection but denies the defendant's request for the evidence, the evidence should be sealed and "placed in the record for appellate review." On appeal, this Court is required to examine the sealed records to determine if they contain information that is "both favorable to the accused and material to [either his] guilt or punishment." If the sealed records contain evidence which is both "favorable" and "material," defendant is constitutionally entitled to disclosure of this evidence.

State v. McGill, 141 N.C. App. 98, 101-02, 539 S.E.2d 351, 355 (2000) (citations omitted). Evidence is "favorable" if it tends to exculpate the accused, as well as " 'any evidence adversely affecting the credibility of the government's witnesses.' " *Id.* at 102, 539 S.E.2d at

355 (quoting *U.S. v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996)). " '[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' " *Id.* at 103, 539 S.E.2d at 356 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985)). The failure of the trial court to turn over evidence to defendant that was both favorable and material to him does not guarantee a new trial, unless such failure was prejudicial. *Id.*

We have reviewed the documents, including the school records, provided to this Court under seal pursuant to the order of the trial court on 16 March 2001. These documents do not contain "information favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 58, 94 L. Ed. 2d 40, 58 (1987). Therefore, this assignment of error is also overruled.

No error.

Judges TYSON and BRYANT concur.

STATE OF NORTH CAROLINA v. JAMES WALLACE COCKERHAM, DEFENDANT

No. COA01-1590

(Filed 21 January 2003)

1. Firearms and Other Weapons— discharging firearm into occupied property—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of discharging a firearm into occupied property even though defendant contends he did not fire into any of the types of property specified in N.C.G.S. § 14-34.1 when he fired a gun through a common wall of an apartment, because: (1) an apartment within an apartment building is an area that is surrounded on all sides or closed in, and therefore, an apartment is an enclosure as that term is used in N.C.G.S. § 14-34.1; and (2) the protection of the occupants of the building was the primary concern and objective of the General Assembly when it enacted N.C.G.S. § 14-34.1.

2. Firearms and Other Weapons— discharging firearm into occupied property—sufficiency of description

An indictment charging defendant with a violation of N.C.G.S. § 14-34.1 for discharging a firearm into occupied property "known as apartment D-1" was not fatally defective because an apartment is an enclosure for purposes of N.C.G.S. § 14-34.1 and the description provided sufficient precision to clearly apprise defendant of the elements of the accusation against him.

3. Confessions and Incriminating Statements— answers to officer's questions—motion to suppress—general investigation

The trial court did not err in a discharging a firearm into occupied property case by denying defendant's motion to suppress his answers to an officer's questions that were asked prior to defendant being given his Miranda warnings, because: (1) the officers did not pat down defendant, search him, handcuff him, or restrain his movement until they formally arrested him; and (2) even assuming arguendo that defendant was in custody, these circumstances are more similar to the general investigation situation in which Miranda warnings need not be given.

Appeal by defendant from judgment entered 13 July 2001 by Judge Donald Jacobs in Durham County Superior Court. Heard in the Court of Appeals 19 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General George K. Hurst, for the State.

Rudolf, Maher, Widenhouse & Fialko, by Andrew G. Schopler, for defendant-appellant.

HUDSON, Judge.

A jury found defendant guilty of discharging a firearm into occupied property, and the court sentenced defendant to a minimum term of twenty-seven months and a maximum term of forty two months imprisonment. Defendant appeals.

The State presented evidence indicating that at approximately 7:00 p.m. on 20 May 2000, Raquel Burnette, age 11, and Dominique Burnette, age 10, were sitting on the bed in their mother's bedroom in Apartment D-1, 2733 Wake Forest Highway in Durham when they

heard a gunshot. The girls ran from the room to a neighbor's house and the neighbor called the police.

Corporal R.D. Edwards, an off-duty Durham police officer, who was nonetheless in uniform with a police vehicle, heard and responded to the dispatch about the shots being fired. When he arrived at the scene, he immediately entered apartment D-1 and spoke with the children, who showed him the hole in the bedroom wall. Corporal Edwards then went to apartment D-2, which shared a common wall with a apartment D-1.

Corporal Edwards knocked on the door and moments later, defendant opened the door. Corporal Edwards testified that "[u]pon him opening the door, I asked him what was going on. And he started mumbling . . . about people been trying to break into his house." Corporal Edwards also noticed a strong odor of alcohol coming from defendant.

Defendant then led Corporal Edwards to the back of the house. When they reached the kitchen, defendant started to walk into the bedroom. Corporal Edwards testified that he had defendant stay in the kitchen while he went into the bedroom, for his safety as well as defendant's. In the bedroom, Corporal Edwards smelled gun powder, and saw a shotgun leaning against a wall or a dresser. When he touched the shotgun to unload it, Corporal Edwards noticed that it was still hot, which he believed indicated that it had been fired recently. Corporal Edwards also testified that he saw a hole in the common wall between apartments D-1 and D-2, which appeared to have been made by a shotgun. Corporal Edwards then secured the shotgun and asked defendant to sit in the living room while he waited for Corporal Grugin to arrive.

When Corporal Grugin arrived shortly thereafter, Corporal Edwards briefed him on the situation. Corporal Grugin saw the hole in apartment D-2, and then looked at the hole from apartment D-1 to confirm that they were made by the same shot. Corporal Grugin returned to defendant's apartment, where defendant was seated on the couch, and asked him what had happened. Defendant told him that some people had tried to break into his apartment. Corporal Grugin testified that he "asked him why he—why he shot the hole in the wall—I don't know if that was my exact terminology I used in asking the question. I may have asked, 'Why did you fire the gun at the wall?' " and defendant responded "that the round he had fired through the wall wouldn't hurt anyone, and he should know, because

he was in Vietnam." Neither Corporal Edwards nor Corporal Grugin saw anyone other than defendant in apartment D-2, and neither observed any signs of forced entry. Corporal Grugin then arrested defendant, handcuffed him and placed him in a police cruiser.

Defendant did not testify, but presented evidence through five witnesses. Defendant's son, Kevin Cockerham, testified that he brought the shotgun to his father's apartment between 4:30 and 5:00 p.m. on the day of the shooting because someone had been trying to break into his father's apartment. He testified that defendant was not home when he left the shotgun and shells on the dresser.

Shekita Green, defendant's girlfriend, testified that defendant had been at her house during the day on 20 May 2000 and that she had her son, Calvin Parker, drive defendant home at approximately 6:45 that evening. Calvin Parker testified that he took the defendant up to his apartment and got him settled on the couch, waited a few minutes to make sure everything was alright, then left.

James Cockerham, Jr., defendant's son, testified that he and two other unidentified individuals went to his father's apartment at approximately 6:00 to 6:15 p.m. on 20 May 2000 to use drugs. According to James Jr., at approximately 7:00 p.m., while they were using drugs, one of the unidentified individuals went into the bedroom and fired the shotgun. James Jr. testified that after the two other individuals left, he cleaned up the apartment, put the shotgun back, and then left. James Jr. did not see his father at that time. He had not told his story to the police, and although he testified that he told his father, his brother Kevin, and his fiancé, none of them told the police.

Apartment D-1 and D-2 are adjacent to each other on the upper floor of a two-story apartment building. There are two additional units downstairs. There is a common wall between the two units, but the two units are not otherwise connected.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss based upon the sufficiency of the evidence. He contends that since the State's evidence showed that defendant was entirely inside the apartment when he fired the shot, he could not have fired into occupied property within the meaning of N.C. Gen. Stat. § 14-34.1 (2001). We disagree.

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). 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. 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); s*ee 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." *State v. Mercer*, 317 N.C. 87, 98, 343 S.E.2d 885, 892 (1986). (citations omitted).

N.C. Gen. Stat. § 14-34.1 proscribes discharging a firearm into occupied property and reads as follows:

> Any person who willfully or wantonly discharges or attempts to discharge:
>
> (1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or
>
> (2) A firearm
>
> into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

N.C. Gen. Stat. § 14-34.1 (2001). While it is not expressly required by the statutory language, our Supreme Court has interpreted this section to add a knowledge requirement with respect to the occupancy of the property categories enumerated. *State v. James*, 342 N.C. 589, 595-96, 466 S.E.2d 710, 714-15 (1996).

The offense of discharging a firearm into occupied property requires that "the person discharging it is not inside the property." *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988); *see*

also, *State v. Williams*, 284 N.C. 67, 74-75, 199 S.E.2d 409, 413-14 (1973); *State v. Surcey*, 139 N.C. App. 432, 436, 533 S.E.2d 479, 482 (2000). Defendant argues that he did not fire into any of the types of property specified in N.C. Gen. Stat. § 14-34.1 (2001).

Our Supreme Court has recently noted that:

> It is well-settled that the meaning of any legislative enactment is controlled by the intent of the legislature and that legislative purpose is to be first ascertained from the plain language of the statute. When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded . . . under the guise of construction.

State v. Bates, 348 N.C. 29, 34-35, 497 S.E.2d 276, 279 (1998) (citations omitted), *cert. denied* 350 N.C. 837, 539 S.E.2d 297 (1999), *habeas corpus appeal at* 308 F.3d 411 (4th Cir. 2002). "Words in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning." *Kilpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000).

Our Supreme Court has stated that:

> Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute.

Perkins v. Arkansas Trucking Services, Inc., 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000).

The dictionary definition of "enclosure" includes the following:

> 1. The act of enclosing. 2. The state of being enclosed. 3. *An area, object, or item that is enclosed.* 4. *Something that encloses, such as a wall or fence.*

The American Heritage Dictionary of the English Language 430 (1978) (emphasis added). Further, the definition of "enclose" is:

> 1. To surround on all sides; fence in; close in. * * * 3. To contain, especially as to shelter or hide . . . .

Id.

Although the word "apartment" is not used in the statute, it is commonly used to refer to a housing unit in a multi-family residential structure. The dictionary defines the term apartment as follows:

> 1. A room or suite of rooms designed for housekeeping and generally located in a building which includes other such rooms or suites . . . .

Id. at 60.

Therefore, for the purposes of N.C. Gen. Stat. § 14-34.1, we believe that an apartment within an apartment building is an "area" that is "surround[ed] on all sides" or "close[d] in." Thus, we hold than an apartment is an enclosure as that term is used in N.C. Gen. Stat. § 14-34.1. Furthermore, our Supreme Court has stated that the "protection of the occupants of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1." *State v. Williams*, 284 N.C. 67, 72, 199 S.E.2d 409, 412 (1973). By classifying an apartment as an enclosure, our holding is consistent with that legislative purpose. A person who fires a gun through a common wall of an apartment is engaged in the same mischief as a person shooting into the building from the outside. This assignment of error is overruled.

[2] Defendant next argues that the indictment for violation of N.C. Gen. Stat. § 14-34.1 was fatally defective in that it failed to allege that defendant fired into a "building, structure . . . or enclosure." The pertinent portion of the indictment here alleged that "the defendant . . . unlawfully, willfully and feloniously did discharge a shotgun, a firearm, into that dwelling known as apartment 'D-1', located at 2733 Wake Forest Highway, Durham, North Carolina . . . ." Defendant's argument is premised on the assumption that an apartment is not one of the types of property specified in N.C. Gen. Stat. § 14-34.1.

According to N.C. Gen. Stat. § 15A-924, an indictment must contain a "plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2001). An indictment which avers facts constituting every element of an offense need not be couched in the language of the statute. *State v. Palmer*, 293 N.C. 633, 638-39, 239 S.E.2d 406, 410 (1977).

Here, the indictment accused defendant of discharging a firearm into "that dwelling known as apartment 'D-1', located at 2733 Wake Forest Highway, Durham, North Carolina . . . ." Since we have held that an apartment is an "enclosure" for purposes of N.C. Gen. Stat. § 14-34.1, and this description provides sufficient precision to clearly apprise defendant of the elements of the accusation against him, this assignment of error is overruled. *Palmer*, 293 N.C. at 638, 239 S.E.2d at 410; *see also*, N.C. Gen. Stat. § 15A-924(a)(5) (2001).

[3] Finally, defendant argues that the trial court erred in denying his motion to suppress his answers to Corporal Grugin's questions that were asked prior to defendant being given his *Miranda* warnings. We disagree.

Our standard of review of the denial of a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991). The court's findings "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), *appeal after remand*, 355 N.C. 264, 559 S.E.2d 785 (2002), *recons. denied*, 355 N.C. 495, 563 S.E.2d 187 (2002). "The determination of whether a defendant was in custody, based on those findings of fact, however, is a question of law that is fully reviewable . . . ." *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000). The trial court's failure to make findings of fact regarding custody "does not prevent this Court from examining the record and determining whether defendant was in custody." *State v. Torres*, 330 N.C. 517, 525, 412 S.E.2d 20, 24 (1992).

