

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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-
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 2. Elected and sworn in 1 January 2003.
 3. Elected and sworn in 1 January 2003.
 4. Elected and sworn in 1 January 2003.
 5. Elected and sworn in 2 January 2003.
 6. Elected and sworn in 3 January 2003.
 7. Retired 31 December 2002.
 8. Retired 31 December 2002.

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-
1. Appointed and sworn in 12 March 2004 to replace Franklin F. Lanier who was appointed to the Superior Court.
 2. Appointed and sworn in 16 April 2004.
 3. Appointed Chief Judge 27 February 2004 to replace John J. Snow, Jr. who retired 27 February 2004.
 4. Appointed and sworn in 20 April 2004.
 5. Appointed and sworn in 28 April 2004.
 6. Appointed and sworn in 17 May 2004.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

REBECCA ANN SPENCER, PLAINTIFF V. TERRY EDMUND SPENCER, DEFENDANT

No. COA02-334

(Filed 4 February 2003)

1. Appeal and Error— appealability—failure to follow appellate rules—failure to timely enter into written contract for transcript

The trial court did not err by denying plaintiff's motion to dismiss based on defendants' failure to follow the appellate rules, including the failure to enter into a written contract for the production of the transcript within fourteen days of the filing of defendant's notice of appeal in violation of N.C. R. App. P. 7, because: (1) defendant's actions in the present case constitute substantial compliance with the appellate rules when defendant made a request for the cassette tapes contemporaneously with his notice of appeal on 25 June 2001 and the tapes were not made available by the clerk's office per defendant's request until 13 September 2001; and (2) while defendant should have served something in the nature of written documentation of the audio tape request on the opposing party to inform her of the status of the appeal, failure to do so did not warrant dismissal.

2. Child Support, Custody, and Visitation— child support—modification—payment of college education—equitable estoppel

Although a trial court in a child support case could not modify a prior court order pursuant to N.C.G.S. § 1A-1, Rule 60(a) on

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the ground that the modification as entered by the trial court was a change in the substantive provision of the original order which affected defendant father's substantive rights and the language in finding of fact number ten is not unequivocal in that it merely suggests that the parties should equally divide their daughter's college expenses, defendant is equitably estopped from refusing to honor the part of the agreement in which he agreed that he should divide the costs of his daughter's college education equally with plaintiff mother.

Appeal by plaintiff and defendant from order entered 18 December 2001 by Judge L. W. Payne in New Hanover County District Court. Heard in the Court of Appeals 14 November 2002.

Law Office of Ellen Arnold Kiernan, by Ellen Arnold Kiernan, for plaintiff appellant-appellee.

R. Kent Harrell for defendant appellant-appellee.

McCULLOUGH, Judge.

Plaintiff Rebecca Ann Carroll, formerly Spencer, and defendant Terry Edmund Spencer were married on 18 May 1974. During their marriage, their daughter, Stephanie Ann Spencer, was born on 14 June 1980. The parties separated on 30 December 1988. On 6 April 1989, the parties filed a consent judgment with the New Hanover County District Court, which was signed by the Honorable Charles E. Rice.

This consent judgment contained several findings of fact, conclusions of law, and a decree. It was the complete embodiment of the issues between the parties, including child custody and visitation, statutory and non-statutory child support, spousal support and equitable distribution. The first six paragraphs are the general introductory paragraphs. Paragraphs 8 through 22 deal with all the above subjects. Paragraph 10, the focus of at least part of this appeal, is one of the several paragraphs that deals with child support, agreed upon by the parties. These include:

8. That the defendant should pay to the Clerk of Superior Court reasonable child support for the support and maintenance of the minor child.

....

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10. That the parties should equally divide the cost for the college education of the daughter, STEPHANIE ANN SPENCER, including, but not limited to tuition, books, fees, room and board, clothing, transportation and other reasonable living expenses.

11. That the defendant shall maintain a policy of insurance providing coverage on his life in the sum of at least \$100,000 naming the parties' child as beneficiary thereof. Said insurance shall be carried until husband's child support obligation shall cease.

....

19. Husband shall keep his present medical insurance on the minor child as long as his duty to support the minor child is in force.

Under the conclusions of law, the issue of child support is noted in Conclusion of Law No. 3, which simply states: "That the defendant shall provide reasonable support for the minor child." However, in the decree, the trial court orders:

2. That the defendant shall pay through the Clerk of Superior Court of New Hanover County the sum of One Hundred, Fifteen Dollars (\$115.00) per week for the support and maintenance of the minor child and shall continue to do so until the minor child reaches eighteen (18) years of age, graduates from high school or otherwise becomes emancipated. [sic]

3. That the defendant shall further keep the minor child on his present medical insurance and keep a \$100,000 life insurance policy in force and effect with the minor child as the beneficiary until his obligation to provide support to said minor child has ended.

The provisions of paragraph 10 are notably missing from the decree even though the other child support provisions were included.

While the parties made other changes to the consent judgment, including a 3 January 1992 order for a change of language (involving a different section) and a 3 July 1998 dismissal of the statutory child support obligations under paragraphs 8 of the findings of fact and 2 of the decree after the child had become emancipated, this omission was never a problem until defendant ceased paying for college expenses. Eventually, plaintiff filed a motion pursuant to Rule 60(a) to correct the judgment on 12 January 2001. Her motion noted the

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absence of paragraph 10 from the decretal portion of the consent judgment. Plaintiff alleged that:

5. Since she started college, Defendant has paid sums toward Stephanie's educational expenses. However, Defendant failed to pay his share of all enumerated expenses and refused demand to pay same. Defendant recently advised Plaintiff and Stephanie that he intended to cease making payments toward Stephanie's college expenses when Stephanie reached the age of twenty-one (21).

Plaintiff argued that the failure to restate defendant's obligation to pay the college expenses as set forth in paragraph 10 "was a clerical mistake arising from oversight or omission."

This matter was heard before the Honorable L. W. Payne in the New Hanover County District Court on 28 February 2001. In an order entered 26 March 2001, the trial court noted that plaintiff contended that paragraph 10 "constitutes a legally binding agreement that defendant pay half the enumerated college expenses and that the absence of similar language in the conclusions of law and decretal portions of the order is a clerical omission or oversight[.]" It also noted that defendant contended "that the word 'should' rather than [sic] 'will' or 'shall' is not a clear statement of intent and does not constitute a binding agreement." Ruling in favor of plaintiff and finding that such was an omission correctable by Rule 60(a), the trial court noted:

7. The Court notes in particular that paragraph 8 states that defendant "should pay . . . reasonable child support". It is clear that this was intended as a legally binding obligation, and this intent was incorporated by mandatory "shall" language in the conclusions and decretal portions of the order. This obligation was in fact enforced by contempt in earlier proceedings herein.

8. In the hearing before the undersigned neither party offered evidence. However, plaintiff's counsel asserted, and defendant's counsel concurred, that defendant has in fact paid half of the college expenses during Stephanie's first three years of college.

9. Taken in isolation the language "should equally divide the cost" in paragraph 10 is arguably ambiguous as to whether it imports a legal obligation or merely a moral directive. However, in the total context of the consent order, particularly considering

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the use of the word “should” in paragraph 8, it is clear to this Court that the intent of the parties was to enter into a legally binding agreement that they “shall” divide the college costs. The behavior of the parties subsequent to the entry of the order is consistent with this clear statement of intent.

10. The absence of language concerning college expenses in the conclusions of law and decretal portions of the order is a clerical oversight or omission which should be corrected by the Court.

Defendant appeals from this order.

Although the order was filed on 28 March 2001, defendant was not served with a copy until 25 June 2001. Defendant filed his notice of appeal (NOA) with the trial court on 25 June 2001. The events that follow are the subject of the cross-appeal by plaintiff.

On 2 July 2001 (7 days from NOA), defendant filed a Request for Duplicate Copy of Verbatim Audio Court Record. Before making his request, defendant’s counsel had spoken with Julie R. Ryan, a Certified Court Reporter, about transcribing the tapes when he received them. Ms. Ryan was already doing transcription work for him, and agreed to transcribe the tapes from the 26 March 2001 hearing. These tapes were not made available to defendant until 13 September 2001 (80 days from NOA) and defendant picked up the same on 14 September 2001 (81 days from NOA). Between the time when the tapes were requested and received, defendant had intermittently checked with the clerk’s office to determine whether the copies had been completed. Once received, defendant forwarded the tapes to Ms. Ryan for transcription.

On 19 September 2001 (86 days from NOA), plaintiff filed a motion to dismiss defendant’s appeal on the basis that defendant had failed to comply with the Rules of Appellate Procedure. Shortly thereafter, defendant filed a reply on 27 September 2001 (94 days from NOA), which included a letter from Ms. Ryan, signed on 21 September 2001 (88 days from NOA), stating that the letter served as a contract between her and defendant to prepare the transcript from the 26 March 2001 hearing. On 9 October 2001 (106 days from NOA), Ms. Ryan certified the delivery of the transcript to defendant.

A hearing was held on 29 October 2001 on plaintiff’s motion to dismiss with the Honorable L. W. Payne again presiding. In denying plaintiff’s motion, the trial court entered its order on 18 December

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2001, finding that defendant had substantially complied with the Rules of Appellate Procedure. Plaintiff cross-appeals from this order.

Defendant appeals from the 28 March 2001 order and assigns as error the trial court's (I) modification of a prior court order pursuant to Rule 60(a) on the ground that the modification as entered by the trial court was a change in the substantive provision of the original order which affected defendant's substantive rights and was therefore not permitted under Rule 60(a); (II) Finding of Fact No. 9 on the ground that there was insufficient evidence to support it; (III) Finding of Fact No. 10 on the ground that there was insufficient evidence to support it.

Plaintiff cross-appeals from the 18 December 2001 order and assigns as error the trial court's denial of its motion to dismiss defendant's appeal pursuant to Rules 7 and 11 of the Rules of Appellate Procedure on the basis that defendant failed (I) to enter into a written contract with the Court Reporter or transcriptionist within 14 days of the filing of his notice of appeal; (II) to serve a proposed record on appeal within a maximum of 35 days from the filing of his notice of appeal in the event that defendant did not order a transcript of the hearing from which defendant appeals as is required by Rule 11 of the Rules of Appellate Procedure; (III) to file a motion or obtain an extension of time in which to produce a transcript of the hearing within a maximum of 74 days after filing of his notice of appeal as is required by Rule 7; and (IV) to timely serve a proposed record on appeal as required by Rule 9 in the event that a transcript was deemed not required by the court to adequately review the trial court's proceedings.

I.

As plaintiff's appeal, if successful, could end the consideration of this matter, we deal with it first.

[1] Plaintiff contends that defendant committed a variety of violations of the North Carolina Rules of Appellate Procedure. First, that defendant failed to enter into a written contract for the production of the transcript within 14 days of the filing of his notice of appeal in violation of Rule 7. Plaintiff also points out that defendant failed to comply with any other provision of Rule 7. The next two are in the alternative. If a transcript was required, then defendant failed to produce and deliver it within 74 days of filing his notice of appeal. On the

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other hand, if a transcript was not necessary, then defendant failed to serve a proposed record on appeal within 35 days of filing his notice of appeal.

N.C.R. App. P. 7, in pertinent part, reads as follows:

(a) *Ordering the transcript.*

(1) *Civil cases. Within 14 days after filing the notice of appeal the appellant shall arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript.*

....

(b) *Production and delivery of transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, *that person shall have 60 days to prepare and deliver the transcript.*

N.C.R. App. P. 7(a)(1) & (b)(1) (2002) (emphasis added).

N.C.R. App. P. 11, "Settling the record on appeal," in pertinent part, reads as follows:

(a) *By agreement.* Within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered . . . , or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

N.C.R. App. P. 11(a) (2002) (emphasis added).

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Plaintiff notes for this Court that defendant's notice of appeal was filed on 25 June 2001. Accordingly, defendant was supposed to execute a written contract with a transcriptionist by 9 July 2001 if a transcript was necessary. Defendant did not do this until 21 September 2001. Nor did he file anything with the Clerk's office as further required by Rule 7.

When an appellant enters into and files a contract with a transcriptionist, it indicates to the appellee, through the operation of Rule 7 and Rule 11, whether the record on appeal shall be due 35 days after the notice of appeal, or a maximum of 74 days after the notice of appeal. Thus, plaintiff could have received a proposed record on appeal by a 30 July 2001 deadline based on the 35-day period. This did not occur. Nor did plaintiff receive a transcript by 7 September 2001, which marked the end of the maximum 74-day period.

It is clear that defendant has not complied with the facial requirements of Rule 7 and/or Rule 11. However, the fact that defendant had been in contact with Ms. Ryan, the transcriptionist, within the 14-day period after filing his notice of appeal bears upon the resolution of these issues. Thus, this issue turns on whether defendant "substantially complied" with the requirements of the Rules of Appellate Procedure.

Defendant contacted the transcriptionist before or contemporaneously with his filing of his notice of appeal, 25 June 2001. He requested the tapes from the clerk's office on 2 July 2001. The tapes were not made available to him until 13 September 2001. Defendant picked up the tapes on 14 September 2001, and immediately forwarded them to the transcriptionist. On 9 October 2001, the transcriptionist certified that the trial transcript had been produced and delivered to defendant.

This Court has held that when a litigant exercises "substantial compliance" with the appellate rules, the appeal may not be dismissed for a technical violation of the rules. See *Pollock v. Parnell*, 126 N.C. App. 358, 484 S.E.2d 864 (1997); *Anuforo v. Dennie*, 119 N.C. App. 359, 458 S.E.2d 523 (1995). On point is the *Pollock* decision. In that case, this Court stated:

Rule 7 sets forth the appropriate procedure for filing a timely appeal in matters requiring transcription by a court reporter. . . .

. . . .

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The circumstances of this case fall between the parameters of Rule 7 and Rule 11. The trial of this case was heard in District Court. N.C.G.S. 7A-198 provides that electronic or other mechanical devices shall be used in district court when court reporters are not available. N.C.G.S. 7A-198(a) (1995). This has become the common practice in all district courts and was the practice employed in [this case]. In order to obtain a transcript of the proceeding, the audio tape must be transcribed. A court reporter's services are not required.

Here, the defendant contacted the district court prior to filing his notice of appeal and inquired as to the transcribing of the trial. The defendant also contacted the Administrative Office of the Courts and sought advice on how to comply with the time requirements of the appellate rules when appealing from the district court. Following the instruction of the Johnston County Clerk of Court, the defendant purchased copies of the audio cassette tapes recording the trial and arranged for an employee of the defendant's attorney to transcribe the tapes within 60 days. Consequently, the defendant did not contract with a court reporter and did not file a copy of a contract with a court reporter within ten days from his notice of appeal. *The transcript of the trial was delivered to the defendant on 20 June 1996, within sixty days of the defendant's delivery of the cassette tapes to the transcriptionist.* The defendant served the record on appeal on the plaintiff on 10 July 1996.

On 30 May 1996, thirty six days after the defendant filed his notice of appeal, the plaintiff moved to dismiss the defendant's appeal because it was not timely. The plaintiff argues that the defendant was bound by the time limit set in Rule 11, thirty five days, because the defendant did not file a copy of a written contract with a court reporter within ten days of his notice of appeal.

Pollock, 126 N.C. App. at 360-61, 484 S.E.2d at 865-66 (emphasis added). The *Pollock* Court concluded that the appellant's actions constituted "substantial compliance" with Rule 7. *Id.* at 362, 484 S.E.2d at 866.

Applying this case law, we hold that defendant's actions in the present case constitute "substantial compliance" with the appellate rules. Like the Court in *Pollock*, this case was in district court and was recorded on cassette tapes. Defendant made a request for these tapes contemporaneously with his notice of appeal, 7 days afterward.

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However, these tapes were not made available by the clerk's office per defendant's request until 13 September. Our case law prevents a dismissal of an appeal based upon a violation of appellate rules caused by a delay by a court reporter, stating that, "[t]o hold otherwise would allow a delay by a court reporter, whether with or without good excuse, to determine the rights of litigants to appellate review." *Lockert v. Lockert*, 116 N.C. App. 73, 81, 446 S.E.2d 606, 610, *disc. review allowed and writ of supersedes allowed*, 338 N.C. 311, 450 S.E.2d 490 (1994). We hold that the same principle applies to a clerk's office in the delivery of audio recordings of proceedings in district court. When an appellant makes a proper request of the clerk's office, as in the present case, a dismissal based upon the delay of the same in delivering the tapes is untenable.

While it may be that defendant should have served something in the nature of written documentation of the audio tape request on the opposing party to inform them of the status of the appeal, failure to do so did not warrant dismissal. The trial court did not err in denying plaintiff's motion to dismiss, and thus we affirm.

II.

[2] Having held that defendant's appeal is properly before this Court, we address the merits of his appeal. Defendant's first assignment of error is that the trial court erred in modifying the existing judgment because it constituted a change in the substantive provisions which in turn affected his substantive rights.

This Court is of the opinion that our current case law allows for three potential theories upon which the trial court's ruling could be affirmed. We will address each of these below.

The first would be to allow this change under N.C. Gen. Stat. § 1A-1, Rule 60(a) (2001). Rule 60(a) provides a limited mechanism for trial courts to amend erroneous judgments. It states:

Clerical mistakes.—Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

Id.

“While Rule 60[a] allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to

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make substantive modifications to an entered judgment.” *Food Service Specialists v. Atlas Restaurant Management*, 111 N.C. App. 257, 259, 431 S.E.2d 878, 879 (1993). “A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order.” *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993) [*disc. review denied*, 335 N.C. 236, 439 S.E.2d 143] (1993).

Pratt v. Staton, 147 N.C. App. 771, 774, 556 S.E.2d 621, 624 (2001). Trial courts “do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions.” *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. review denied*, 316 N.C. 377, 342 S.E.2d 895 (1986). “We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error.” *Id.*

Recently, in *S.C. Dep’t of Soc. Servs. v. Hamlett*, 142 N.C. App. 501, 543 S.E.2d 189 (2001), this Court addressed a similar issue. In that case, a party moved to have a North Carolina child support order, which reduced a party’s child support obligation, clarified under Rule 60(a) by adding a phrase that would specifically nullify a previous judgment from South Carolina. *Id.* at 503, 543 S.E.2d at 190. Such language was required under South Carolina law for such a nullification. *Id.* The moving party contended that the intent of the North Carolina order was to modify and effectively nullify a previous South Carolina judgment. The trial court, pursuant to Rule 60(a), amended the language in the decretal portion of the order to reflect that the South Carolina order was “specifically nullified.” The Court stated that the

amendment, rather than merely correcting a clerical error, clearly and substantively altered its earlier order. Further, the change by the trial court prejudiced the rights of plaintiff to receive the amount of child support ordered by the South Carolina Court by effectively reducing the amount of that arrearage to zero.

Id. at 505, 543 S.E.2d at 191. Thus, the *Hamlett* Court held that “the trial court was without authority under Rule 60(a) to enter such an order.” *Id.* at 506, 543 S.E.2d at 191-92. (The *Hamlett* Court relied on the *Hinson* case, which held that a similar change, which was touted as clerical, was clearly substantive because it changed the substantive effect of the order on the rights of the parties. *See also Buncombe County, ex rel. Andres*, 111 N.C. App. at 827, 433 S.E.2d at 785;

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Vandooren v. Vandooren, 27 N.C. App. 279, 281, 218 S.E.2d 715, 716-17 (1975)).