Our Supreme Court recently held that "the 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. Absent objective indicia of such restraint, the fact that police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not necessarily relevant to the determination of whether the person was in custody for *Miranda* purposes. *Stansbury v. California*, 511 U.S. 318, 324, 128 L. Ed. 2d 293, 300 (1994), *cert. denied*, 516 U.S. 923, 133 L. Ed. 2d 222 (1995).

Here, the officers did not pat down defendant, search him, handcuff him, or restrain his movement until they formally arrested him.

Defendant let Corporal Edwards into his apartment and led him to the back of the apartment. While Corporal Edwards was looking in the bedroom, he left defendant in the kitchen. Corporal Edwards located a shotgun in the bedroom, smelled gunpowder, found a spent shotgun shell, and observed a hole in a bedroom wall that appeared to have been made by the shotgun. Corporal Edwards then secured the shotgun and had defendant sit in the living room. Corporal Edwards then waited at the door to the apartment for Corporal Grugin, the lead investigator, to arrive.

Corporal Grugin arrived seven to ten minutes after Corporal Edwards and was briefed on the situation by Corporal Edwards. After Corporal Grugin observed the hole in the wall from both apartments, he returned to defendant's apartment and asked defendant what had happened, to which defendant replied that some people had tried to break into his apartment. Corporal Grugin then asked defendant why he shot at the wall and defendant replied "that the round he had fired through the wall wouldn't hurt anyone, and he should know, because he was in Vietnam."

Here, Officers Edwards and Grugin did not formally arrest defendant or restrain his movement to the extent associated with formal arrest until after the general investigative questions were asked and answered. Based upon this evidence, we find no objective indicia of formal arrest or similar restraint. However, even assuming *arguendo* that defendant was in custody, these circumstances are more similar to the "general investigation" situation in which *Miranda* warnings need not be given. *See State v. Meadows*, 272 N.C. 327, 158 S.E.2d 638 (1968); *State v. Hipps*, 348 N.C. 377, 501 S.E.2d 625 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). The questions asked by Corporal Grugin were general "what happened" and "why" questions apparently asked when the officers did not yet know if what occurred was accidental or potentially criminal. Thus, we conclude that defendant was not in custody when he answered Corporal Grugin's questions and, as such, *Miranda* warnings were not required. This assignment of error is overruled.

No error.

Judges TIMMONS-GOODSON and CAMPBELL concur.

(Judge Campbell concurred prior to 1/1/03).

RUSSELL W. BRINKMAN, ET AL., PLAINTIFFS v. BARRETT KAYS & ASSOCIATES, P.A., ET AL., DEFENDANTS

No. COA01-1392

(Filed 21 January 2003)

1. **Fraud-negligent misrepresentation-waste disposal system— absence of reliance**

The trial court did not err by granting summary judgment in favor of defendants on plaintiff homeowners' negligent misrepresentation claim arising out of defendants' alleged misrepresentations to the Department of Environment and Natural Resources to procure the required permits for implementation of their low pressure pipe waste disposal system, because there was no evidence supporting the conclusion that there was actual reliance by plaintiffs upon defendants' statements as required by Restatement of Torts § 552(1).

2. **Unfair Trade Practices; Environmental Law— no private cause of action for violation of Clean Water Act**

The trial court did not err by granting summary judgment in favor of defendants on plaintiff homeowners' unfair and deceptive trade practices claim arising out of defendants' misleading the State to obtain permits for their low pressure pipe waste disposal systems in violation of the Clean Water Act under N.C.G.S. § 143-215.6, because the legislature omitted a private right of action to enforce this statute and specifically created the honesty requirement within the enforcement procedures envisioned.

Appeal by plaintiffs from summary judgment entered 22 March 2001 and order striking affidavits entered 3 May 2001 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 21 August 2002.

Michaels & Oettinger, P.A., by John A. Michaels and Lewis & Roberts, P.L.L.C., by A. Graham Shirley for plaintiffs-appellants.

Newsom, Graham, Hendrick & Kennon, P.A., by Evelyn M. Coman and John C. Rogers, III, for defendants-appellees.

CAMPBELL, Judge.

Plaintiffs appeal from summary judgment granted against their claims of negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act.

Plaintiffs are approximately two hundred homeowners from four subdivisions that originally used a waste removal system designed by defendants Barrett Kays ("Kays"), Barrett Kays & Associates, and Henry Wells ("Wells"). Defendant Tarheel Utility Management, Inc. ("Tarheel Utility") was the original permit holder for three of the subdivisions' waste disposal systems.[1] The systems were designed by Kays, Wells and Barrett Kays & Associates in the mid 1980s and subsequently constructed for use in the four subdivisions. The systems failed in 1996 and thereafter plaintiffs incurred expenses connecting to the city water and sewer system.

The system at issue is a low pressure pipe system which connects an on-lot septic tank effluent pump system to an off-lot collection and disposal system. Through this system waste is pumped from the houses into a community drain-field where the waste is dispersed through perforated pipes for natural treatment by the soil. Plaintiffs alleged defendants made misrepresentations to the Department of Environment & Natural Resources ("the department") to procure the required permits for implementation of their low pressure pipe waste disposal system. Plaintiffs alleged they relied upon the permits and underlying misrepresentations in purchasing their properties and therefore defendants are liable for negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act.

Plaintiffs assert the trial court erred by granting defendants' summary judgment motion regarding plaintiffs' claims for negligent misrepresentation and violation of the Unfair and Deceptive Trade Practices Act and granting defendants' motion to strike plaintiffs' affidavits.

Summary judgment is appropriate and "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." N.C. Gen. Stat. § 1A-1, Rule 56 (c) (2001). "A summary judgment movant bears the burden of

1. Tarheel Utility never acted on these permits, and another corporation subsequently obtained the permits necessary to manage the waste disposal systems.

establishing the lack of any triable issue." *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). "A defendant who moves for summary judgment may meet this burden by showing either that (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim." *Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). "[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). "Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

I. Negligent Misrepresentation

[1] " '[I]ssues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner.' It is only in exceptional negligence cases that summary judgment is appropriate." *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972) (citations omitted). "In negligent misrepresentation cases, 'whether liability accrues is highly fact-dependent, with the question of whether a duty is owed a particular plaintiff being of paramount importance.' As such, summary judgment is seldom appropriate in these types of cases." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (quoting Logan, *N.C. Torts* § 25.30, at 551).

With the burden upon defendants, we consider whether all essential elements of plaintiffs' claim exist. Generally, "[t]o the extent that plaintiff . . . ha[s] alleged a breach of that duty of due care and that the breach was a proximate cause of their injury, they have stated a cause of action [for negligent misrepresentation]." *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 669, 255 S.E.2d 580, 585 (1979).

Plaintiffs assert the right to sue for negligent misrepresentation under *Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 331 S.E.2d 717 (1985) and the Restatement Second of Torts § 552 (3) (1977).

In *Biddix*, a private citizen was permitted to sue for violation of the common law torts of continuing trespass of land and nuisance, utilizing the Clean Water Act as the standard of care. In *Biddix*, the Court held "the Clean Water Act does not abrogate the common law civil actions for private nuisance and trespass to land for pollution of waters resulting from violation of a NPDES [National Pollutant Discharge Elimination System] permit." *Biddix*, 76 N.C. App. at 40, 331 S.E.2d at 724. The Court held that plaintiffs have the right to sue *in negligence* for violation of the statute.[2] Here, plaintiffs assert defendants violated the Clean Water Act, and that under *Biddix* they may assert their claim of negligent misrepresentation using the statute as the applicable standard of care.

To assert a claim for negligent misrepresentation, plaintiffs look to the Restatement because "[i]n this State, we have adopted the Restatement 2d [of Torts] definition of negligent misrepresentation." *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 525, 430 S.E.2d 476, 480 (1993). Restatement 2d § 552 provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of per-

2. There is no private right of action under the statute. Enforcement is provided for through criminal penalties in N.C. Gen. Stat. § 143-215.6B (2001), civil penalties assessed by the Secretary of Environment and Natural Resources in N.C. Gen. Stat. § 143-215.6A (2001) and by a suit for injunctive relief brought by the Attorney General of North Carolina pursuant to N.C. Gen. Stat. § 143-215.6C (2001).

> sons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

The elements of a claim for negligent misrepresentation are set forth in section (1), while sections (2) and (3) provide requirements for who may assert such a claim. The North Carolina Supreme Court specifically adopted sections (1) and (2) of the Restatement in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991). The public duty exception, contained in section (3), has yet to be specifically addressed by our appellate courts. The public duty exception expands the class of potential plaintiffs that may sue for negligent misrepresentation under section (1).

Before addressing whether or not plaintiffs here are within the class of plaintiffs entitled to bring actions for negligent misrepresentation, we address whether the elements of the cause of action, found in section (1), exist in the case at bar. "It has long been held in North Carolina that '[t]he tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.' " *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 18 (2001) (quoting *Raritan*, 322 N.C. at 206, 367 S.E.2d at 612).

The requirement of justifiable reliance is derived from Restatement § 552 (1), providing "liability for pecuniary loss caused to [the plaintiffs] by their justifiable reliance upon the information." The North Carolina Supreme Court held that justifiable reliance requires actual reliance. *Raritan*, 322 N.C. at 206, 367 S.E.2d at 612. Following this directive, North Carolina's Pattern Jury Instructions instruct that for the jury to find defendant guilty of the tort of negligent misrepresentation they must find "that the plaintiff actually relied on the false information supplied by the defendant, and that the plaintiff's reliance was justifiable. Actual reliance is direct reliance upon false information." N.C.P.I.—Civil 800.10 (1992). Therefore, where "there [was] no evidence . . . that defendant did in fact rely upon the information to her harm, . . . summary judgment was proper as to defendant's negligent misrepresentation claim." *Jefferson-Pilot Life Ins. Co. v. Spencer*, 110 N.C. App. 194, 205, 429 S.E.2d 583, 589 (1993), *rev. on other grounds*, 336 N.C. 49, 54, 442 S.E.2d 316, 318 (1994).

There is no evidence in the case at bar supporting the conclusion that there was actual reliance by plaintiffs upon defendants' statements. The statements were made to the department, which relied upon them and issued permits to defendants. Plaintiffs relied upon the department to fully investigate defendants' application for permits. Plaintiffs relied upon the original permits and the re-issuance of the permits to conclude that their waste disposal system was functioning correctly. Finally, upon discovering the misrepresentations, plaintiffs relied upon the Attorney General and the Secretary of Environment and Natural Resources to utilize their powers under the Clean Water Act to enforce the law. However, there is no evidence that plaintiffs relied upon statements made by defendants as required by Restatement § 552 (1).

Plaintiffs contend that the public duty exception contained in Restatement § 552 (3) provides them a cause of action for negligent misrepresentation. Restatement § 552 (3), as well as section (2), delineates the potential plaintiffs eligible to bring a claim under section (1). Since there is no evidence regarding the essential element of reliance required by section (1), we need not address whether plaintiffs would be eligible under section (3) to bring a negligent misrepresentation claim. Defendants have met their burden of proof that there is an essential element of plaintiffs' claim of negligent misrepresentation regarding which there is no genuine issue of material fact and therefore summary judgment was properly granted to defendants.

II. Unfair and Deceptive Trade Practices

[2] North Carolina provides a private cause of action for persons injured by a violation of the Unfair and Deceptive Trade Practices Act. N.C. Gen. Stat. § 75-16 (2001). Whether defendants have performed the acts asserted by plaintiffs is a question of fact for a jury. *First Atl. Mngmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). However, in a summary judgment motion, it is a question of law for the court to determine whether the facts, taken in the light most favorable to the party opposing summary judgment, constitute an unfair or deceptive trade practice. *Id.* The elements of an Unfair and Deceptive Trade Practices Act claim are: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991).

Plaintiffs assert that by misleading the State to obtain permits for their low pressure pipe systems defendants violated Chapter 143, Article 21 of the North Carolina General Statutes ("Clean Water Act") and committed an unfair and deceptive act in violation of N.C. Gen. Stat. § 75-1.1. Chapter 75 has been utilized to assert a private right of action for unfair practices regulated by other statutes. For example, this Court held that a person may assert a Chapter 75 claim in addition to claims for violation of the Uniform Commercial Code ("U.C.C.") because "[t]he U.C.C. was not specifically designed to regulate the alleged unethical conduct or oppressive practices of banks." *United Virginia Bank v. Air-lift Associates*, 79 N.C. App. 315, 319, 339 S.E.2d 90, 93 (1986). Moreover, in *Phillips v. Integon Corp.*, 70 N.C. App. 440, 319 S.E.2d 673 (1984), the Court determined that Chapter 58, which regulates the insurance industry did not preclude an action under Chapter 75 because "the purpose behind Chapter 58 was to regulate insurance rates and Chapter 58 was not designed to regulate immoral, unethical, or oppressive behavior on the part of insurance companies." *United Virginia Bank*, 79 N.C. App. at 320, 339 S.E.2d at 93. Therefore, the question in this case, is whether the Clean Water Act was designed, in part, to regulate the unfair and deceptive practices of potential polluters.