In the present case, as discussed earlier, the original consent judgment included in the findings of fact that “the parties *should equally divide the cost* for the college education of the daughter” (Emphasis added.) However, this language was not present in the conclusions of law or decretal portions of the judgment. Plaintiff made a Rule 60(a) motion to correct this alleged clerical error and insert language in the decretal portion to the effect that defendant *shall* divide the cost equally with plaintiff.

While the trial court’s order is logically correct, the relief granted substantively affected the rights and duties of the parties, and was thus not available under Rule 60(a). The 6 April 1989 order, on its face, did not order defendant to equally share the cost of the daughter’s college education. It merely stated that he should, and nothing more. It is conceivable that this language was inadvertently left out of the decretal portion, given the context noted by the trial court in its 18 December 2001 order. Nevertheless, the change is clearly substantive in that defendant is now required to do something he was previously not obligated to do. Therefore, it was beyond the authority of the trial court to amend the 6 April 1989 judgment pursuant to Rule 60(a).

The second and third methods come from another recent case of this Court, *Langston v. Johnson*, 142 N.C. App. 506, 543 S.E.2d 176 (2001). In that case, parties sought a divorce. After a hearing, the trial court filed a judgment on 6 June 1991 that included several findings of fact, including:

7. That there were two children, Tari Krystal Aquia Johnson, born November 20, 1974 and Charles Edward Johnson, Jr., born October 17, 1979, born of the marriage of . . . Plaintiff and Defendant.

8. That Plaintiff is granted sole physical custody of the children and Defendant is granted liberal visitation rights.

9. That both Plaintiff and Defendant are granted joint legal custody.

10. That Plaintiff is responsible for major medical for both children and Defendant will be responsible for amounts not covered.

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11. That Defendant is responsible for life insurance for both children.

12. That both Plaintiff and Defendant are equally responsible for college tuition for both children.

13. That Defendant is to pay \$340, monthly, in child support to Plaintiff.

Langston, 142 N.C. App. at 507, 543 S.E.2d at 177. In the decretal portion, however, the 6 June 1991 judgment only stated that the marital bonds were dissolved. *Id.*

The wife later filed a motion for modification of child support in 1997, and the trial court ordered:

1. That . . . [D]efendant shall forward to [P]laintiff an amount of \$31.00. This amount constitutes [D]efendant's current child support obligation through October, 1997, when the minor child, Charles Edward Johnson, Jr., born October 17, 1979, shall reach majority.

. . . .

3. That . . . [D]efendant is only obligated to pay one-half of the tuition per the previous court order entered between the parties on June 6, 1991.

. . . .

7. That . . . [D]efendant shall reimburse . . . [P]laintiff for one-half of the daughter's Fall, 1997, tuition at North Carolina State University.

Id. at 507-08, 543 S.E.2d at 177. The next year, after a motion to show cause for failure to pay child support in violation of the original judgment by the wife and an order of the same by the trial court, a hearing was held on the issue of what the order actually required of the husband. The trial court found that the original judgment only ordered that the couple was divorced, and although it was mentioned in the findings of fact, "there was no valid order regarding child support." *Id.* at 508, 543 S.E.2d at 177. Thus, the wife's motion was dismissed.

On appeal, this Court held that:

Generally, a judgment is in a form that contains findings, conclusions, and a decree. The decretal portion of a judgment is that

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portion which adjudicates the rights of the parties. *See* 46 Am. Jur. 2d *Judgments* § 99 (1994). The failure to follow this precise form, however, is not fatal to the judgment. *Id.* § 83. “The sufficiency of a writing claimed to be a judgment is to be tested by its substance rather than its form.” *Id.*; *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (appellate court not bound by trial court’s classification of matter as a conclusion of law or a finding of fact).

In this case, the 6 June 1991 judgment contains an *unequivocal directive* that Defendant pay child support in the amount of \$340.00 per month. Although this directive was not contained in the decretal portion of the judgment, it nonetheless constitutes a decree of the trial court. To hold otherwise would place form over substance, which this Court is not required to do.

Id. at 508-09, 543 S.E.2d at 178 (emphasis added).

Applied to the present case, if the language in Finding of Fact No. 10 qualified as an “unequivocal directive,” then *Langston* would control and plaintiff would prevail. The language of Finding of Fact No. 10 is not unequivocal in that it merely suggests that the parties *should* equally divide the college expenses. Therefore, we cannot affirm the trial court’s order on this basis.

This brings us to our final method under which to analyze the trial court’s order. The concurring opinion in the *Langston* case noted that the doctrine of equitable estoppel provided an alternative ground for which to overturn the trial court’s finding that there was no order as to child support:

Where a party engages in positive acts that amount to ratification resulting in prejudice to an innocent party, the circumstances may give rise to estoppel. *Howard v. Boyce*, 254 N.C. 255, 265-66, 118 S.E.2d 897, 905 (1961). Further, “[a] party who, with knowledge of the facts, accepts the benefits of a transaction, may not thereafter attack the validity of the transaction to the detriment of other parties who relied thereon.” *Yarborough v. Yarborough*, 27 N.C. App. 100, 105-06, 218 S.E.2d 411, 415, *cert. denied*, 288 N.C. 734, 220 S.E.2d 353 (1975) (quoting 3 Strong’s N.C. Index 2d *Estoppel* § 4)[.]

Langston, 142 N.C. App. at 509-10, 543 S.E.2d at 178. The concurrence cited the facts that both parties had recognized the original order to be one which dealt with child support and lived under it for seven

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years and never objected to it or repudiated it, plus a later order recognized it as a valid child support order.

Applying the doctrine of equitable estoppel to the present case, we note that defendant has complied with the “suggestion” in finding of fact #10 for three years of the daughter’s college career. It was only after those years did he repudiate the original order.

We cite with particular interest paragraph number five of the decretal portion of the order. It reads:

5. That the defendant shall be able to claim the minor child for Federal and State Income Tax purposes every other year beginning the year 1989, until he remarries [added by 3 January 1992 order,] and the plaintiff will sign whatever forms are necessary to enable him to claim this deduction.

The significance of this paragraph is in its tax implications. Once a minor has reached the age of majority or been otherwise emancipated, that minor cannot be claimed as a dependent unless certain conditions are met. When divorced parents are involved, the rules are more complex.

According to the IRS Code § 152, titled “Exemptions for Children of Divorced Parents,” the dependency exemption goes to the “parent who has custody of the child for the greater part of the calendar year,” unless there is a “multiple support agreement that allows the child to be claimed as a dependent by a taxpayer other than the custodial parent,” or “the custodial parent releases his or her right to the child’s dependency exemption to the noncustodial parent.” Due to above paragraph number five, one of these two was done.

As for dependents who are beyond the age of 19, they may still be claimed if they are a “full-time student under age 24.” IRS Code § 151. “[A] taxpayer’s child who . . . was under age 24 and was a full-time student at a regular educational institution . . . may be claimed as a dependent (if the taxpayer satisfies the support test), regardless of the amount of the child’s income.” IRS Code § 151.

The IRS Code deals with the support required in § 152, which requires the person claiming the dependent to furnish more than half of the total support for that year or, as in the present case, when “(1) no one person provided over half of the support; (2) over half of the support was received from persons who each would have been entitled to claim the exemption had they contributed more than half

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of the support; and (3) over 10 percent of the support was provided by the person claiming the exemption.

We assume that defendant has claimed the daughter as a dependent at least one of the three years she was in college and he contributed money for half of her expenses, as there is nothing in the record to the contrary. Thus, defendant accepted the benefits of the agreement as granted under paragraph 5. Plaintiff was unable to claim the child in the years that defendant did so and plaintiff signed the necessary forms to enable defendant to so claim the daughter as a dependent. Therefore, we hold that defendant is equitably estopped from refusing to honor the part of the agreement in which he agreed that he should divide the costs of the daughter's college education equally with plaintiff.

Accordingly, the order of the trial court is

Affirmed.

Judge TYSON concurs.

Judge WALKER concurs in this opinion prior to 31 December 2003.

GEORGE ELLIS, PLAINTIFF V. TERRY WHITE, LITTLE EGYPT SALVAGE, INC.; D.W. MAYBERRY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, AND LETHA PHILLIPS, DEFENDANTS

No. COA01-1577

(Filed 4 February 2003)

1. Immunity— sovereign—arresting officer—acting within authority

A DMV inspector did not act outside the scope of his authority and summary judgment was granted for him correctly on the ground of sovereign immunity on claims of false arrest, malicious prosecution, and abuse of process where the inspector, defendant Mayberry, became involved in a dispute between plaintiff and the salvage dealer from whom plaintiff bought a truck and plaintiff was arrested for obstructing the inspector.

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2. Civil Rights— 42 USC § 1983—underlying constitutional right not clearly stated—officer within his authority

Summary judgment was correctly granted for a DMV inspector in his individual capacity on a 42 U.S.C. § 1983 claim on the ground of qualified immunity where the inspector became involved in a dispute between a salvage dealer and plaintiff over a pick-up truck and plaintiff was arrested for obstructing the inspector. It could be discerned from plaintiff's brief that he believed his Fourth Amendment right was abridged, although it was not clearly stated, but defendant had probable cause to arrest plaintiff and acted within his authority.

3. Appeal and Error— preservation of issues—issue not raised at trial

The issue of whether plaintiff was entitled to summary judgment on tort claims *ex mero motu* was not addressed on appeal because plaintiff had not presented the issue to the trial court.

Appeal by plaintiff from order entered 10 September 2001 by Judge Charles C. Lamm, Jr., in Gaston County Superior Court. Heard in the Court of Appeals 9 October 2002.

Ferguson Stein Chambers Wallas Adkins Gresham & Sumter, P.A., by S. Luke Largess, for plaintiff appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General Kimberly P. Hunt, for respondent appellee.

McCULLOUGH, Judge.