The Clean Water Act was created to standardize water conservation and pollution abatement. N.C. Gen. Stat. § 143-211 (2001). The State created the Environmental Management Commission, and granted the Commission the power to issue permits signifying compliance with this law, including the actions of defendants here, the implementation of new waste disposal systems. N.C. Gen. Stat. § 143-215.1 (2001). This provision was designed to regulate the behavior of potential polluters, specifically requiring, at the time of the action, that "[a]ny person who knowingly makes any false statement, representation, or certification in any . . . document filed or required to be maintained . . . shall be guilty of a misdemeanor." N.C. Gen. Stat. § 143-215.6(b)(2) (1981).[3] Plaintiffs assert that defendants violated this provision, and since this was a deception, plaintiffs may assert a Chapter 75 claim.

The honesty requirement is excerpted from the enforcement provision of the statute, which, at the time of the defendants' action, provided for enforcement of the statute through civil and criminal penal-

3. This requirement is now provided for in N.C. Gen. Stat. § 143-215.6B(i) (2001).

ties and injunctive relief, but not a private right of action.[4] N.C. Gen. Stat. § 143-215.6 (1981). Plaintiffs seek to create a private right of action in the Clean Water Act by importing Chapter 75 and asserting a Chapter 75 claim to enforce the statutory provision. *Id.* However, the legislature omitted a private right of action to enforce this statute, and specifically created the honesty requirement within the enforcement procedures provision.

We note that plaintiffs' attempts to assert a private right of action in this case are different from plaintiff's assertion of common law tort claims in *Biddix*. In *Biddix*, the Court held that the statute did not preempt common law actions for nuisance and continuing trespass where there was pollution in excess of the permitted amount. First, "statutes in abrogation of the common law are strictly construed." *Biddix*, 76 N.C. App. 34, 331 S.E.2d. at 720. Moreover, "the issue of whether the common law civil actions of nuisance and trespass to land have been abrogated for permitted industrial waste discharges proximately damaging real property [wa]s not before us." *Biddix*, 76 N.C. App. at 33, 331 S.E.2d. at 719. In this case, we are not faced with common law claims, but rather whether Chapter 75 was intended to supplement Chapter 143 to provide for a private right of action to enforce duties provided in the Clean Water Act's enforcement provision. Moreover, here, defendants acted lawfully within the requirements of a permit.

We conclude that plaintiffs may not utilize Chapter 75 to create a private right of action where none existed and thereby circumvent the intent of the legislature to have the honesty requirement in the enforcement section of the Clean Water Act enforced as provided for in that section. We hold, with reference to this provision of the statute, that it was created to regulate, among other things, deceptive behavior in the permitting process, and provides the exclusive statutory remedy for violation thereof. Therefore, the trial court correctly granted defendants' motion for summary judgment of plaintiffs' claim for violation of the Unfair and Deceptive Trade Practices Act.

Since the trial court properly granted summary judgment against plaintiffs, this Court need not consider whether plaintiffs' affidavits filed in opposition to the motion were properly struck.

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4. Enforcement of the Clean Water Act is still provided for through civil and criminal penalties and injunctive relief. N.C. Gen. Stat. § 143-215.6A-C.

No error.

Judges WYNN and HUDSON concur.

Judges WYNN and HUDSON concurred in this opinion prior to 31 December 2002.

THE NORTH CAROLINA BAPTIST HOSPITALS, INC., PLAINTIFF v. JAMES W. CROWSON, DEFENDANT

No. COA01-1542

(Filed 7 January 2003)

Liens— medical services—personal injury recovery—pro rata disbursement not required

The trial court did not err by granting summary judgment in favor of defendant attorney in an action alleging that defendant violated N.C.G.S. §§ 44-49 and 44-50 by failing to disburse to plaintiff hospital certain funds being held by defendant in his capacity as an attorney recovered from the settlement of a personal injury lawsuit and by disbursing the settlement funds in favor of two other lien holders even though plaintiff provided defendant with written notice of a lien on any funds that defendant's client received in the personal injury action in order to cover the value of those medical services provided to defendant's client as a result of the accident, because (1) N.C.G.S. §§ 44-49 and 44-50 do not require a pro rata disbursement of funds when there are multiple lien holders and insufficient funds to fully compensate such lien holders; and (2) it is within the province of the legislature, and not the Court of Appeals, to place any new or additional restrictions on the distribution of funds to medical service provider lien holders.

Judge CAMPBELL dissenting.

Appeal by plaintiff from order entered 4 September 2001 by Judge Chester Davis in Forsyth County District Court. Heard in the Court of Appeals 12 September 2002.

Turner Enochs & Lloyd, P.A., by Melanie M. Hamilton, Laurie S. Truesdell, and Wendell H. Ott, for plaintiff appellant.

Crowson & Nagle, L.L.P., by James W. Crowson, for defendant appellee.

TIMMONS-GOODSON, Judge.

North Carolina Baptist Hospitals, Incorporated ("plaintiff") appeals from an order of the trial court granting summary judgment in favor of James W. Crowson ("defendant"). For the reasons stated herein, we affirm the order of the trial court.

The pertinent facts of this appeal are as follows: On 21 July 2000, plaintiff filed a complaint in Forsyth County District Court alleging that defendant had violated sections 44-49 and 44-50 of the North Carolina General Statutes by failing to disburse to plaintiff certain funds being held by defendant in his capacity as an attorney. Defendant timely filed an answer denying such allegations, and both parties moved for summary judgment.

The matter came before the trial court on 3 September 2001, at which time plaintiff presented evidence tending to show the following: In September of 1997, plaintiff provided medical services to Christopher Reid ("Reid"), who had been injured in an automobile accident. The total cost of plaintiff's medical services to Reid was $38,234.85. Reid later retained defendant to represent him in a personal injury suit to recover damages for the injuries he incurred as a result of the automobile accident. In November of 1997, plaintiff provided defendant with written notice of a lien pursuant to section 44-49 of the North Carolina General Statutes upon "any sums recovered as damages for personal injury in any civil action." N.C. Gen. Stat. § 44-49(a) (2001). The lien covered the value of those medical services provided to Reid as a result of the accident.

On 15 February 1999, defendant informed plaintiff that, although Reid had reached a settlement of his personal injury suit, the funds were insufficient to compensate plaintiff. This was due to the fact that, in addition to the monies owed to plaintiff, Reid owed money to two other creditors with valid medical service provider liens, namely Wake Forest University Physicians and the Forsyth County Ambulance Service. Upon receipt of the settlement proceeds, defendant paid the Forsyth County Ambulance Service its balance in full and paid Wake Forest University Physicians its balance almost in its

entirety. Upon payment of these debts, no other monies remained to compensate plaintiff. Plaintiff thereafter filed an action against Reid and obtained a default judgment against him in October of 1999.

Upon considering the evidence and arguments by counsel, the trial court determined that there were no genuine issues of material fact and that defendant was entitled to summary judgment as a matter of law. The trial court therefore entered an order granting summary judgment to defendant. From this order, plaintiff appeals.

The dispositive issue on appeal is whether sections 44-49 and 44-50 of the North Carolina General Statutes prohibit an attorney from disbursing funds recovered from the settlement of a personal injury lawsuit in a non-proportional manner where there are multiple medical service providers holding equally valid liens upon such settlement funds and insufficient funds to compensate all lien holders. Because we conclude that sections 44-49 and 44-50 do not require a *pro rata* disbursement of funds, we affirm the order of the trial court granting summary judgment in favor of defendant.

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); *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *affirmed per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). In the instant case, the essential facts are uncontroverted. We therefore examine the applicable law to determine whether or not either party was entitled to summary judgment.

Section 44-49 of the North Carolina General Statutes creates a lien

> upon any sums recovered as damages for personal injury in any civil action in this State. This lien is in favor of any person, corporation, State entity, municipal corporation or county to whom the person so recovering . . . may be indebted for any drugs, medical supplies, ambulance services, services rendered by any . . . hospital, or hospital attention or services rendered in connection with the injury in compensation for which the damages have been recovered.

N.C. Gen. Stat. § 44-49(a). At the time of the institution of this suit, section 44-50 of the General Statutes provided, in pertinent part, that:

> Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof . . . [p]rovided . . . that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered.

N.C. Gen. Stat. § 44-50 (1999). As this was the statute in effect at the time that the disputed events occurred, this is the controlling version of the statute in this case.[1]

Although section 44-50 provides that it is "the duty of any person receiving [settlement funds] before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims" of valid lien holders, neither section 44-49 nor section 44-50 provide any directive as to the manner of dispensation of such funds where there are multiple lien holders and insufficient funds to fully compensate such lien holders.

In the instant case, fifty percent of the client's settlement proceeds, less attorneys' fees and expenses, were delivered to Reid and are not in dispute. The disputed funds comprise the remaining fifty percent of Reid's settlement proceeds. There is no question that plaintiff held a valid lien interest on the settlement proceeds, along with two other medical service providers. Plaintiff argues that defendant violated section 44-50 when he disbursed the settlement funds in favor of the two other lien holders, rather than in a *pro rata* fashion. We disagree.

Plaintiff concedes that sections 44-49 and 44-50 are completely silent on the issue of distribution of funds among valid medical service provider lien holders. Because sections 44-49 and 44-50 "provide rather extraordinary remedies in derogation of the common law . . .

1. Section 44-50 has since been amended, effective October 1, 2001, to provide that "a client's instructions for the disbursement of settlement or judgment proceeds are not binding on the disbursing attorney to the extent that the instructions conflict with the requirements of this Article." N.C. Gen. Stat. § 44-50 (2001).

they must be strictly construed." *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E.2d 925, 927 (1955). Strict construction of statutes requires that "their application be limited to their express terms, as those terms are naturally and ordinarily defined." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988). Thus, " 'everything [should] be excluded from [the statute's] operation which does not clearly come within the scope of the language used.' " *In re Appeal of Worley*, 93 N.C. App. 191, 195, 377 S.E.2d 270, 273 (1989) (quoting *Harrison v. Guilford County*, 218 N.C. 718, 722, 12 S.E.2d 269, 272 (1940)) (alteration in original). Further, " 'where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and *limitations* not contained therein.' " *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)) (alteration in original).

In the instant case, sections 44-49 and 44-50 place no restrictions on the method of distribution among valid lien holders. As such, we are unable to conclude that defendant violated either of these sections by distributing all of the funds to one lien holder rather than distributing the funds on a *pro rata* basis. Put simply, it is within the province of the legislature, and not this Court, to place any new or additional restrictions on the distribution of funds to medical service provider lien holders not mandated by sections 44-49 and 44-50. *See id.*

Because sections 44-49 and 44-50 did not require defendant to distribute the funds at issue in a *pro rata* manner, the trial court properly concluded that defendant was not liable to plaintiff for the monies owed. We hold that the trial court did not err in granting summary judgment in favor of defendant. The order of the trial court is hereby affirmed.

Affirmed.

Judge Hudson concurs.

Judge Campbell dissented from the majority opinion prior to 31 December 2002.

CAMPBELL, Judge, dissenting.

Since I disagree with the majority's conclusion that defendant was not obligated to distribute the settlement funds *pro rata* to the medical provider lien holders, I respectfully dissent.

Defendant's client, Reid, owed money to three creditors with valid medical provider liens: North Carolina Baptist Hospitals, Inc., Wake Forest University Physicians and the Forsyth County Ambulance Service. Upon receipt of the settlement proceeds, defendant at the direction of his client, paid the Forsyth County Ambulance Service its balance in full, paid Wake Forest University Physicians the majority of its balance and paid no money to plaintiff. The majority concludes that since the legislature did not delineate how the attorney must disburse the funds in N.C. Gen. Stat. § 44-50, defendant's decision to follow his client's directive and not preserve any of the settlement funds for plaintiff, violated no duty. Plaintiff asserts that in dispersing the funds without retaining "a sufficient amount to pay the just and bona fide claims" of the lien holders, as required by N.C. Gen. Stat. § 44-50, defendant breached his duty to plaintiff. I agree.

First, defendant asserts he was correct in following his client's request for disbursement because, in so doing, he complied with the North Carolina Revised Rules of Professional Conduct ("Revised Rules")[2] by following his client's directives. Rule 1.15-2(m)[3] requires a lawyer to "promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled." N.C. Admin. Code tit. 27, Chapter 2, Rule 1.15-2(m) (2002). However, this rule is not applicable because these are not funds "to which the client is cur-

2. Ethics codes for North Carolina lawyers are promulgated by the North Carolina State Bar, certified to the Chief Justice of the North Carolina Supreme Court, and entered upon the minutes of the Court. *See* N.C. Gen. Stat. § 84-23 and 84-21. The North Carolina Code of Professional Responsibility (1973) governed until 1985, when the North Carolina Rules of Professional Conduct (1985) took effect. The North Carolina Revised Rules of Professional Conduct (1997) have been in effect since July 24, 1997 and are the most current rules governing ethics of North Carolina attorneys. Since the events leading up to the case *sub judice* began in September 1997 and the dispute between plaintiff and defendant arose in 1998, the Revised Rules of Professional Conduct govern the issues herein. Although the rules have been reviewed and revised, the general policies of the North Carolina State Bar regarding the ethical obligations of North Carolina lawyers in this area have remained consistent.

3. Plaintiff-appellant cites Rule 1.15-2(h) in its brief. Rule 1.15-2(m), from the Annotated Rules of North Carolina 2002 edition, is cited herein. By amendment of May 4, 2000, the subsection designation changed from 1.15(h) to 1.15-2(m), but the provisions of the subsection remain the same.

rently entitled." *Id.* North Carolina General Statutes §§ 44-49 and -50 create a lien in fifty percent of the client's settlement proceeds. This lien attaches immediately upon settlement of the client's claim. *Charlotte-Mecklenburg Hospital Auth. v. First of GA. Ins. Co.*, 340 N.C. 88, 90-91, 455 S.E.2d 655, 656-57 (1995). Thus, as to admittedly valid medical provider liens (as in the case here), the client cannot sustain an assertion of being "currently entitled" to the funds. Rather than this fifty percent of the settlement being disbursed pursuant to client directives, the funds were entrusted to the attorney, who was under a duty to the lien holders. *See* N.C. Gen. Stat. § 44-50 (2000).[4] North Carolina State Bar Ethics Opinions, RPCs 69 and 125[5], would have provided ethical guidance for defendant if he could not determine from the statute that, as to this part of the settlement proceeds, his duty was to the lien holders and not his client. RPC 69 (1989) and RPC 125 (1992) both state that while an attorney is generally required to obey a client's instructions regarding payment of medical providers from settlement proceeds, this general rule does not apply if the funds are subject to a valid lien. 2002 North Carolina State Bar Lawyer's Handbook, RPC 69 (1989). Defendant, therefore, should not have disbursed the funds "as directed by the client" pursuant to Rule 1.15-2(m).

Once it is established that the funds subject to valid medical provider liens are not subject to the client's directives, the question remains: what are an attorney's obligations under N.C. Gen. Stat. § 44-50 when the fifty percent of the settlement proceeds subject to

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4. Although a "duty" may still exist, the revised statute no longer includes this specific word, but reads as follows: "Before their disbursement, any person that receives those funds shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims . . . after having received notice of those claims. . . ." N.C. Gen. Stat. § 44-50 (2001).

5. RPCs are formal ethics opinions of the North Carolina State Bar adopted under the superseded 1985 North Carolina Rules of Professional Conduct. While not precedential authority for this Court, formal ethics opinions, as defined in the Procedures for Ruling on Questions of Legal Ethics of the North Carolina State Bar, "provide ethical guidance for attorneys and to establish a principle of ethical conduct." N.C. Admin. Code tit. 27, Chapter 1D, Rule .0101(10) (2001). Several RPCs address the issue of whether an attorney is ethically obligated to follow his client's instructions as to disbursement of settlement proceeds. Under the North Carolina Revised Rules of Professional Conduct, ethics opinions are called "Formal Ethics Opinions." The North Carolina State Bar has remained consistent in its opinions regarding an attorney's obligation with respect to disbursement of a client's settlement proceeds to lien holders. For example, Formal Ethics Opinion 2001-11 addresses the issue of disbursement of settlement proceeds and is consistent with the State Bar's analysis in the RPCs that address this issue.

valid medical provider liens is insufficient to satisfy the liens? North Carolina General Statute § 44-50 (2000), which was the statute in effect when defendant disbursed the funds, states:

> [I]t shall be the *duty* of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof[.]

N.C. Gen. Stat. § 44-50 (2000) (emphasis added). This section does not state how the holder of the disbursement should distribute the funds, and therefore the majority concludes that any distribution is permitted. I disagree. Even though the formula is not prescribed in the statute, the statutory duty is owed equally to every valid lien holder. I do not believe an attorney can equitably fulfill this duty to each lien holder unless he distributes the funds *pro rata*. Case law on the issue of disbursement of insufficient funds subject to numerous liens amply supports the conclusion that *pro rata* distribution would be the only equitable approach to satisfy the creditors. In numerous cases involving medical provider liens, although not the holding in the case, it is clear that *pro rata* distribution of insufficient settlement proceeds has been consistently approved. *See North Carolina Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 374 S.E.2d 844 (1988); *see also North Carolina Baptist Hospitals, Inc. v. Franklin*, 103 N.C. App. 446, 405 S.E.2d 814 (1991); *In re: Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964). Furthermore, I found no lien statute, besides those which specifically provide for payment of liens on a priority basis, in which distribution is not done on a *pro rata* basis. For example, *see* N.C. Gen. Stat. §§ 1-440.33(f) (2001) and 44A-21 (2001). Therefore, I would hold that for an attorney to effectuate his duty to medical lien holders, when the funds received in a personal injury settlement or judgment are insufficient to satisfy all valid liens, the attorney may not follow his client's instructions, but must distribute the funds *pro rata* to the undisputedly valid medical lien holders. Whenever an attorney has a question as to distribution of funds held for the benefit of others, he may simply continue to hold the funds pending prompt resolution of the matter or file an interpleader action with the court pursuant to N.C. Gen. Stat. § 1A-1, Rule 22(b) (2001). Contrary to the majority, I would hold that defendant made the distribution at his own peril and must now reimburse plaintiff for its *pro rata* share.

SMILEY'S PLUMBING CO., INC., PLAINTIFF v. PFP ONE, INC. AND/OR PFP HOLDINGS, INC., AND ROYAL AMERICAN CONSTRUCTION OF N.C., INC., DEFENDANTS

No. COA01-1384

(Filed 21 January 2003)

Construction Claims— subcontract agreement—summary judgment—attempt to clarify arbitration award

The trial court did not err in an action arising out of the dispute of a subcontract agreement involving the construction of apartment complexes by granting summary judgment in favor of defendants even though plaintiff contends that an independent action may be brought to clarify an arbitration award and to determine whether the judgment in 98-CVS-874 held by defendant company against plaintiff had been satisfied, because: (1) plaintiff failed to set forth any specific facts showing there was an issue for trial as required by N.C.G.S. § 1A-1, Rule 56(e) in that the affidavits it submitted do no more than set forth its unsubstantiated allegations; and (2) plaintiff should have proceeded to move for clarification of the arbitration award under N.C.G.S. § 1-567.10.

Appeal by plaintiff from judgment entered 10 July 2001 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 21 August 2002.

Ferguson and Scarbrough, P.A., by James E. Scarbrough; and William C. Isenhour, for plaintiff appellant.

Johnston, Allison, & Hord, P.A., by Greg C. Ahlum and Jennifer McKay Patterson, for defendant appellees.

McCULLOUGH, Judge.

Plaintiff Smiley's Plumbing Co., Inc. (Smiley's), appeals from an order granting summary judgment to defendants PFP One, Inc. and/or PFP Holdings, Inc., and Royal American Construction of N.C., Inc. This appeal was born out of a dispute involving the construction of apartment complexes between the builder, a subcontractor, and a supplier.

The Chapman family is a wealthy Florida family that owns several companies and has built over 100 apartment projects up and

down the eastern seaboard. The main Chapman company is People's First Properties, Inc. (PFP). PFP is a Florida corporation and the parent company which owns and controls most of the other Chapman companies. One of these companies is Royal American Construction Corp., another Florida corporation. PFP is the sole shareholder of Royal American of Florida.

Defendant Royal American Construction of North Carolina, Inc., was formed as a North Carolina corporation for the sole purpose of obtaining a North Carolina contractor's license to build two apartment projects in this State. This defendant is owned by Royal American of Florida, but PFP is the sole shareholder.

As for the two apartment projects planned for North Carolina, one was the Oak Crest Apartments in Kannapolis, N.C., which is located in Cabarrus County. The other project was the Stonecreek Apartments in Mooresville, N.C., which is located in Iredell County. Two limited partnerships were created by the Chapmans to own and run the apartment complexes. They were Oak Crest Apartments of Kannapolis, Ltd., and Stonecreek Apartments of Mooresville, Ltd., respectively.

The last player in the Chapman group involved in this litigation is defendant PFP One, Inc. PFP One was a Florida corporation that served as an investment company to own real estate and act as a holding company. PFP is also the sole shareholder of this company. It is to be noted that during the present litigation, PFP One was folded into another corporation named PFP Holdings, Inc.

Plaintiff, Smiley's Plumbing Co., Inc., is a North Carolina plumbing subcontractor out of Kannapolis, N.C. Plaintiff was hired by defendant Royal American of N.C., the general contractor on the two projects, to install plumbing on the two apartment projects.

The last player in this litigation, though not a party to this appeal, is Parnell-Martin Companies, LLC. Parnell-Martin is a plumbing materials supplier out of Mecklenburg County, N.C., which supplied plaintiff with all of its material needs for these two projects.

During 1997, the Oak Crest and Stonecreek projects were proceeding with construction, and plaintiff was installing the plumbing on both projects pursuant to its 19 March 1997 subcontract agreement with defendant Royal American of N.C. According to plaintiff, on 13 November 1997, defendant Royal American of N.C. unilaterally terminated the agreement between the two. Plaintiff made a demand

for payment of the services and material provided on both the projects, which was rejected. Thus, plaintiff filed a complaint in Cabarrus County against defendant Royal American of N.C., Oak Crest Apts. of Kannapolis, Ltd., and Stonecreek Apts. of Mooresville, Ltd., on 20 February 1998, (docket number 98-CVS-382), demanding payment on both projects.

While this dispute was ongoing, Parnell-Martin's bill for materials it had supplied to the projects came due. After plaintiff refused to pay for the materials, Parnell-Martin filed a complaint in Iredell County on 20 April 1998 against plaintiff, plus the same parties sued in 98-CVS-382, and a couple of banks in Florida that provided financing (docket number 98-CVS-854), demanding payment for the materials provided on the Stonecreek Project in the amount of $58,222.15, plus interest. The complaint also noted that Parnell-Martin had filed liens against the real property, the owner of the real property (Stonecreek Apartments of Mooresville, Ltd.), the funds due to Smiley's from Royal American of N.C., plus the funds due to Royal American of N.C. from Stonecreek Apts. of Mooresville, Ltd.

Parnell-Martin also filed a complaint against the same parties on 21 April 1998 (docket number 98-CVS-874) in Cabarrus County, demanding payment for the materials provided on the Oakcrest Project in the amount of $42,034.65, plus interest. As in 98-CVS-854, this complaint also noted that Parnell-Martin had filed liens against the real property, the owner of the real property (Oak Crest Apartments of Kannapolis, Ltd.), the funds due to Smiley's from Royal American of N.C., plus the funds due to Royal American of N.C. from Oak Crest Apts. of Kannapolis, Ltd.

The Chapman companies decided to rid themselves of the Parnell-Martin liens. Negotiations between Parnell-Martin, Royal American of N.C., and PFP One, Inc., began. Soon after, these parties signed a "Settlement Agreement" on 29 May 1998.

As Parnell-Martin filed separate suits as to each project, the agreement dealt with each project separately. As to the Oak Crest suit, a settlement was reached between PFP One and Parnell-Martin. PFP One was to pay Parnell-Martin the sum of $42,034.65 (the amount Smiley's owed Parnell-Martin) to purchase all of Parnell-Martin's rights and litigation claims against Smiley's involving the Oak Crest project, namely case number 98-CVS-874. Accordingly, Parnell-Martin was to assign all of such rights to PFP One, and dismiss all claims against any Chapman company and the banks, as well as withdraw all the liens on the project.

As to the Stonecreek suit, a settlement was reached between Royal American of N.C. and Parnell-Martin. Royal American of N.C. was to pay Parnell-Martin the sum of $37,965.35 to satisfy all claims which Parnell-Martin had against any Chapman company in case number 98-CVS-854. Accordingly, Parnell-Martin was to dismiss the Chapman defendants from 98-CVS-854 and remove all liens on the project. Parnell-Martin's claim in 98-CVS-854 against Smiley's was for $58,222.15. The agreement noted that "[t]he remaining claim of Parnell-Martin against Smiley's Plumbing Co., Inc., is reduced by the payment of $37,965.35 made by [Royal American of N.C.]." This left $20,256.80 on Smiley's debt to Parnell-Martin in case number 98-CVS-854.

One last interesting note on the settlement agreement: Joey Chapman, was the Vice President of PFP One and the President of Royal American of N.C. He signed for both companies, and his was the only signature on the agreement from either Chapman entity.