On 3 November 2000, plaintiff George Ellis filed a complaint against defendant D.W. Mayberry alleging false arrest, malicious prosecution, abuse of process and violation of his civil rights under 42 U.S.C. § 1983. The pertinent facts leading to plaintiff's lawsuit are as follows: In October 1997, plaintiff was interested in purchasing a pickup truck, and while attending an automobile auction, learned of a salvage dealer who sold trucks. Soon thereafter, plaintiff negotiated the purchase of a Toyota T-100 pickup truck from Terry White, who owned and operated Little Egypt Salvage, Inc. (Little Egypt), a salvage vehicle repair garage located in Alexander County, North Carolina. Mr. White agreed to sell plaintiff the truck for \$14,750.00 and assured plaintiff that the vehicle had a clean title. Mr.

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White was unable to locate the truck's title, but filled out a lost title application instead.

Plaintiff encountered difficulties when he attempted to register the vehicle in Gastonia, North Carolina. The Vehicle Identification Number (VIN) did not correspond to the computer index and the truck could not be registered. Plaintiff attempted to locate the truck's VIN, but could not find it. He drove back to Little Egypt and explained the problem to Mr. White. After searching through his spare parts, Mr. White located a doorframe that was part of the original truck, removed the VIN decal, and told plaintiff how to attach it to the truck. Mr. White informed plaintiff that the VIN was also located on the truck's chassis. Mr. White filled out a new lost title application and advised plaintiff to go to the license tag office in Taylorsville, North Carolina. Plaintiff successfully registered the truck in Taylorsville and transferred the tags and insurance from another truck he owned.

On 11 November 1997, plaintiff learned that his truck had to display a visible VIN in order to be properly registered. Plaintiff attempted to go to a Division of Motor Vehicles (DMV) office to seek advice, but the office was closed for Veteran's Day. Plaintiff returned to his home and located the VIN on the truck's chassis; however, the number was incomplete. Plaintiff became concerned that the truck was stolen and called Little Egypt and asked them to take the truck back. Mr. White's wife, who also worked at Little Egypt, talked to plaintiff and told him they would not accept the truck. She also stated that DMV officer would meet with plaintiff the next morning at Little Egypt to answer his questions about the truck.

Defendant David W. Mayberry was employed as an inspector with the North Carolina DMV and served a twelve-county territory that included Alexander County. One of Inspector Mayberry's duties was to inspect salvaged vehicles being rebuilt for sale by dealers. On 11 November, Mrs. White contacted Inspector Mayberry and told him about plaintiff's allegation that Little Egypt sold him a stolen truck. She also stated that she and her husband had offered to give plaintiff his money back, but that he was not satisfied. Mrs. White then asked Inspector Mayberry to come to Little Egypt to assist her and her husband with the matter, since he was the DMV inspector who examined the truck before Little Egypt worked on it. Even though Inspector Mayberry was on vacation, he agreed to meet plaintiff and the Whites at Little Egypt the following day.

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On the morning of 12 November 1997, plaintiff went to Little Egypt as instructed and waited in the parking lot. Inspector Mayberry arrived approximately 30 minutes later in an unmarked car wearing jeans and a windbreaker reading "DMV Enforcement" on the back. Inspector Mayberry was also wearing two badges and carried his gun at his belt. Inspector Mayberry first went into the office, then returned outside to speak to plaintiff. Upon examining the truck, Inspector Mayberry was unable to locate a VIN on the truck's dashboard or on the door, but did see the incomplete VIN on the truck's chassis. Plaintiff told Inspector Mayberry he feared the truck was stolen, and wanted to return the truck and get a refund of both the purchase price and the fees associated with registering the truck at the tag office. Inspector Mayberry discussed the terms for cancelling the sale and told plaintiff he would check the partial VIN to see if the truck was stolen, then review his own paperwork on the inspection he performed before the truck was worked on by Little Egypt. Inspector Mayberry then left to attend to those matters.

Inspector Mayberry reviewed his paperwork, which reflected that he had inspected the truck and determined that it was not stolen. He then drove to the Taylorsville tag office and arranged to have the tag office cancel plaintiff's registration (in accordance with Mr. Ellis' request) and give Inspector Mayberry the cash plaintiff paid on 10 November. Inspector Mayberry was able to cancel the registration because the paperwork had not yet been processed. The Raleigh registration office was consulted and allowed the Taylorsville tag office to cancel the transaction. Inspector Mayberry did not get a receipt or other written record of the cancellation, nor did he inform plaintiff that he was obtaining his requested refund. He did, however, receive \$497.50 in cash to return to plaintiff.

Inspector Mayberry went back to Little Egypt and met with plaintiff. According to plaintiff, Inspector Mayberry pushed a roll of cash into his stomach without explanation, and told him to take it and be satisfied. When plaintiff refused, Inspector Mayberry became angry, hit plaintiff in the stomach with the money, and made plaintiff feel threatened. Plaintiff then took the money and put it in his pocket without looking at it. According to Inspector Mayberry, when he returned with the registration refund, plaintiff stated he was not satisfied and wanted both a certified check for \$15,000.00 and the registration money, as well as compensation for his trips to Alexander County. Inspector Mayberry stated he told plaintiff that he accom-

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plished what plaintiff wanted, and that the issue of additional compensation was a matter to be discussed with Mr. White.

Despite these differing accounts, it is clear that Inspector Mayberry told plaintiff that the registration had not been processed and that title had never been transferred from Little Egypt to him. Inspector Mayberry explained that plaintiff was not the owner of the truck, and then asked plaintiff for the truck's keys and registration card. Plaintiff refused, and Inspector Mayberry told plaintiff he would be arrested unless he complied. Before arresting Mr. Ellis, Inspector Mayberry warned him three times that if he failed to hand over the keys and registration card, he would be arrested. Plaintiff allegedly replied that he would not comply and that Inspector Mayberry would have to arrest him. When plaintiff attempted to get into the truck and leave, Inspector Mayberry placed him under arrest. At some point before Inspector Mayberry and plaintiff left Little Egypt, Mrs. White came outside and told the men that she would write plaintiff a check for the purchase price of the truck.

Inspector Mayberry allowed plaintiff to sit in the front seat of the car and did not handcuff him as they drove to the county jail. Plaintiff testified he was held in a locked holding area and a small cell for one and one-half hours. During that time, he felt nauseated. However, according to Inspector Mayberry, no magistrate was available upon their arrival, so he had plaintiff wait in the jail office without being searched or being locked in a cell; plaintiff was also permitted to keep his cell phone the entire time. Just before Inspector Mayberry took plaintiff before the magistrate, Mrs. White hand delivered a certified check for \$14,750.00 and the tag from the truck.

Plaintiff testified that Inspector Mayberry took him before a magistrate and charged him with resisting, delaying, and obstructing an officer. While before the magistrate, Inspector Mayberry informed plaintiff that additional charges were possible unless he immediately turned over the truck's keys and registration. When plaintiff complied, Inspector Mayberry gave him the certified bank check signed by the Whites for the purchase price of the truck, the tag, and \$35.00 in cash. Inspector Mayberry also allegedly told plaintiff not to discuss the truck with anyone and to find his own way home to Gaston County. According to Inspector Mayberry, he served the warrant on plaintiff by reading it to him and giving him a copy. He later took plaintiff before the magistrate and explained the case. The magistrate found probable cause and then discussed the issue of setting bail.

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Ultimately, Inspector Mayberry did not object when the magistrate released plaintiff on his own recognizance. Inspector Mayberry testified that plaintiff continued to refuse to hand over the keys and registration, but eventually did so at the urging of the magistrate.

On 8 December 1997, plaintiff was tried on the misdemeanor charge of resisting, delaying, and obstructing an officer under N.C. Gen. Stat. § 14-223 (2001). In the middle of the State's evidence, the trial court dismissed the case after finding that Inspector Mayberry had no duties related to the truck's registration and that there were, therefore, no duties for plaintiff to obstruct. The trial court stated:

Court dismissed the case before the close of State's evidence for the reasons that the witness indicated that he was not involved in registration with vehicle and that this was a civil matter. State objected to the dismissal before the State's evidence was complete.

The State did not appeal the trial court's determination.

On 3 November 2000, plaintiff filed suit against Inspector Mayberry, Little Egypt, Mr. White, and Letha Phillips (the manager of the Taylorsville tag office) regarding the sale of the truck and the aforementioned events. The claims against Little Egypt, Mr. White, and Ms. Phillips were resolved prior to this appeal. On 13 July 2001, Inspector Mayberry moved for summary judgment based on sovereign immunity and qualified immunity. On 10 September 2001, the trial court entered an order granting summary judgment for Inspector Mayberry. Plaintiff appealed.

On appeal, plaintiff argues the trial court erred by granting summary judgment for Inspector Mayberry and by failing to grant summary judgment to him *ex mero motu*. For the reasons stated herein, we disagree with plaintiff's arguments and affirm the order of the trial court.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001).

The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. The purpose of Rule 56 is not to allow the court to decide an issue of fact, but to

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determine whether a genuine issue of fact exists and thereby eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim or defense of a party is exposed.

Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 641-42, 281 S.E.2d 36, 40 (1981). "Once the movant has established its right to summary judgment, the non-movant may not rest upon conclusory allegations but must come forward with affidavits showing that a material factual dispute exists." *Pierce Concrete, Inc. v. Cannon Realty & Construction Co.*, 77 N.C. App. 411, 412, 335 S.E.2d 30, 31 (1985).

I. Immunity

In the present case, plaintiff sued Inspector Mayberry in both his official and individual capacities on three state law claims (false arrest, malicious prosecution, and abuse of process), and in his individual capacity on the federal civil rights claim under 42 U.S.C. § 1983. However, plaintiff's appeal only addresses "the trial court's granting of summary judgment to Mayberry on the state and federal individual-capacity claims." Therefore, we address only plaintiff's claims against defendant Mayberry in his individual capacity. Individual capacity lawsuits "seek to impose individual liability upon a government officer for actions taken under color of state law." *Hafer v. Melo*, 502 U.S. 21, 25, 116 L. Ed. 2d 301, 309 (1991).