In the suit filed by Smiley's against Royal American of N.C., et. al, 98-CVS-382, the subcontract agreement between the two parties mandated that they submit to arbitration pursuant to N.C. Gen. Stat. § 1-567 (2001) for all claims. The parties were ordered to do so on 16 September 1998 by the trial court. Subsequent to that order, but before the arbitration took place, PFP One was substituted for Parnell-Martin in the Cabarrus County suit, docket number 98-CVS-874, pursuant to the 29 May 1998 agreement, on 14 January 1999. PFP One also made a motion for summary judgment in that case. At the 4 January 1999 hearing, the motion was granted despite arguments by Smiley's that PFP One and Royal American of N.C. were similar entities and summary judgment was not appropriate because of their involvement with Royal American of N.C. in arbitration. Judgment was filed on 14 January 1999 in favor of PFP One for $42,831.52. Smiley's did not appeal.

The arbitrators heard the matter of 98-CVS-382 and made an award on 15 September 1999. The arbitrators made an award to Smiley's: $28,237.00 for the Oak Crest Project; and $11,565.40 for the Stonecreek Project. The net sum that Royal American of N.C. was to pay Smiley's came to $39,802.40. In awarding so, the arbitrators explained that:

> Responsibility for controlling and administering the project was weighted against Royal American Construction Company. The project was viewed as a "troubled project" separate from the

> Smiley's Plumbing problems. Neither party produced manpower, workday history, progress schedules, etc. as support of their claims of lack of performance and/or accelerated effort. The cost of the work completed by Smiley's Plumbing was viewed as a fair and reasonable cost. Both parties were viewed as having contributed to the lack of effective communication. The project was viewed as improperly planned, scheduled and administered by Royal American Construction. Smiley's Plumbing was viewed as a "difficult subcontractor" but, Royal American's process of terminating Smiley's Plumbing was questionable. Both parties allowed personal feelings to over ride [sic] sound business practices. Smiley's Plumbing failed to support its claimed amount of work completed as presented in its summary. Royal American Company had "double dipped" relative to backcharges included in its payments to Smiley's and as shown in its summary listing of backcharges. Some of the backcharges claimed by Royal American against Smiley's Plumbing were viewed as inappropriate. It was viewed that Royal American's efforts to mitigate damages after the termination of Smiley's Plumbing could have been improved. The award consists of retainage amounts due to Smiley's Plumbing on completed work as identified in documents presented by Royal American Construction during the Arbitration proceedings.
>
> This AWARD is in full settlement of all claims and counterclaims submitted to this Arbitration.

In addition, the arbitrators included the following statement:

> Royal American Construction shall provide information and/or documents within twenty calendar days to Smiley's Plumbing to satisfy the condition that no further claim by Parnell-Martin will be made against Smiley's Plumbing for monies paid to Parnell-Martin by Royal American Construction.

Of specific note in the record is Royal American of N.C.'s summary of damages for the arbitration. This statement was a laundry list of the money owed between the parties. Included in that summary was a column titled, "Parnell-Martin Settlement." This column contained two sections: a Stonecreek Project section and an Oak Crest Project section. Royal American of N.C. included the amount of $37,965.35 in the Stonecreek Project column, the precise amount that it paid to Parnell-Martin pursuant to the 29 May 1998 agreement. This amount was used as a set-off by Royal American of N.C. of the money

it owed Smiley's at the arbitration, considering that debt was actually owed by Smiley's in the first place.

In contrast, Royal American of N.C. listed nothing in the Oak Crest column, as PFP One had paid that sum to Parnell-Martin. This was reduced to judgment in 98-CVS-874. After the arbitration, PFP One executed on its $42,034.65 judgment in 98-CVS-874. The parties had a dispute as to whether the judgment in 98-CVS-874 had been satisfied by the arbitration hearing and award. Eventually Smiley's filed a motion in the cause under Rule 60 for relief from the 98-CVS-874 judgment alleging that it had been satisfied. According to Smiley's, in order to compel discovery, it withdrew its Rule 60 motion and filed an independent action on 14 February 2000. The complaint alleged that the arbitration award took into account any sums owed by Smiley's in the Parnell-Martin matter "so that all matters would be resolved." Further,

> [a]ccording to the award, no further claim would be made against Smiley's Plumbing in the Parnell Martin matter for any monies. The arbitration award was intended to be the "net" amount owed to Smiley's after taking into account the amount owed by Smiley's in the Parnell Martin matter. Royal American and PFP One both signed the settlement agreement with Parnell Martin and both knew the arbitration award meant that the judgment held by PFP One would be satisfied by the arbitration award since PFP One took the position of Parnell Martin by purchasing Parnell Martin's claim against Smiley's.

It also claimed that PFP One and Royal American of N.C. were the same entities.

PFP One and Royal American of N.C. filed their answer on 20 March 2000, essentially claiming that the arbitration had nothing to do with PFP One and its judgment and certainly didn't satisfy it.

By February 2001, PFP One had been folded into another corporation named "PFP Holdings, Inc.," and they were joined as parties by order of the trial court on 13 March 2001. Smiley's filed an amended complaint reflecting this change but alleged the same grounds for recovery. Defendants filed an answer to the same effect, along with several affidavits.

Defendants had filed a previous motion for summary judgment on 12 December 2000. On 10 July 2001, this motion was granted by Judge Michael E. Beale. Smiley's appealed.

Plaintiff assigns as error the following: The trial court erred in granting defendant's motion for summary judgment on the ground that (I) an independent action may be brought to determine whether the judgment in 98-CVS-874 held by defendant PFP Holdings, Inc., against plaintiff has been satisfied; and (II) there is a genuine issue of fact as to whether the judgment held by defendants against plaintiff has been satisfied.

Plaintiff argues that the case *sub judice* is not an attempt to clarify, modify or attack the arbitration award, rather it is an attempt to determine if the parties to this litigation had an oral agreement or understanding to consider the PFP One judgment in 98-CVS-874 satisfied.

Plaintiff is well aware that, if the present suit were viewed as a lack of clarity in the arbitration award, then the present action would be improper. The Uniform Arbitration Act, N.C. Gen. Stat. §§ 1-567.1, *et. seq.* (2001), requires a party seeking clarification of an award to apply to the arbitrators for clarification within 20 days of the award. N.C. Gen. Stat. § 1-567.10 (2001). Modification of an award can only be sought within 90 days of the award from the court that ordered the arbitration. N.C. Gen. Stat. § 1-567.14 (2001).

Plaintiff argues that it need not resort to these statutory procedures as the issue in this case is *not* about the correctness of the award but whether the parties had an independent agreement on whether the award satisfied the aforementioned judgment. Thus, plaintiff also claims it is not violating the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.* (2001), as that Act cannot be utilized to attack a prior judgment. *See State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 354, 323 S.E.2d 294, 312 (1984).

While it is not clear that the Declaratory Judgment Act can be used to determine an issue which is solely factual, we need not address that issue as this Court believes that the trial court's granting of summary judgment for defendants should be affirmed applying traditional summary judgment analysis.

Summary judgment is proper where the evidence before the court shows that there is no genuine issue of material fact and that one party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). Here plaintiff failed to set forth any specific facts showing there was an issue for trial as required by Rule

56(e) in that the affidavits it submitted do no more than set forth its unsubstantiated allegations. Thus, defendants were entitled to summary judgment as plaintiff failed to carry its burden under Rule 56(e). *See Dixie Chemical Corp. v. Edwards*, 68 N.C. App. 714, 716, 315 S.E.2d 747, 750 (1984). Plaintiff may not rest upon the allegations of its pleading to create an issue of fact, even though the evidence must be interpreted in a light favorable to the nonmovant. *Id.*; *see Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972).

The evidence submitted by plaintiff, namely the affidavit of its president and arbitrator, go to their understanding of whether the arbitration proceeding would satisfy the PFP One judgment. Such evidence does not meet plaintiff's burden of showing the understanding complained of, rather it demonstrates that plaintiff should have proceeded to move for clarification of the arbitration award pursuant to N.C. Gen. Stat. § 1-567.10 if plaintiff believed such was the case.

As we believe plaintiff failed to produce independent evidence of the alleged agreement that the PFP One judgment be considered satisfied, we agree with the trial court that plaintiff did not satisfy the requirements of Rule 56(e).

Accordingly the granting of summary judgment for defendants is

Affirmed.

Judges McGEE and BRYANT concur.

MARY JORDAN, ALPHONSO LITTLE, LEE BROADIE, WALTER WEATHERS, JON CURRY, ROBERT BALEY, THEODORE RANKIN, JOHN WHITE, FLORENCE GEER, SALLY GRIER, ESTHER GAINER, JERRY NIVENS, JAMES EARNHARDT, HELEN BAILEY, NORMAN HUFFMAN, FRANCES STITT, COLA McLEOD, THOMAS HUNTER, RACHEL CAMPBELL, SOPHIE ANTHONY, JANE CANIPE, RICHARD RANKIN, PEGGY CAMPBELL, WILLIE KAY, DAVID EALEY, WILSON JOHNSON, EDWARD BIGGERS, GWENDOLYN SELLERS, GERALD RUDD, BRIAN LOFTY, MICHAEL AGAH, DONNA GEER, MARK KING, CYNTHIA STRONG, JONATHAN BLACKMON, BILLY GASKIN, FRANCIS ERVIN, CLAY DURHAM, RONALD NETH, RANDY HARDIN, LULA JACKSON, ARSONIA BEATTY, WESLEY WITHERS, WARREN PHIFER, JAMES REVELS, KYLE GORDON, VIRGIL HACKER, JOHNNY LOVE, MICHAEL SPEACH, BERNICE JONSTON, GLADYS SHEPARD, ROBERT COLLINS, ARNOLD OSBORNE, DORTHEA THOMPSON, JANET HUNTER, ARNOLD GERADS, SAMMY BELCHER, BILLY NEWTON, RANDALL HARDEN, JAMES CURL, SYLVIA McDANIEL, JAMES NEWTON, JEFFREY McCORKLE, DANIEL SIMPSON, VERA JAMES, TIJA ANDERSON, MELVIN REED, BOBBY KELLY, MICHAEL TALLMAN, MICHAEL WATTS, LAHAI AMADU, ALFRED HANSHAW, GLORIA WALL, ROSEWILL HAYES, CARL CROOK, VERNON ALSBROOKS, JIM COGGINS, VIRGIL OSBOURNE, WANES AUTRY, LEONARD DAVIS, JOSEPH GUTEKANST, CARL SMITH, TERRY FISH, DENNIS GLOVER, STANLEY BREWER, OLEN MOORE, J. C. HAGER, ROBERT McGINNIS, JACK FOX, ROBERT BROWN, RONALD HAGER, ROGER BROWN, CHARLES CAMPBELL, ROBERT MORROW, THEODORE SHERMAN, WALTER JOHNSON, KENNETH DEAVER, RANDY SMITH, MONTERRON COBBS, RICHARD QUEEN, DANA JOHNSON, DEREK SUTTON, CHRISTOPHER RITCHIE, BILLY SIGMON, HENRY RUCKER, RICHARD ARNETT, JR., CURTIS FILLER, WILLIAM RITCHIE, RONALD DOUGLAS, RANDY DUNCON, FRANK ISREAL, JR., TOKO TUMAMBO, CARL BLACK, JONATHAN PERRY, MALANDA MAMBWENI, GARY RITCHIE, DANA PRESSLEY, DONNA BROWN, MARVIN ROBINSON, MALCOLM HODGE, GEORGE ADKINS, JUANITA HUNTLEY, JOEL BERRY, TIMOTHY McCAUSLIN, PANY NOVANSY, BOBBIE COLLINS, RICHARD DULIN, KENNETH MUNGROW, DACE JONES, GLORIA JACKSON, ADOLPHE MOUNKASSA, DIANE MILLER, LARRY PERKINS, RICKIE BROOKS, MICHAEL EDWARDS, PERRY SHEPHERD, WANDA YOUNG, MICHAEL BOST, JOEL ST. GERMAINE, ALFRED TAYLOR, EDWARD NESBIT, JACQUELINE DAVIS, DOROTHERY MASSEY, ALICE OUTLAW, GEORGE OWUSU, TINA BECKHAM, SHARON BELTON, MITCHELL BEST, TONY HARKLEY, ANTWON LOGAN, VALLERY McCLAIN, JESSEE WHITT, WALTER HAGER, MATTHEW ROBINSON, JOSEPH LEE, DEAN TUCKER, DONNIE GRIER, PERNELL PAULING, TERESA BARNES, TODD GOOD, JAMES RITCHIE, DORIS MILLER, TERRY PATE, ANTHONY CHRISTIAN, ALAN PRUNTY, MARSHALL PARKS, RIAN TUCKER, AMY STARNES, EDWIN FAULKNER, RODNEY GADDY, JAMES CARELOCK, GLENN HOPE, CHRIS PAULEY, TONEY HILTON, GLEASON QUIDLEY, CHRIS PAYBORN, JERRY CUNNINGHAM, DONAL HICKELY, ROGER MEEKS, ROGER THOMPSON, OTIS WALKER, ROBERT LEADFORD, HAROLD PHILLIPS, JAMES HOWZE, THONY PAYER, DOMINIQUE SIMPSON, WILLIE HOPE, BILL DOWNY, JAMES CRENSHAW, ED ENOLE, ERIC HARRIS, CHARLES PERRY, JAMES SPY, FRED WILLIAMS, FLOYD LOVE AND TIM HARDEN, AS WELL AS THE ESTATES OF THE FOLLOWING PERSONS NOW DECEASED, WILLIE HENRY, THOMAS QUERNS AND

MICHAEL LORICK, PLAINTIFFS v. THE EARTHGRAINS COMPANIES, INC., ANHEUSER-BUSCH, INC. AND CAMPBELL TAGGART BAKING COMPANIES, INC. NOW EARTHGRAINS BAKING COMPANIES, INC., DEFENDANTS

No. COA01-1481

(Filed 21 January 2003)

1. **Appeal and Error— preservation of issues—failure to assert at trial—failure to assert in assignments of error**

Although plaintiffs contend in a negligent misrepresentation case that defendants violated N.C.G.S. § 1A-1, Rule 12(a)(2) by failing to file an answer upon remand and that therefore all allegations of plaintiffs' complaint are deemed true, plaintiffs have waived the right to argue this issue on appeal because plaintiffs did not raise this issue before the trial court nor did plaintiffs designate the alleged violation in their assignments of error in the record on appeal.

2. **Corporations; Fraud— negligent misrepresentation—director of corporation—fiduciary duty**

The trial court did not err in a negligent misrepresentation case by granting summary judgment in favor of defendants based on allegations that a director of a corporation breached a fiduciary duty to employees of the corporation by informing them that the plant was profitable and their jobs were secure because: (1) plaintiffs failed to show that the president and chief financial executive officer of the corporation owed a duty to report accurate information about the pertinent plant's financial status when the president as director of a corporation only owed a duty of care to the corporation and not to individual employees; and (2) plaintiffs failed to show that the president was offering plaintiffs guidance in a business transaction, that the alleged information was false, that defendants had a pecuniary interest in inducing plaintiffs to continue employment, or that plaintiffs were justified in relying on the alleged information.

Appeal by plaintiff from order entered 10 June 2001 by Judge Catherine C. Eagles in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 October 2002.

Pamela A. Hunter and N. Clinton Cannon, Jr., for plaintiff-appellants.

Fisher & Phillips, LLP, by Anderson B. Scott and Hutson, Hughes & Powell, P.A., by James H. Hughes, for defendant-appellees.

TIMMONS-GOODSON, Judge.

Mary Jordan, et al (hereinafter referred to collectively as "plaintiffs") appeal from an order of the trial court granting summary judgment in favor of The Earthgrains Company, Anheuser-Busch, Inc., and Campbell Taggart Company (hereinafter collectively, "defendants"). For reasons stated herein, we affirm the trial court's decision.

An examination of the pleadings, exhibits, and depositions filed in response to defendants' summary judgment motion, considered in the light most favorable to plaintiff, tends to show the following: The Earthgrains Company ("Earthgrains") is a national baking company operating several plants nationwide, including a plant located in Charlotte, North Carolina. Earthgrains is owned by Campbell Taggart Baking Companies, Inc. ("Campbell"), which in turn is a wholly-owned subsidiary of Anheuser-Busch Companies ("Anheuser").

In 1993, Barry Beracha ("Beracha") was hired as Chief Executive Officer of Campbell. In 1995, Anheuser decided to "spin-off" Campbell's common stock by distributing it to Anheuser shareholders. This plan would allow Campbell to become an independent publicly-owned company. On 1 August 1995, Beracha traveled to the Charlotte plant to conduct a meeting regarding the status of the Charlotte plant ("the August 1995 meeting"). At that time, plaintiffs were employed at the Charlotte plant operated by Earthgrains. The August 1995 meeting and the events following the meeting are the basis for three lawsuits filed by plaintiffs.

During the August 1995 meeting, plaintiffs questioned Beracha about job security and the economic status of the Charlotte plant. According to plaintiffs, Beracha reported that the Charlotte plant was profitable and that their jobs were secure. However, according to defendants, Beracha was asked if any jobs would be lost as a result of the spin-off of common stock to defendants' shareholders. Defendants contend that Beracha reported that the Charlotte plant would not close and plaintiffs would not lose their jobs as a result of the spin-off procedure.

On 6 December 1995, plaintiffs were notified that the Charlotte plant would close in February 1996. Plaintiffs filed a class action lawsuit on 24 February 1997 in federal court alleging Title VII violations and contending that statements made by Beracha in the August 1995 meeting constituted fraudulent misrepresentation. Defendants were granted summary judgment, a decision which was eventually affirmed by the United States Court of Appeals for the Fourth Circuit. On 9 February 1999, plaintiffs filed a second lawsuit in federal court, but later dismissed the action.

On 3 May 2000, plaintiffs filed a lawsuit in Mecklenburg County Superior Court alleging negligent misrepresentation. In the complaint, plaintiffs contended that the statements made by Beracha in the August 1995 meeting led them to believe that the Charlotte plant was profitable and that plaintiffs' jobs were secure. Plaintiffs further allege that at the time of the August 1995 meeting, Beracha knew that the operating costs of the Charlotte plant far exceeded its revenue, but that Beracha failed to inform them of this fact.

Defendants thereafter filed a motion for summary judgment which came before the trial court on 19 June 2001. Upon review of the evidence and argument by counsel, the trial court granted defendants' motion for summary judgment on 10 July 2001. Plaintiffs appeal.

Plaintiffs argue that the trial court erred in granting summary judgment in favor of defendants when (1) there are genuine issues of material fact for a claim of negligent misrepresentation, (2) their claim for negligent misrepresentation was not barred by collateral estoppel or *res judicata*, and (3) plaintiffs were not subject to a collective bargaining agreement. For the reasons stated herein, we disagree.

[1] We first note that plaintiffs argue extensively in each assignment of error that defendants violated Rule 12(a)(2) of the North Carolina Rules of Civil Procedure by failing to file an answer upon remand. From this argument, plaintiffs reason that "because . . . [d]efendants failed to file an [a]nswer, all factual allegations of [p]laintiffs' [c]omplaint are deemed true." Plaintiffs then contend that defendants do not dispute their claim for negligent misrepresentation because they "failed to file an answer." Plaintiffs did not raise this issue before the trial court, however, nor did plaintiffs designate the alleged violation in their assignments of error in the record on appeal. Having

failed to preserve this alleged error, plaintiffs have waived the right to argue on appeal that defendants failed to file an answer. *See* N.C.R. App. P. (10)(b)(1) (2002).

[2] Plaintiffs argue that the trial court erred in granting summary judgment in favor of defendants. Plaintiffs contend that genuine issues of material fact exist for a claim of negligent misrepresentation.

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The party moving for summary judgment 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). In reviewing a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing the motion. *Id.*

Plaintiffs argue that genuine issues of material fact exist concerning their claim for negligent misrepresentation. It is well established that "the tort of negligent misrepresentation occurs when (1) a party justifiably relies (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *reversed on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991). Generally, directors of a corporation owe a fiduciary duty to the corporation. *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 26, 560 S.E.2d 817, 822, *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002). When there are allegations that a director of a corporation has breached a fiduciary duty, the action is properly maintained by the corporation. *Id.*

Therefore, in order to show error, plaintiffs in the instant case must be able to show that Beracha owed plaintiffs a duty of care, which was breached, and that they justifiably relied on the alleged misrepresentations made by Beracha. Viewing the evidence in the light most favorable to plaintiffs, there are no genuine issues of material fact concerning the essential elements of duty of care, breach of duty and justifiable reliance, and defendants are entitled to judgment as a matter of law. Thus, plaintiffs' claims could not withstand a summary judgment motion.

In the instant case, plaintiffs fail to show that Beracha owed a duty to report accurate information about the Charlotte plant's financial status. The evidence tends to show that Beracha is the president and chief executive officer of Campbell. In his position as the director of a corporation, Beracha only owed a duty of care to the corporation and not to individual employees. Therefore, plaintiffs fail to show that Beracha owed them a duty of care, which is an essential element of negligent misrepresentation.

Plaintiffs further argue that even if Beracha was "under no duty to speak, when he did speak he was under a duty to give competent information and plaintiffs were justified in relying on Beracha's statements." We disagree.

In *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 537 S.E.2d 237 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 18 (2001), a corporation's president and chief operating officer informed potential stock buyers that the corporation could emerge from bankruptcy reorganization as a revitalized entity, and that an investment in the corporation could be valuable and profitable. This Court held that the buyers of stock in the corporation could not recover on a theory of negligent misrepresentation after their stock lost its value because neither the president nor the corporation was in the business of giving financial advice, and the president did not obtain a pecuniary gain from the investment. *Id.* at 534, 537 S.E.2d at 241. The *Sims* Court defined a breach of duty owed in negligent misrepresentation as:

> "... One who, in the course of his business, profession or employment, or in any other transaction in which he *has a pecuniary interest*, supplies false information for the guidance of others in *their business transactions*, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Id. (quoting *Marcus Bros. Textiles Inc.*, 350 N.C. at 218, 513 S.E.2d at 323-24.

In the case at bar, plaintiffs fail to show that (1) Beracha was offering them guidance in a business transaction; (2) that the alleged information was false; (3) that defendants had a pecuniary interest in inducing plaintiffs to continue employment; or (4) that plaintiffs were justified in relying on the alleged information. The evidence tends to

show that plaintiffs and defendants were not engaged in a business transaction; however, Beracha's visit to the Charlotte plant was shortly after the public announcement of the spin-off of stock by defendants, and plaintiffs were concerned with how the spin-off would affect the Charlotte plant. During the meeting, plaintiffs and Beracha discussed the spin-off and Beracha informed plaintiffs that the spin-off did not affect the Charlotte plant. Plaintiffs offer no evidence to the contrary, but merely contend that Beracha reported to them that the Charlotte plant was profitable. The record further reveals that after a study commission reviewed the operation of the Charlotte plant, the committee recommended that the Charlotte plant be closed. Beracha approved the committee's recommendation on 16 November 1995, which was approximately four months after the August 1995 meeting. Therefore, Beracha could not provide false information regarding the Charlotte plant's closure and thus could not breach any alleged duty owed to plaintiffs.

Assuming, *arguendo*, that plaintiffs' claims are true, they fail to show that defendants had a pecuniary interest by allegedly informing plaintiffs that the Charlotte plant was profitable. Plaintiffs fail to claim that Beracha's alleged representations were calculated or made with the intent to deceive plaintiffs. A further review of the record reveals that consistent with obligations under the National Labor Relations Act, defendants, represented by the International Brotherhood of Teamsters Local Union 71, negotiated with the union concerning the terms and arrangements for the Charlotte plant's closure. The agreement contained a special bonus package not mandated by the collective bargaining agreement. Assuming, as argued by plaintiffs, that Beracha knew the Charlotte plant was not profitable, defendants would obviously lose money by advising plaintiffs to continue employment, close the plant, and then negotiate a bonus package for plaintiffs. The union agreement is inconsistent with plaintiff's argument that defendants obtained a pecuniary interest by inducing plaintiffs to continue employment with defendants. Without the essential element that defendants breached an alleged duty of care, plaintiffs' claim for negligent misrepresentation must fail.

Additionally, plaintiffs fail to show justifiable reliance. Plaintiffs contend that it was "reasonable" for them to conclude that Beracha conducted "all necessary investigations regarding the profitability" of the Charlotte plant in preparation of the August 1995 meeting. Plaintiffs offer no further evidence to establish that they relied on the representations made by Beracha to their detriment.

"Justifiable reliance is an element of negligent misrepresentation in North Carolina." *APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority*, 110 N.C. App. 664, 680, 431 S.E.2d 508, 517 (1993). The evidence tends to show that plaintiffs offer no evidence that they relied on Beracha's statements or that such reliance was justified. Therefore, we conclude that any reliance by plaintiffs was not justified for several reasons. First, plaintiffs failed to inspect financial information posted inside the Charlotte plant. Second, plaintiffs failed to show that they declined any job offers in order to remain with defendants based on comments made at the August 1995 meeting. Third, Beracha did not know in the August 1995 meeting that the commission study would recommend the closure of the Charlotte plant.

Since essential elements of negligent misrepresentation are absent in this case, we conclude the trial court did not err in granting summary judgment in favor of defendants.

In light of the foregoing, we decline to address plaintiffs' remaining assignments of error.

Affirmed.

Judge WYNN concurs.

Judge THOMAS concurred in the opinion prior to 31 December 2002.