"The general rule is that suits against public officials are barred by the doctrine of governmental immunity where the official is performing a governmental function, such as providing police services." *Thomas v. Sellers*, 142 N.C. App. 310, 314, 542 S.E.2d 283, 286 (2001). Our Court has previously held that "an inspector of the DMV exercises some portion of sovereign power of the State and thus is a public officer[.]" *Murray v. Justice*, 96 N.C. App. 169, 176, 385 S.E.2d 195, 201 (1989), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 115 (1990). "[A] public official is immune from personal liability for mere negligence in the performance of his duties, but is not immune if his actions were corrupt or malicious or if he acted outside and beyond the scope of his duties." *Marlowe v. Piner*, 119 N.C. App. 125, 128, 458 S.E.2d 220, 222-23 (1995). Public officials "enjoy absolute immunity from personal liability for their discretionary acts done without corruption or malice." *Schlossberg v. Goins*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000), *disc. reviews denied and dismissed*, 355 N.C. 215, 560 S.E.2d 136 (2002). "Discretionary acts are those requiring

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personal deliberation, decision, and judgment.” *Jones v. Kearns*, 120 N.C. App. 301, 306, 462 S.E.2d 245, 248, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995).

To maintain a suit against a public official in his/her individual capacity, the plaintiff must make a *prima facie* showing that the official’s actions (under color of authority) are sufficient to pierce the cloak of official immunity. Actions that are malicious, corrupt or outside the scope of official duties will pierce the cloak of official immunity, thus holding the official liable for his acts like any private individual.

Moore v. Evans, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

One reason for the existence of such a rule is that it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward anyone who might be affected thereby.

Miller v. Jones, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945); *see also Block v. County of Person*, 141 N.C. App. 273, 280-81, 540 S.E.2d 415, 421 (2000).

(a) Sovereign Immunity on plaintiff’s state law tort claims

[1] Defendant Mayberry argues, and we agree, that he is entitled to sovereign immunity on plaintiff’s state law tort claims because there is no evidence that he intended his actions to be prejudicial or injurious to plaintiff. Plaintiff, on the other hand, contends Inspector Mayberry acted outside the scope of his authority by (1) cancelling his registration without a statutory basis; (2) negotiating the terms of a commercial transaction on behalf of Little Egypt; and (3) failing to produce written notice to him that the registration was cancelled and should be surrendered as required by N.C. Gen. Stat. §§ 20-111 and 20-48 (2001). We review each of these contentions in turn.

We do not discern any merit in plaintiff’s first argument. It appears from the record that all of Inspector Mayberry’s actions were done to resolve the conflict between Mr. White and plaintiff regarding the truck and to obtain the requested refund of the registration fees. After plaintiff stated he did not want the truck and instead wanted a

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full refund of the purchase price and the registration fees, Inspector Mayberry went to the Taylorsville tag office and obtained a full refund of plaintiff's registration money. Thereafter, plaintiff accepted the money, put it in his pocket, and did not count it. Plaintiff never said he did not want the money, nor did he return the money to either Inspector Mayberry or Little Egypt. Plaintiff's repeated assertions that he wanted his money back could reasonably have been seen as an authorization and acceptance of Inspector Mayberry's actions. In any event, plaintiff accepted the refund and thereby ratified defendant Mayberry's actions. Plaintiff is therefore estopped from taking an inconsistent position now (*i.e.*, claiming that Inspector Mayberry was not acting on his behalf). See *Yarborough v. Yarborough*, 27 N.C. App. 100, 105-06, 218 S.E.2d 411, 415, *cert. denied*, 288 N.C. 734, 220 S.E.2d 353 (1975) (equitable estoppel); and *Carolina Medicorp v. Bd. of Trustees of the State Medical Plan*, 118 N.C. App. 485, 492, 456 S.E.2d 116, 120 (1995) (quasi-estoppel (also known as estoppel by acceptance of benefits)).

After giving plaintiff his refund, defendant Mayberry requested the truck's registration and keys, as he knew the truck was not registered to plaintiff. When plaintiff did not comply, Inspector Mayberry explained that his noncompliance would result in arrest. Moreover, before actually arresting plaintiff, Inspector Mayberry issued three separate warnings to him. Only then did Inspector Mayberry arrest plaintiff for resisting, obstructing, and delaying an officer. He subsequently took plaintiff to the magistrate's office, where a warrant was issued. Plaintiff was later released on his own recognizance.

With regard to plaintiff's second contention, we note that Inspector Mayberry did not negotiate the commercial transaction between plaintiff and Little Egypt. Before Mrs. White contacted Inspector Mayberry, she and her husband offered to refund the purchase price of the truck. However, plaintiff was not satisfied with the Whites' offer, as he also wanted a refund of his registration fees. Defendant Mayberry came to Little Egypt at the Whites' request to address plaintiff's concerns that the truck was stolen. Despite Inspector Mayberry's assurances that the truck was not stolen, plaintiff wanted to terminate the transaction and get a refund of the purchase price of the truck, the registration fees, and also requested compensation for his troubles. Rather than become involved in the dispute, Inspector Mayberry told plaintiff that any compensation issues would have to be settled between plaintiff and Little Egypt.

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Finally, plaintiff's argument that Inspector Mayberry acted unlawfully by failing to provide written notice of the cancellation of the registration as required by N.C. Gen. Stat. §§ 20-111(4) and 20-48 is meritless. N.C. Gen. Stat. § 20-111 provides, in pertinent part:

It shall be unlawful for any person to commit any of the following acts:

- (1) To drive a vehicle on a highway, or knowingly permit a vehicle owned by that person to be driven on a highway, when the vehicle is not registered with the Division in accordance with this Article or does not display a current registration plate.
- (2) To display or cause to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered[.]

* * * *

- (4) To fail or refuse to surrender to the Division, upon demand, any title certificate, registration card or registration number plate which has been suspended, canceled or revoked as in this Article provided. Service of the demand shall be in accordance with G.S. 20-48.

Inspector Mayberry testified that the truck's title had never transferred from Little Egypt to plaintiff because the registration had not been processed. "[B]asically it was never taken out of Little Egypt's name, never put in Mr. Ellis's name, when they backed it out. Because none of the paperwork had ever been sent to Raleigh, so therefore they treated it as the transaction had never happened." We believe plaintiff incorrectly based his argument on N.C. Gen. Stat. § 20-111(4) and instead should have looked to subsections (1) and (2). Defendant Mayberry had firsthand knowledge that the truck was not registered to plaintiff and had probable cause to arrest plaintiff for attempting to operate an unregistered vehicle on a highway and possessing a canceled/revoked registration card in violation of N.C. Gen. Stat. § 20-111(1) and (2). He also knew that legal title of the truck was in the name of the Whites and Little Egypt, so that plaintiff's attempts to take the truck amounted to attempted theft, unauthorized use and conversion in violation of N.C. Gen. Stat. §§ 14-72, -72.2, and -168.1 (2001), even though plaintiff may have retained an equitable interest and may have been entitled to a refund of the purchase money.

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Defendant exercised his discretion and did not charge plaintiff on all these offenses, but his failure to do so did not mean those violations did not occur.

We also note that defendant Mayberry had probable cause to arrest plaintiff for resisting, obstructing, and delaying an officer. "Probable cause refers to those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent [person] in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985). We further note that the magistrate also made an independent finding of probable cause. "[G]reat deference is to be paid the magistrate's determination of probable cause, and reviewing courts 'should not conduct a *de novo* review of the evidence to determine whether probable cause existed at the time the warrant was issued.'" *State v. Ledbetter*, 120 N.C. App. 117, 121-22, 461 S.E.2d 341, 343-44 (1995) (quoting *State v. Greene*, 324 N.C. 1, 9, 376 S.E.2d 430, 436 (1989), *cert. granted and vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990)).

We hold Inspector Mayberry did not act outside the scope of his authority in any of the three ways argued by plaintiff. Inspector Mayberry made a lawful arrest based upon probable cause and acted within the scope of his authority. Thus, the trial court properly granted summary judgment for defendant Mayberry in his individual capacity on plaintiff's state law tort claims on the ground of sovereign immunity.

(b) Qualified Immunity on plaintiff's 42 U.S.C. § 1983 claim

[2] Plaintiff contends defendant is not entitled to qualified immunity on the 42 U.S.C. § 1983 claim. Specifically, plaintiff believes that a reasonable person in defendant's position would have known, under the circumstances, that his actions violated plaintiff's right not to be arrested without probable cause. *See Roberts v. Swain*, 126 N.C. App. 712, 487 S.E.2d 760 (1997), *disc. review denied*, 347 N.C. 270, 493 S.E.2d 746 (1997). Plaintiff further contends defendant Mayberry lacked statutory authority for his actions and that plaintiff acted fully within his rights by refusing to surrender the truck, as defendant provided no written notice or any proof that the registration had been cancelled. Defendant Mayberry, on the other hand, argues that he is entitled to qualified immunity because plaintiff's claim fails in several respects. Upon review, we agree with defendant.

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42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

We note that “one cannot go into court and claim a ‘violation of § 1983’—for § 1983 by itself does not protect anyone against anything. . . . Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all.” *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18, 60 L. Ed. 2d 508, 522-23 (1979). Defendant argues plaintiff has failed to allege which of his federal constitutional rights were abridged, and that such failure defeats his claim under § 1983. Though we agree that plaintiff did not clearly state the federal constitutional right at issue, we can discern from his brief that he believes his Fourth Amendment right was abridged. Thus, we address the claim on its merits.

“Under the doctrine of qualified immunity, ‘governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Roberts*, 126 N.C. App. at 718, 487 S.E.2d at 765 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982)). “Therefore, ruling on a defense of qualified immunity requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer’s position would have known that his actions violated that right.” *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994). “If there are genuine issues of historical fact respecting the officer’s conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial.” *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992). “Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost.”