LAWRENCE CHAVIS, EMPLOYEE, PLAINTIFF v. THETFORD PROPERTY MANAGEMENT, INC., EMPLOYER, AND LEGION INSURANCE COMPANY (MANAGED CARE USA, SERVICING AGENT), CARRIER, DEFENDANTS

No. COA02-497

(Filed 7 January 2003)

Workers' Compensation— attorney fees—claim defended without reasonable ground

The Industrial Commission did not abuse its discretion in a workers' compensation case by awarding attorney fees to plaintiff's attorney under N.C.G.S. § 97-88.1 based on defendants' actions of defending the claim without reasonable ground by its

appeal to the Full Commission and for not paying a claim defendants admitted was compensable just before the hearing before the Deputy Commissioner, because: (1) defendants do not offer any reasonable ground for defending the claim; and (2) defendants have not paid any medical or indemnity compensation to plaintiff, and plaintiff has subsisted on six weeks of disability insurance payments and twenty-six weeks of unemployment.

Appeal by defendants from opinion and award filed 19 December 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 December 2002.

Goodwin Law Offices, by George Wayne Goodwin, for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jennifer Ingram Mitchell, for defendant appellants.

McCULLOUGH, Judge.

Plaintiff Lawrence Chavis was working as a maintenance supervisor for defendant-employer, Thetford Property Management, Inc., on 4 December 1997. On this date, as plaintiff backed down steps holding a paint can in his left hand, he slipped and fell, injuring his left knee. He informed his supervisor of the injury, and the employer filed a Form 19, "Employer's Report of Injury to Employee" on the same date. Plaintiff filed a Form 18, "Notice of Accident to Employer" on 19 February 1998, and on 23 February 1998, filed a request that his claim be assigned for hearing. He alleged that defendants had not paid any benefits or accepted his claim as compensable. Defendants filed a response in which they denied that plaintiff sustained an injury by accident arising out of and in the course of the employment.

Deputy Commissioner Theresa B. Stephenson conducted a hearing on 24 March 2000 and after receiving deposition testimony of two other witnesses, filed an opinion and award on 30 January 2001 awarding compensation for temporary total disability from 4 December 1997 through 16 February 1998 and again from 25 May 1999 until further order of the Commission. The opinion and award reflected, as a stipulation, that just before the hearing, defendants informed the Deputy Commissioner they would accept the claim as compensable.

Defendants filed an application for review of the Deputy Commissioner's decision on 19 October 2001. The Commission

entered the same award of compensation for temporary total disability as the Deputy Commissioner. The Commission additionally found that defendants defended the claim without reasonable ground. It awarded a fee pursuant to N.C. Gen. Stat. § 97-88 (2001) in the amount of $1,000 to plaintiff's attorney for defending the appeal to the Commission. It also ordered defendants to pay an amount equal to 25% of all compensation amounts "without deduction from the compensation to be paid to plaintiff, to plaintiff's attorney as reasonable attorney fees pursuant to N.C. Gen. Stat. § 97-88.1 and such amounts are hereby taxed as costs to defendants." The Commission also directed that defendants pay directly to plaintiff's counsel "at the same time defendants pay every fourth check to plaintiff (and this does NOT mean that defendants do not make weekly payments of compensation to plaintiff) they shall pay a like amount directly to plaintiff's attorney."

Defendants' sole contention on appeal is that the Commission abused its discretion by making the above award of attorney fees pursuant to N.C. Gen. Stat. § 97-88.1. The Commission may award attorney fees if it determines that "any hearing has been brought, prosecuted, or defended without reasonable ground[.]" N.C. Gen. Stat. § 97-88.1. The purpose of this statute is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured workers. *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990). The decision whether to make such award, and the amount, is in the discretion of the Commission and will not be disturbed on appeal absent an abuse of discretion. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). An abuse of discretion will be found only when the decision is manifestly unsupported by reason or is so arbitrary that it could not have been the product of a reasoned decision. *Long v. Harris*, 137 N.C. App. 461, 464-65, 528 S.E.2d 633, 635 (2000).

Defendants argue that since they have not appealed or contested the Commission's award of benefits to plaintiff, the award of a fifth check to plaintiff's attorney constituted an abuse of discretion. We disagree.

The Full Commission assessed defendants with the attorney fee, not for bringing the present appeal, but for appealing to the Full Commission and for not paying a claim defendants admitted was compensable just before the hearing before the Deputy

Commissioner. Defendants in their brief to this Court do not offer any reasonable ground for defending the claim. They do not cite any evidence to support a reasonable defense. In fact, they do not include any of the evidence in the record on appeal.

In *Harrison v. Tobacco Transp., Inc.*, 139 N.C. App. 561, 533 S.E.2d 871, *disc. review denied*, 353 N.C. 263, 546 S.E.2d 96 (2000), the Commission awarded attorney fees pursuant to N.C. Gen. Stat. § 97-88.1, finding the defendant-employer had not raised credible evidence to dispute the nature and extent of the plaintiff's compensable injury. The Commission stated that the plaintiff should not have been denied compensation while the employer and the carrier litigated an issue as to whether the carrier's policy covered plaintiff's injury in North Carolina. This Court upheld the award, noting that plaintiff endured six years without receiving any compensation from the employer for an admittedly compensable injury.

Here, although the Commission did not make an express finding that defendants failed to present credible evidence to dispute the nature and extent of the injury, it did find that the testimony of defendants' vocational rehabilitation counselor had little weight because the counselor failed to perform a functional capacity examination, failed to obtain plaintiff's current physical abilities, failed to obtain any specific job descriptions, or failed to engage in any active search for jobs plaintiff could perform and actually obtain. Based upon the record before us, it appears that as of the date of the Commission hearing, 11 December 2001, defendants had not paid any compensation, neither medical nor indemnity, to plaintiff. The Commission's findings of fact reflect that plaintiff was out of work from 4 December 1997 through 16 February 1998 and again from 25 May 1999 through the date of the Commission hearing. During this time period, plaintiff subsisted on six weeks of disability insurance payments and 26 weeks of unemployment. Under these circumstances, we do not find the Commission abused its discretion by ordering defendants to pay the attorney fee.

The opinion and award is affirmed.

Affirmed.

Chief Judge EAGLES and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER ALLEN NANCE, DEFENDANT

No. COA02-380

(Filed 21 January 2003)

Appeal and Error— appealability—guilty plea—habitual felon status—writ of certiorari

The State's motion to dismiss defendant's appeal in an action where defendant purports to appeal from the judgment entered upon his guilty plea for various substantive drug charges as well as to the ancillary habitual felon charge is allowed and defendant's petition for writ of certiorari under N.C. R. App. P. 21(a)(1) is denied even though defendant claims that he did not knowingly and voluntarily plead guilty to having attained the status of habitual felon, because: (1) defendant has sought neither to withdraw his guilty plea nor to obtain any other relief by motion at the trial court; (2) defendant's claim is not one that he may raise on direct appeal under N.C.G.S. § 15A-1444(a)(1) or (a)(2); and (3) defendant has not lost his right to appeal through untimely action, is not attempting to appeal an interlocutory order, and is not seeking review of an order denying a motion for appropriate relief under N.C.G.S. § 15A-1422(c)(3).

Appeal by defendant from judgment entered 3 July 2001 by Judge Preston Cornelius in Iredell County Superior Court. Heard in the Court of Appeals 23 December 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Noell P. Tin, for defendant-appellant.

HUDSON, Judge.

Defendant was charged with some thirteen drug-related offenses after he sold controlled substances to a police informant during an undercover drug operation of the Iredell County Sheriff's Department. Based upon previous felony convictions, defendant was also charged with having attained the status of habitual felon. Defendant subsequently entered into a plea agreement whereby he agreed to plead guilty to all of the charges. In exchange, the charges against defendant would be consolidated into one judgment, and defendant would be sentenced as a level IV, Class C felon. The trial

court subsequently accepted defendant's guilty plea. In accordance with the plea agreement, the trial court entered a consolidated judgment on the plea, sentencing defendant to a presumptive term of 133 to 169 months' imprisonment. Defendant purports to appeal from the judgment entered upon his guilty plea. The State has moved to dismiss defendant's appeal, alleging that defendant does not have a right to appeal in this case. Defendant, alternatively, petitions this Court for writ of certiorari to review the court's judgment.

On the face of this record, it appears that petitioner pled guilty to the various substantive drug charges, as well as to the ancillary habitual felon charge. Just recently, in *State v. Dickson*, we explained that a defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty to a criminal charge in the superior court unless he is appealing sentencing issues or the denial of a motion to suppress. 151 N.C. App. 136, 137, 564 S.E.2d 640, 640 (2002); see also N.C. Gen. Stat. § 15A-1444(e) (2001)). Although N.C. Gen. Stat. § 15A-1444(e) does provide that such a defendant may petition the appellate division for review by writ of certiorari, this Court is limited to issuing the writ of certiorari:

> in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

Dickson, 151 N.C. at 137-38, 564 S.E.2d at 640 (quoting N.C. R. App. P. 21(a)(1)). As the defendant in *Dickson* sought review of matters outside of G.S. § 15A-1444(a)(1) and (a)(2) and N.C. R. App. P. 21(a)(1), the Court dismissed his appeal and denied his petition for writ of certiorari. We act similarly here.

Defendant here seeks to bring forth a claim that he did not knowingly and voluntarily plead guilty to having attained the status of habitual felon. However, defendant has sought neither to withdraw his guilty plea, nor to obtain any other relief by motion in the superior court. Defendant's claim is not one that he may raise on direct appeal pursuant to G.S. § 15A-1444(a)(1) or (a)(2). Further, defendant has not lost his right of appeal through untimely action, nor is he attempting to appeal an interlocutory order or seeking review of an order denying a motion for appropriate relief under G.S. § 15A-1422(c)(3).

We conclude that defendant does not have a right to appeal the issue presented here under G.S. § 15A-1444(a)(1) or (a)(2), and that this Court is without authority under N.C. R. App. P. 21(a)(1) to issue a writ of certiorari. *See State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (describing the post-conviction motion for appropriate relief as "[t]he proper procedure which provides the defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights"). Accordingly, the State's motion to dismiss defendant's appeal is allowed, and defendant's petition for writ of certiorari is denied. This decision is without prejudice to defendant's right to file a post-conviction motion for relief in the superior court, pursuant to Article 89 of the General Statutes, §§ 15A-1411-1422.

Appeal dismissed; petition for writ of certiorari denied.

Chief Judge EAGLES and Judge McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 JANUARY 2003

IN RE BETTS No. 02-577	Cumberland (01J358)	Affirmed
STATE v. BROOKS No. 02-623	Granville (95CRS4516) (01CRS1728)	No error
STATE v. GALLOWAY No. 02-552	Forsyth (01CRS52874)	No error
STATE v. GRIFFITH No. 02-292	Guilford (94CRS74930) (94CRS74931) (95CRS20497)	Affirmed
STATE v. HAITH No. 02-588	Guilford (99CRS102577)	No error
STATE v. HARRIS No. 02-421	Wake (00CRS18045)	No error
STATE v. JACKSON No. 02-436	Pitt (99CRS64866)	No error
STATE v. ROBINSON No. 02-330	Guilford (01CRS76272)	No error
STATE v. SARTORI No. 02-476	Haywood (96CRS2930)	Affirmed

FILED 21 JANUARY 2003

BROWN v. LIBERTY MUT. INS. CO. No. 01-1578	Durham (99CVS3072)	Affirmed
BUXTON v. GARY JOBE BUILDERS, INC. No. 02-428	Guilford (00CVS6314)	Affirmed
COX v. FOLEY No. 02-16	Cumberland (99CVS8752)	Affirmed
KEFFER v. KEFFER No. 01-366-2	New Hanover (98CVD3112)	Affirmed
PATTERSON v. STRICKLAND No. 02-58	Mecklenburg (95CVS3906)	No error
POWELL v. AMLEASE/ SCUILLIO INTERIOR SYS. No. 02-680	Ind. Comm. (I.C. 567516)	Affirmed

PRITCHARD v. HARRIS TEETER, INC. No. 01-1375	Forsyth (99CVS9127)	Affirmed
PROVIDIAN NAT'L BANK v. BRYANT No. 01-754	Forsyth (00CVD10974)	Affirmed
PROVIDIAN NAT'L BANK v. BRYANT No. 01-1546	Forsyth (00CVD10974)	Affirmed
RIVENBARK v. N.C. FARM BUREAU MUT. INS. CO No. 01-1420	Columbus (00CVS288)	Affirmed
STATE v. BANNER No. 02-272	Forsyth (00CRS56436) (01CRS4463)	Affirmed
STATE v. FLEMING No. 01-1558	Wilson (99CRS54353)	No error
STATE v. JEFFREYS No. 02-627	Wake (00CRS42376) (00CRS42377) (00CRS42378) (00CRS42379)	No error
STATE v. LITTLE No. 02-249	Stanly (00CRS50013)	Appeal dismissed without prejudice to defendant's right to file a motion for appropriate relief in superior court
STATE v. OAKLEY No. 02-38	Guilford (93CRS20795) (93CRS42688) (93CRS61655)	Affirmed
STATE v. RUSHING No. 02-614	Union (01CRS4128) (01CRS4129)	No error
STATE v. WADDELL No. 02-545	Durham (00CRS63440)	No error
STATE v. WAITES No. 02-450	Gaston (98CRS18589)	No error
UTILITIES COMM'N v. CAROLINA WATER SERV., INC. No. 01-1340	Utils. Comm. (W-354, SUB232) (W-354, SUB238) (W-354, SUB239)	Affirmed

APPENDIX

PRESENTATION OF
S. GERALD ARNOLD
PORTRAIT

PRESENTATION OF THE PORTRAIT

OF

S. GERALD ARNOLD

CHIEF JUDGE

COURT OF APPEALS OF NORTH CAROLINA

1993 - 1998

JUDGE

COURT OF APPEALS OF NORTH CAROLINA

1974 - 1992

23 FEBRUARY 2004

OPENING REMARKS

BY

CHIEF JUDGE JOHN C. MARTIN

Good afternoon, Ladies and Gentlemen. Welcome to the North Carolina Court of Appeals. The Court is convened this afternoon for the purpose of receiving the portrait of the Honorable S. Gerald Arnold, who served on this Court from November, 1974 until his retirement on April 30, 1998. Judge Arnold served as Chief Judge for more than five years.