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Malley v. Briggs, 475 U.S. 335, 344-45, 89 L. Ed. 2d 271, 281 (1986) (citation omitted).

In the present case, defendant Mayberry argues the central issue is whether he acted in an objectively reasonable manner under the circumstances. See *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 501, 451 S.E.2d 650, 655-56, *appeal dismissed, disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995). We agree. As discussed above, defendant had probable cause to arrest plaintiff for violating N.C. Gen. Stat. § 20-111(1) and (2). Inspector Mayberry acted within his authority as a law enforcement officer when he arrested plaintiff, because he had firsthand knowledge that plaintiff's registration had been canceled and that the truck was not properly registered to him. Plaintiff is unable to meet the test set forth in *Lee v. Greene*, 114 N.C. App. 580, 442 S.E.2d 547 and his assignment of error must fail. We therefore conclude that the trial court properly granted summary judgment for defendant Mayberry in his individual capacity on plaintiff's 42 U.S.C. § 1983 claim on the ground of qualified immunity.

II. Tort Claims

[3] By his second assignment of error, plaintiff argues he was entitled to summary judgment on his tort claims *ex mero motu*. Plaintiff's complaint contained allegations of false arrest, malicious prosecution, and abuse of process. However, plaintiff never moved for summary judgment; consequently, the record contains no evidence that plaintiff presented this issue to the trial court. We therefore decline to address this assignment of error. See N.C.R. App. P. 9(a)(1)(h) and 10(b)(1) (2002); and *Buckingham v. Buckingham*, 134 N.C. App. 82, 91, 516 S.E.2d 869, 876, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999).

Upon careful review of the record and the arguments presented by the parties, we conclude the trial court properly granted summary judgment for defendant Mayberry based on sovereign immunity and qualified immunity. Accordingly, the trial court's order is

Affirmed.

Judges TYSON and BRYANT concur.

FLOYD v. MCGILL

[156 N.C. App. 29 (2003)]

HARRIETTE FLOYD AND ROBERT J. FLOYD, PLAINTIFFS-APPELLEES V. STEPHANIE L. MCGILL, TRANSIT MANAGEMENT OF CHARLOTTE, INC., AND THE CITY OF CHARLOTTE, DEFENDANTS-APPELLANTS

No. COA02-372

(Filed 4 February 2003)

1. Husband and Wife— loss of consortium—husband's claim— prior settlement of claim for husband's personal injuries

The trial court did not err in submitting plaintiff husband's claim for loss of consortium to the jury in plaintiff wife's personal injury case arising out of an automobile accident, even though plaintiffs had settled a separate lawsuit against defendants seeking damages for the husband's personal injuries, where the husband's claim for loss of consortium was joined with the wife's negligence claim, because: (1) each party who suffers a loss of consortium is entitled to institute a suit to recover for his or her individual loss; and (2) recovery for loss of consortium is not limited to one claim per marital unit.

2. Motor Vehicles— automobile accident—negligent training of bus driver

The trial court did not err in a personal injury case arising out of an automobile accident by submitting the issue of negligent training of defendant bus driver to the jury, because there was sufficient evidence presented at trial to allow the jury to conclude that defendant bus company was negligent in its training of defendant driver.

3. Motor Vehicles— automobile accident—inadequate brakes—failure to maintain brakes

The trial court did not err in a personal injury case arising out of an automobile accident by submitting to the jury the issues of inadequate brakes and failure to maintain the brakes, because the jury was able to weigh the evidence and determine whether defendant bus company met its duty of care in operating the bus and maintaining the brakes.

4. Damages and Remedies— automobile accident—medical expenses

The trial court did not err in a personal injury case arising out of an automobile accident by submitting to the jury the issue of damages regarding medical expenses, because the evidence

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was sufficient to allow the jury to decide the expenses were necessary and reasonable and that they resulted from defendants' negligence.

5. Appeal and Error— preservation of issues—failure to object at trial

Although defendants contend the trial court erred in a personal injury case arising out of an automobile accident by allowing plaintiff wife's attorney to state that plaintiff incurred actual and projected medical expenses of approximately \$330,000, this issue was not preserved for appellate review because defendants failed to object to this statement at trial.

6. Damages and Remedies— sanction—willful destruction of evidence

The trial court did not err in a personal injury case arising out of an automobile accident by failing to set aside the verdict and judgment and by failing to order a new trial as a sanction for plaintiff wife's alleged willful destruction of evidence, because: (1) defendants cite no authority that compels or permits the trial court to order a new trial in light of destruction of evidence; and (2) defendants failed to develop their argument that plaintiff destroyed evidence in bad faith and that sanctions are warranted.

7. Evidence— expert testimony—knowledge

The trial court did not err in a personal injury case arising out of an automobile accident by allowing expert witnesses to testify to evidence of which they allegedly lacked knowledge or that was allegedly outside their area of expertise, because: (1) defendants failed to demonstrate that two doctors were not qualified to testify regarding biomechanics or that their opinions were confusing or unhelpful to the jury; (2) the testimony of another doctor was sufficient to permit the trial court to determine that the doctor possessed training and experience to offer an opinion regarding plaintiff wife's brain injury that would be helpful to the jury, and there was sufficient evidence presented at trial to support plaintiff's claim of brain injury; and (3) the expert in the field of cognitive rehabilitation was able to observe plaintiff and acquire knowledge about plaintiff's condition as a foundation for the expert's testimony.

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8. Evidence— exhibit—deposition—separate counsel not provided at deposition

The trial court did not err in a personal injury case arising out of an automobile accident by admitting under N.C.G.S. § 1A-1, Rule 32(a)(3) defendant bus driver's deposition as an exhibit during her testimony even though defendant was not represented by separate counsel at the time of her deposition, because: (1) Rule 32(a) states that a deposition can be used against any party who was present or represented at the taking of the deposition, and defendant was present at the deposition in addition to being represented by counsel for the other two defendants; and (2) defendants fail to cite any authority that would compel the finding of any error.

9. Appeal and Error— preservation of issues—failure to assign as error

Although defendants contend the trial court erred in a personal injury case arising out of an automobile accident by permitting the jury to read the complete transcript of defendant bus driver's deposition, this argument is dismissed because defendants failed to assign this issue as error in the record.

10. Motor Vehicles— automobile accident—inoperable horn and speedometer—proximate cause

The trial court did not err in a personal injury case arising out of an automobile accident by instructing the jury that plaintiffs could recover damages based on defendant bus driver's operation of a bus with an inoperable horn and speedometer even though defendants contend there was no evidence that either of these factors was a proximate cause of the collision, because: (1) more than one inference could be drawn from the evidence; and (2) defendants failed to demonstrate that the jury instruction was erroneous and likely to mislead the jury.

Appeal by defendants from judgment entered 19 January 2001 and from order entered 16 March 2001 by Judge Jerry Cash Martin in Superior Court, Mecklenburg County. Heard in the Court of Appeals 13 November 2002.

Chandler Workman & Hart, by W. James Chandler and W. Michael Workman, for plaintiffs-appellees.

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Frank B. Aycock, III, for defendant-appellant Stephanie L. McGill.

Robert D. McDonnell, for defendants-appellants Transit Management of Charlotte, Inc. and the City of Charlotte.

McGEE, Judge.

Plaintiffs filed suit on 10 December 1997 against Stephanie L. McGill (McGill), Transit Management of Charlotte, Inc. (Transit), and the City of Charlotte (the City), collectively known as “defendants,” for damages arising from a rear-end collision of plaintiffs’ pickup truck by a bus owned by the City. All three defendants filed an answer on 23 March 1998. Defendants filed a motion to dismiss the consortium claim of Robert J. Floyd (Mr. Floyd) on 10 October 2000. Plaintiffs amended their complaint on 9 November 2000 to include additional allegations of violations of motor vehicle statutes. Plaintiffs also filed a separate lawsuit against defendants seeking damages for personal injuries suffered by Mr. Floyd in the collision; this suit was settled prior to trial.

Evidence presented at trial tended to show the following: McGill was operating a bus owned by the City on 27 March 1996 on Independence Boulevard in Charlotte, North Carolina. As she approached an intersection, McGill saw the traffic light turn yellow and applied her brakes but the bus failed to slow down. McGill saw plaintiffs’ pickup truck in the lane ahead of her and attempted to steer the bus into the right and left lanes but was blocked on both sides. She repeatedly pumped the brakes and attempted to engage the emergency brake. The bus failed to stop and collided with plaintiffs’ pickup truck.

McGill had recently completed a five-week training course and was a probationary employee authorized to drive a bus. She testified that she knew the brakes were responding differently than usual and were the most inefficient brakes she had ever operated. McGill stated that throughout the day she had to apply the brakes slowly and provide additional distance to allow the bus to stop. She stated that the speedometer on the bus was not working and stated that she had to “kind of feel” her speed. She stated she was unaware it was illegal to operate a vehicle without a speedometer and was never informed of the law by her supervisors. McGill also testified the bus horn was not working and that she knew it was illegal to operate a vehicle without a functioning horn. McGill stated that she was supposed to call

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the dispatcher if she experienced problems with a bus, but she could not remember if she reported the problems on the afternoon of the collision.

At the time of the collision, Randy Mullinax (Mr. Mullinax) had been employed as Transit's director of safety administration for approximately one month. He testified that drivers who discovered a problem with a bus were supposed to remove the bus from service immediately and report the problem to the dispatcher. He also testified as to the preventative maintenance schedules for buses and the designation and assignment of bus routes.