On behalf of the Court and Chief Judge Arnold and his family, I express to you our gratitude for your attendance.

We are delighted that members of Judge Arnold's family are with us this afternoon, including his wife Sue, son Stan, his daughter, Lisa Coats and her husband Andrew and their daughters whom you will meet a bit later, and his mother, Mrs. Delia Arnold. We are also happy that Judge Arnold's assistant, Sue Taylor, who served with him for his entire tenure on the Court, is also with us. All of you, of course, are our special guests and we welcome each of you.

Chief Judge Arnold has indicated that it is his wish to make the presentation himself. This is the first occasion we have had when the person whose portrait is being presented has made such a request—there is a reason for that:

Until very recently, when the rule was changed at the instance of Chief Judge Eagles, this Court did not receive portraits of former judges while the judge was still living. We are delighted that we had the wisdom to change that rule so that we can be here today to recognize Judge Arnold for this happy occasion, which, Gerald, is all the happier because you are with us. Chief Judge Arnold.

PRESENTATION ADDRESS

BY

CHIEF JUDGE ARNOLD

The proverb says "a happy heart doeth good like medicine . . . ." This Court was a happy place for me, and I am happy to be here again. I have to confess, though, to a rather discomforting self-consciousness over the reason why this Cour is sitting en banc in this ceremonial session.

By the grace of God, and with the help of many wonderful people—surpassing people—I spent 24 years at this Court. Cicero had it right, "Memory is the treasury and guardian of all things." Few human beings are blessed to have such wonderful memories as I have of my years here at this Court.

As I think of Chief Judges Raymond Mallard, Walter Brock, Naomi Morris, and Earl Vaughan, and you see their portraits hanging high and handsome here in these hallowed halls, and I think of Fred Hedrick, I can scarcely imagine my own portrait in a group of such stout and stalwart North Carolinians.

You honor me indeed by hanging my portrait in this courtroom. But it is an honor that does not compare with a much higher honor that was afforded me every day that I came to work here.

I hope that whenever you see portraits of the Chief Judges you will remember that they are symbolic of everybody who was connected in any way with the Court during that Judge's tenure as Chief Judge. And I also hope that you will remember whenever you come into this courtroom that you are connected to the past and to what other people did who came before you, and that what you do will connect those in the future, in another time and place perhaps, to what you do.

Chief Judge Martin, in recognition of the men and women with whom I was so privileged to work on this Court, Judges, Clerks, everyone, and in recognition of all those currently serving and working here now, and of those who in the future shall build upon what you do, my family and I wish to present this portrait.

Thank you for letting me say these few words.

ACCEPTANCE OF CHIEF JUDGE ARNOLD'S PORTRAIT

BY

CHIEF JUDGE MARTIN

Judge Arnold's granddaughters, Caitlin and Claire Coats, who hold a very special place in his heart, will unveil the portrait.

Chief Judge Arnold, on behalf of the Court we accept this portrait with gratitude, not only for this painting which we will proudly display on the walls of this courtroom, but also for your many years of service and leadership. We are truly honored by this gift and by the opportunity to follow the example you have set for us.

I would also like to recognize and thank Craig Green, the artist who captured Judge Arnold's likeness on this canvas so well.

A record of these proceeding will be included in the minutes of the Court and printed in the North Carolina Court of Appeals Reports.

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

denial of plaintiffs' motion to dismiss defendant's counterclaim did not affect a substantial right; no substantial right is involved that would allow an immediate appeal where, under uncomplicated circumstances, a court directs a party to pay fees or costs; and an order refusing to impose sanctions is not immediately appealable absent a showing that a substantial right is involved. **Powell v. Bulluck, 613.**

Appealability—denial of motion for stay—right to arbitrate—Although defendant's appeal in a claim arising out of the purchase of a new home from the denial of its motion to stay plaintiffs' action pending arbitration is an appeal from an interlocutory order, it may be immediately appealed. **Brevorka v. Wolfe Constr., Inc., 353.**

Appealability—denial of preliminary injunction—interlocutory—Plaintiffs' appeal was dismissed as interlocutory where they attempted to appeal from the denial of a preliminary injunction against a zoning ordinance amendment restricting video game machines. The denial of the injunction did not deprive plaintiffs of any rights (much less a substantial right) because the amendment was not in effect at the time plaintiffs moved for the injunction, and because the ordinance simply limited use of video games but did not restrict plaintiffs' other business functions. **Bessemer City Express, Inc. v. City of Kings Mountain, 637.**

Appealability—denial of summary judgment—sovereign immunity—A denial of summary judgment was immediately appealable because the motion was based on sovereign immunity. **Childs v. Johnson, 381.**

Appealability—entire defense struck—An immediate appeal is available when an entire further answer or defense is struck. **Faulconer v. Wysong & Miles Co., 598.**

Appealability—guilty plea—habitual felon status—writ of certiorari—The State's motion to dismiss defendant's appeal in an action where defendant purports to appeal from the judgment entered upon his guilty plea for various substantive drug charges as well as to the ancillary habitual felon charge is allowed and defendant's petition for writ of certiorari under N.C. R. App. P. 21(a)(1) is denied even though defendant claims that he did not knowingly and voluntarily plead guilty to having attained the status of habitual felon. **State v. Nance, 773.**

Appealability—interlocutory order—certiorari granted—A superior court order remanding a university grievance to a university committee was interlocutory, but was treated as a petition for a writ of certiorari and heard in the interests of justice because there was merit in some of the substantive arguments. **Sack v. N.C. State Univ., 484.**

Appealability—interlocutory order—contempt order—substantial right—Although defendant's appeal from a civil contempt order and an enforcement order for sanctions is an appeal from interlocutory orders, the orders affect a substantial right and are therefore immediately appealable. **Guerrier v. Guerrier, 154.**

Appealability—interlocutory order—contract and tort claims distinct—no risk of separate verdicts—Plaintiff's appeal was dismissed as interlocuto-

APPEAL AND ERROR—Continued

ry in an action arising from the provision of industrial electrical service where plaintiff appealed from a trial court order dismissing its contract claims as being within the exclusive jurisdiction of the Utilities Commission, finding that its tort claims were derivative of the contract claims, and staying the tort claims pending review by the Utilities Commission. Although plaintiff argued that a substantial right was affected in that there was a risk of inconsistent verdicts, the contract and tort claims address entirely separate issues. Moreover, plaintiff has preserved its objections and can appeal from the trial court's ultimate disposition of the entire controversy. **Mitsubishi Elecs. & Elecs. USA, Inc. v. Duke Power Co., 555.**

Appealability—interlocutory order—grant of partial summary judgment—Plaintiffs' appeal from the trial court's grant of partial summary judgment on some but not all issues in a case seeking to require defendants to remove improvements to their real property is dismissed as an appeal from an interlocutory order. **Munden v. Courser, 217.**

Appealability—interlocutory order—order to pay attorney fees as a sanction—Although an order compelling discovery is generally not immediately appealable based on the fact that it is an appeal from an interlocutory order and an order to pay attorney fees as a sanction does not affect a substantial right, this order is appealable because the underlying legal issues in this case have been resolved by the parties in a settlement agreement. **Long v. Joyner, 129.**

Appealability—interlocutory order—sanction for failure to comply with discovery order—Plaintiff's appeal in a medical malpractice action from an order sanctioning him for failure to comply with a discovery order is dismissed as an appeal from an interlocutory order. **Myers v. Mutton, 213.**

Appealability—partial summary judgment—certification—Although an appeal from the grant of partial summary judgment is ordinarily an appeal from an interlocutory order, this appeal was properly before the Court of Appeals because the trial court certified this case under N.C.G.S. § 1A-1, Rule 54(b). **Gilbert v. N.C. Farm Bureau Mut. Ins. Co., 400.**

Appealability—partial summary judgment—certification—A prison construction claim was immediately appealable where the trial court granted a motion for summary judgment from the State, which did not dispose of all the claims in the case, but the court certified that there was no just reason for delay. **N.C. Monroe Constr. Co. v. State, 320.**

Appealability—partial summary judgment—certification—A partial summary judgment was correctly certified for immediate appeal where the action arose from a car accident which occurred while defendant Levinson was driving to an office Christmas party and summary judgment was granted for defendant employer. There is a distinct possibility of a second trial and inconsistent verdicts if it is later determined that summary judgment was improperly granted for the employer. **Williams v. Levinson, 332.**

Appealability—partial summary judgment—writ of certiorari—There was no need to determine whether a substantial right was affected by a partial summary judgment where the Court of Appeals had issued a writ of certiorari. **Harleysville Mut. Ins. Co. v. Narron, 362.**

CONSTITUTIONAL LAW—Continued

EVIDENCE—Continued

Expert testimony—victim in fact sexually abused—no plain error—Although the trial court erred in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by admitting expert testimony that the victim was in fact sexually abused, the error did not amount to plain error. **State v. Wade, 1.**

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Hearsay—business records—medical records of sexual disease in child abuse case—The trial court did not commit plain error in an indecent liberties with a child, felonious child abuse by a sexual act, incest, statutory rape, and first-degree rape case by failing to strike ex mero motu a witness nurse's testimony that both defendant and his victim daughter had been treated for gonorrhea when the witness did not treat defendant where the testimony was based upon the contents of medical records maintained by the county health department. **State v. Wade, 1.**

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Hearsay—deposition testimony—available witness—Rule 32 exception—Although the trial court erred in a medical malpractice case by allowing the admission of selected portions of the deposition testimony of an available expert witness without showing that a stated purpose under Rule 32(a) was met, the error was harmless. **Suarez v. Wotring, 20.**

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franchise under N.C.G.S. § 130A-294(b1)(3) or N.C.G.S. § 160A-319 from respondent-intervenor town for operation of a sanitary landfill prior to receiving Facility Permit 92-22. **County of Wake v. N.C. Dep't of Env't & Natural Res., 225.**

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First-degree murder—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder of his pregnant girlfriend. **State v. Holliman, 120.**

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possessed a second or third key to the other room, this does not confer a reasonable expectation of privacy. **State v. Diaz, 307.**

Warrantless search—motion to suppress—plain view—The trial court did not err in a first-degree murder case by denying defendant's motion to suppress the evidence taken by officers from the home of the victim on 13 August 1998 without a search warrant, because: (1) officers were responding to information provided to them by the eventual defendant; (2) the officers' entry into the house was lawful since officers are authorized to enter buildings when they believe it reasonably necessary to save a life or prevent serious bodily harm; (3) it was not an illegal search and seizure for the detectives to come into the house later while it was still secure to collect the evidence that had already been seized; and (4) defendant did not object to anything that was seized as not being in plain view. **State v. Earwood, 698.**

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alone does not constitute unnecessary hardship, and there was no evidence that respondent could obtain no reasonable return or use from his property if he complied with the setback requirements, and (2) the evidence was insufficient to support the board's findings that a variance will not impair the adequate supply of light and air to adjacent property and that a variance will not impair established property values within the surrounding area. **Showcase Realty & Constr. Co. v. City of Fayetteville Bd. of Adjust., 548.**

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Successive ordinances—time of enforcement controls—The trial court did not err by applying the zoning ordinance in effect at the time of enforcement (the Unified Development Ordinance) rather than the ordinance in effect at the time of the violation (the Camden County Zoning Ordinance) in a case involving the replacement of an existing mobile home. **Overton v. Camden Cty., 391.**

Variance—findings mirroring language of ordinance—sufficient—A board of adjustment's findings in granting a zoning variance were not conclusory or insufficient in form or substance simply because they mirrored the language of the ordinance. **Showcase Realty & Constr. Co. v. City of Fayetteville Bd. of Adjust., 548.**

WORD AND PHRASE INDEX

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