Plaintiff Harriette Floyd (Mrs. Floyd) was diagnosed with a concussion after examination in the Carolinas Medical Center emergency room following the collision. She testified that since the collision she often suffered dizziness that caused her to fall and that she had a constant high-pitched squeal in her head. Mrs. Floyd also testified that her injuries caused her to resign her job as a high school math teacher, which she had held for twenty-eight years. Mrs. Floyd stated because of the collision she had suffered a loss of friends, low energy, and elimination of exercise and outdoor activities. Dr. Young Davis, an economics expert, testified that Mrs. Floyd's lost future earnings and benefits totaled \$534,454.

Dr. Otto Charles Susak, an emergency physician who treated Mrs. Floyd at Carolinas Medical Center, testified that Mrs. Floyd's post-accident condition fit into all but one of the categories for a mild brain injury. Dr. Joseph Estwanik testified that he diagnosed Mrs. Floyd with neck strain, dizziness, and mild symptoms of post-concussion headache. Dr. Ervin Batchelor (Dr. Batchelor), a neuropsychologist, diagnosed Mrs. Floyd with post-accident cognitive difficulties, including problems with concentration, reading, spelling, forgetfulness, increased irritability, and depression. Dr. Batchelor testified that Mrs. Floyd complained of ringing in her ears (tinnitus), blurred vision, headaches, and dizziness. Dr. Batchelor also testified that Mrs. Floyd would be unable to maintain any gainful employment due to her injuries.

Dr. Hemanth Rao (Dr. Rao), a neurologist, testified regarding Mrs. Floyd's injuries from the accident and agreed with Dr. Batchelor's diagnosis of head trauma and post-concussive syndrome. Dr. Rao also testified to the mechanics of Mrs. Floyd's brain injury and the causal connection between the injury and her symptoms. He also stated that he did not think Mrs. Floyd could sustain gainful employment as a

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result of the injuries she suffered. Dr. Rao also estimated that Mrs. Floyd's medical expenses would range between four thousand dollars and fifteen thousand dollars per year for the remainder of her life.

Dr. Dale Brown (Dr. Brown) testified concerning Mrs. Floyd's balance problems and stated that he diagnosed her with chronic disequilibrium. He stated that she became dizzy when she turned her head and demonstrated a lack of balance in an eye-to-eye motion test. He testified that her chronic disequilibrium and tinnitus were caused by the collision and had deprived Mrs. Floyd of her quality of life.

Patricia Benfield (Ms. Benfield), a cognitive rehabilitation expert, testified concerning her evaluation and treatment of Mrs. Floyd for a brain injury. Ms. Benfield observed Mrs. Floyd in her teaching environment and testified that Mrs. Floyd lost her balance several times and had some difficulty in focusing and in assisting students. She also opined that Mrs. Floyd was overwhelmed and was experiencing difficulty in carrying out her duties as a math teacher. She further stated that she was concerned about Mrs. Floyd's competency to continue teaching.

A jury awarded Mrs. Floyd \$750,000 for personal injuries and awarded Mr. Floyd \$75,000 for loss of consortium in a judgment entered on 19 January 2001. Defendants moved for judgment notwithstanding the verdict and alternatively for a new trial on 24 January 2001. The trial court denied both motions on 16 March 2001. Defendants appeal.

[1] Defendants first argue the trial court erred in admitting evidence about Mr. Floyd's claim for loss of consortium and in submitting the issue to the jury. Defendants contend the release signed in the voluntary dismissal of Mr. Floyd's negligence claim settled Mr. Floyd's loss of consortium claim. Defendants argue that loss of consortium should be viewed as damage to the marital unit and thus should be the subject of only one claim rather than separate claims by each spouse.

"[A] spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries." *Nicholson v. Hospital*, 300 N.C. 295, 304, 266 S.E.2d 818, 823 (1980). In the case before us, Mr. Floyd properly joined his loss of consortium claim with Mrs. Floyd's negligence claim. Each party who suffers a loss of consortium is entitled to institute a suit to recover for his or her individ-

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ual loss. North Carolina law does not limit recovery for loss of consortium to one claim per marital unit as advocated by defendants and we decline to adopt such a rule. The trial court did not err in admitting evidence of Mr. Floyd's loss of consortium or in submitting his claim to the jury. This assignment of error is overruled.

Defendants next argue the trial court erred in submitting issues of negligence and damages to the jury.

Our standard of review on the grant of a motion for directed verdict is "whether, upon examination of all the evidence in the light most favorable to the nonmoving party [with this] party be[ing] given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." A directed verdict should be granted in favor of the moving party only where " 'the evidence so clearly establishes that fact in issue that no reasonable inferences to the contrary can be drawn,' and 'if the credibility of the movant's evidence is manifest as a matter of law.' "

Culler v. Hamlett, 148 N.C. App. 372, 374, 559 S.E.2d 195, 198 (2002) (citations omitted). "If there is such relevant evidence as a reasonable mind might accept as adequate to support the elements of negligence, the trial court must deny defendant's motion and allow the case to go to the jury." *Cobb v. Reitter*, 105 N.C. App. 218, 220-21, 412 S.E.2d 110, 111 (1992).

[2] Defendants first argue there was insufficient evidence to submit the issue of negligent training of McGill to the jury. McGill testified about the training program and stated that she was instructed to contact the dispatcher if she experienced trouble with a bus. She also testified that in her training she was not instructed that it was unlawful to operate a vehicle without a functioning speedometer. McGill could not recall the amount of classroom time she received before she began driving buses and testified that she was on the wrong route at the time of the collision. Mr. Mullinax also testified about driver training and safety procedures to be used when a driver experienced bus problems while in service. He stated that a driver who experienced mechanical problems, such as an inoperable speedometer, could finish the route before finding a location to exchange the bus.

When considered in a light most favorable to the nonmoving party, there was sufficient evidence presented at trial to allow the jury to conclude that Transit was negligent in its training of McGill.

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The jury was able to weigh the evidence and determine whether Transit met its duty of care while training McGill. The trial court did not err in submitting the issue to the jury.

[3] Defendants next argue the trial court erred in submitting to the jury the issues of inadequate brakes and failure to maintain the brakes. McGill testified that the brakes on the bus were the worst she had ever operated and that the condition existed when she initially left the bus lot. She also testified that a bus company mechanic and her manager told her that the bus had experienced brake failure after an inspection following the accident. Mr. Mullinax also testified that the brakes were leaking and had been repaired the evening following the accident, but that the brakes were not damaged in the accident.

When considered in a light most favorable to the nonmoving party, there was sufficient evidence presented at trial to allow the jury to conclude Transit was negligent in allowing a bus to be operated with inadequate brakes and in failing to maintain the brakes. The jury was able to weigh the evidence and determine whether Transit met its duty of care in operating the bus and maintaining the brakes. The trial court did not err in submitting the issue to the jury.

[4] Defendants next argue the trial court erred in submitting the issue of damages to the jury. Defendants argue Mrs. Floyd failed to provide sufficient evidence of medical expenses to warrant recovery for medical expenses. Defendants also argue that Mrs. Floyd failed to prove that her medical expenses were necessary and reasonable.

“Medical bills are admissible where lay and medical testimony of causation is provided.” *Smith v. Pass*, 95 N.C. App. 243, 253, 382 S.E.2d 781, 788 (1989). “[T]he treatment for which charges are incurred must be reasonably necessary, and the charges must be reasonable in amount.” *Chamberlain v. Thames*, 131 N.C. App. 705, 717, 509 S.E.2d 443, 450 (1998). “[I]t remains entirely within the province of the jury to determine whether certain medical treatment was reasonably necessary.” *Jacobsen v. McMillan*, 124 N.C. App. 128, 135, 476 S.E.2d 368, 372 (1996).

Evidence in the record shows that Dr. Rao, Dr. Estwanik, Dr. Batchelor, and Dr. Brown testified to Mrs. Floyd’s medical treatment and resulting expenses. Dr. Rao testified that he believed all of his charges were “reasonable and necessary based on treatment rendered following the motor vehicle accident.” Defendants stipulated

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to the charges for Dr. Estwanik's medical services. Dr. Batchelor testified to the "reasonably anticipated and necessary costs" of lifetime treatment for Mrs. Floyd's injuries. Dr. Brown testified that his charges were "reasonable and customary . . . to deal with the condition which [he] found in [Mrs. Floyd]." This testimony provided an evidentiary basis for Mrs. Floyd's past and anticipated future medical bills to permit the jury to decide the issue of damages.

When considered in a light most favorable to the nonmoving party, there was sufficient evidence presented at trial to permit the jury to decide the issue of damages. The evidence was sufficient to allow the jury to decide the expenses were necessary and reasonable and that they resulted from defendants' negligence. The trial court did not err in submitting the issue to the jury.

[5] Defendants also argue they were prejudiced by Mrs. Floyd's counsel's statement that Mrs. Floyd incurred actual and projected medical expenses of approximately \$330,000. Defendants failed to object to this statement at trial and therefore failed to preserve the issue for appellate review. N.C. R. App. P. 10(b)(1).

[6] Defendants next argue the trial court erred in failing to set aside the verdict and judgment and failing to order a new trial as a sanction for Mrs. Floyd's willful destruction of evidence. Defendants cite no authority that compels or permits the trial court to order a new trial in light of destruction of evidence. Defendants cite cases that merely discuss the inferences that may be drawn at trial in the event a party destroys evidence. *See Maraman v. Cooper Steel Fabricators*, 146 N.C. App. 613, 555 S.E.2d 309 (2001), *aff'd in part, rev'd in part*, 355 N.C. 482, 562 S.E.2d 420 (2002); *Red Hill Hosiery Mill, Inc. v. Magnetek, Inc.*, 138 N.C. App. 70, 530 S.E.2d 321, *disc. review denied* 353 N.C. 268, 546 S.E.2d 112 (2000). Additionally, defendants fail to develop their argument that Mrs. Floyd destroyed evidence in bad faith and that sanctions are warranted. Defendants have failed to demonstrate a basis for granting a new trial on this issue. This assignment of error is without merit.

[7] Defendants next argue the trial court erred in allowing expert witnesses, medical providers, and lay witnesses to testify to evidence of which they lacked knowledge or that was outside their area of expertise. Defendants contend Dr. Rao, Dr. Batchelor, and Dr. Brown lacked the expertise to testify to the biomechanics of a closed head injury and were not qualified to offer an opinion on the issue of causation.

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N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001) permits the admission of expert testimony if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” “The determination of the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal absent abuse of discretion.” *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991).

The trial transcript shows that Dr. Rao was tendered as an expert in the field of neurology without objection. The record also shows that defendants stipulated to Dr. Brown’s tender as an expert in otolaryngology. Dr. Rao and Dr. Brown testified regarding their respective clinical experiences in treating victims of brain injury. Dr. Rao testified that neurologists specialize in the treatment of problems affecting the nervous system. Similarly, Dr. Brown testified that otolaryngologists specialize in treatment of problems affecting the head and neck. Both Dr. Rao and Dr. Brown have appropriate educational and clinical backgrounds to qualify them as experts. Defendants have failed to demonstrate that Dr. Rao or Dr. Brown were not qualified to testify regarding biomechanics or that their opinions were confusing or unhelpful to the jury. We believe the respective specialty of each expert encompasses biomechanics and qualifies them to offer an opinion regarding Mrs. Floyd’s brain injury.

Dr. Batchelor was tendered as a witness in neuropsychology over defendants’ objection. Dr. Batchelor testified to his educational background and clinical experience in treating individuals with brain injuries. Dr. Batchelor also testified that he had training and experience in neurology and medicine but did not possess a medical degree in either of those fields. The trial court conducted a voir dire examination of Dr. Batchelor and determined that he was qualified to offer expert testimony.

In *Curry v. Baker*, 130 N.C. App. 182, 502 S.E.2d 667, *disc. review denied*, 349 N.C. 355, 517 S.E.2d 890 (1998), this Court found no error when a neuropsychologist testified to the brain injuries suffered by the plaintiff in a car accident. We found that there was sufficient evidence in the record independent of the neuropsychologist’s testimony to warrant submission of the claim to the jury. The reports of three doctors who had treated the plaintiff and diagnosed him with traumatic brain injury were admitted into evidence during the neuropsychologist’s testimony. The neuropsychologist’s testimony served to corroborate the conclusions of those doctors who had examined and diagnosed the plaintiff. *Id.* at 188, 502 S.E.2d at 672-73. Additionally,

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the defendants in *Curry* “did not demonstrate that the conditions afflicting plaintiff were caused by anything other than the collision or dispute that these types of conditions are commonly associated with traumatic brain injury.” *Id.* (citing *Goble v. Helms*, 64 N.C. App. 439, 307 S.E.2d 807 (1983), *disc. review denied*, 310 N.C. 625, 315 S.E.2d 690 (1984)).

In the present case, Dr. Batchelor’s testimony served to corroborate the testimony of Dr. Rao and Dr. Brown regarding Mrs. Floyd’s brain injury. Dr. Batchelor testified that he had received training and education in the field of neurology sufficient to render him qualified to testify to issues in this field. Dr. Batchelor’s testimony was sufficient to permit the trial court to determine that Dr. Batchelor possessed training and experience to offer an opinion regarding Mrs. Floyd’s brain injury that would be helpful to the jury. Additionally, defendants failed to demonstrate that Mrs. Floyd’s conditions arose from other circumstances. There was sufficient evidence presented at trial to support her claim of brain injury, thereby rendering any error in the admission of Dr. Batchelor’s testimony harmless. This assignment of error is overruled.

Defendants argue the trial court erred in admitting the testimony of Ms. Benfield. Defendants argue that no foundation was laid for Ms. Benfield’s evaluation of Mrs. Floyd’s condition. N.C. Gen. Stat. § 8C-1, Rule 703 (2001) states that “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.”

Ms. Benfield was tendered as an expert witness in the field of cognitive rehabilitation. Ms. Benfield testified extensively to her education and background as a cognitive and vocational rehabilitation therapist and the trial court properly tendered her as an expert. *See Braswell*, 330 N.C. at 377, 410 S.E.2d at 905. Ms. Benfield subsequently testified to her discussions with Dr. Batchelor regarding Mrs. Floyd’s brain injury and her evaluation and treatment of Mrs. Floyd both inside and outside of Mrs. Floyd’s work environment. The record shows that Ms. Benfield was able to observe Mrs. Floyd and acquire knowledge about Mrs. Floyd’s condition as a foundation for her testimony. This assignment of error is without merit.

[8] Defendants next argue the trial court erred in admitting McGill’s deposition as an exhibit during her testimony. N.C. Gen. Stat. § 1A-1, Rule 32(a)(3) (2001) states that the “deposition of a party . . . may be used by an adverse party for any purpose, whether or not the depo-

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nent testifies at the trial or hearing.” Any part of a party’s deposition or all of a party’s deposition may be used against the party “so far as admissible under the rules of evidence applied as though the witness were then present and testifying.” Rule 32(a).

In the case before us, McGill’s deposition was admitted during her testimony at trial in accordance with Rule 32(a). Defendants do not assign error to the admission of her deposition based on violations of the rules of evidence.

Defendants contend that McGill was deprived of her procedural rights because she was not represented by separate counsel at the time of her deposition. Defendants argue that these circumstances show McGill was essentially without counsel during her deposition, thus prohibiting her deposition from being admitted at trial. Rule 32(a) states that a deposition can be used against “any party who was present or represented at the taking of the deposition.” McGill was present at her deposition in addition to being represented by counsel for the City and for Transit. Accordingly, the admission of McGill’s deposition was proper under Rule 32(a). Additionally, defendants fail to cite any authority that would compel us to find error as argued by defendants. This argument is overruled.

[9] Defendants also contend the trial court erred in permitting the jury to read the complete transcript of McGill’s deposition. “[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal.” N.C. R. App. P. 10(a). Defendants failed to assign error in the record to the trial court’s decision to permit the jury to read the deposition. Accordingly, we do not address this argument.

[10] Defendants argue the trial court erred in instructing the jury that plaintiffs could recover damages based on McGill’s operation of a bus with an inoperable horn and speedometer. Defendants argue there was no evidence that either of these factors was a proximate cause of the collision.

On appeal, this Court considers a jury charge contextually and in its entirety. 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. . . .” The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. “Under such a standard of review, it is not enough for

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the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.”

Bass v. Johnson, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (citations omitted).

Proximate cause is an inference of fact to be drawn from other facts and circumstances.

It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. . . . “[W]hat is the proximate cause of an injury is ordinarily a question for the jury.”

Hairston v. Alexander Tank and Equipment Co., 310 N.C. 227, 234-35, 311 S.E.2d 559, 566 (1984) (quoting *Conley v. Pearce-Young-Angel Co.*; *Rutherford v. Pearce-Young-Angel Co.*, 224 N.C. 211, 214, 29 S.E.2d 740, 742 (1944)).

The evidence presented at trial permitted more than one inference to be drawn regarding the issue of proximate cause. The evidence demonstrates that McGill operated a bus with an inoperable speedometer and horn in violation of North Carolina motor vehicle statutes. The trial court instructed the jury that it could find that either of these facts was the proximate cause of the collision but did not require the jury to find proximate cause on these facts. The trial court properly permitted the jury to draw inferences from these facts and decide the issue of proximate cause. Since more than one inference could be drawn from the evidence, submission of the issue to the jury was appropriate. Defendants have failed to demonstrate that the jury instruction given by the trial court was erroneous and likely to mislead the jury. This assignment of error is without merit.

We have reviewed defendants’ remaining arguments and assignments of error and find them to be without merit.

No error.

Chief Judge EAGLES and Judge HUDSON concur.

JOHNSON v. PIGGLY WIGGLY OF PINETOPS, INC.

[156 N.C. App. 42 (2003)]

BETTY L. JOHNSON, PLAINTIFF V. PIGGLY WIGGLY OF PINETOPS, INC., DEFENDANT

No. COA02-263

(Filed 4 February 2003)

1. Evidence— medical testimony—reasonable medical probability not required

The trial court did not err in a negligence action by admitting medical testimony that it was “possible” that plaintiff’s shingles were caused by an incident in defendant’s store where the testimony was not baseless speculation. Testimony is admissible as long as it is helpful to the jury and is based on information reasonably relied upon under Rule 703; medical testimony is no longer inadmissible for failure to state that it is based on “reasonable medical probability.”

2. Negligence— causation—shingles outbreak

There was sufficient evidence of causation in a negligence action in the admission of a doctor’s testimony that an incident in defendant’s store was “possibly” the cause of plaintiff’s shingles outbreak, in the doctor’s explanation of why the medical community believes shingles occur, and in other evidence.

Appeal by defendant from judgment entered 28 August 2001 and order entered 28 August 2001 by Judge Clifton W. Everett, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 31 October 2002.

King & King, L.L.P., by Charlene Boykin King, for plaintiff appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Patrick M. Meacham, for defendant appellant.

McCULLOUGH, Judge.

On the afternoon of 22 September 1997, plaintiff Betty L. Johnson, her daughter and granddaughter were shopping at the store of defendant Piggly Wiggly of Pine Tops, Inc. Unbeknownst to them, a physical confrontation was taking place inside the store, involving employees of defendant as well as others. Plaintiff moved toward the exit of the store as the group moved to the front of the store. The confrontation was broken up momentarily as some of the participants

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left the premises. However, an employee of defendant broke away from those restraining her and proceeded to give chase. As she did, she ran into plaintiff from behind as plaintiff was attempting to exit the store. As a result, plaintiff's arms were thrust forward and her head was jerked backwards.

Plaintiff filed a complaint alleging negligence on the part of defendant on 19 January 1999. Plaintiff alleged her injuries as ongoing pain and soreness, palsy and loss of sensation in the face, difficulty hearing, memory loss, an outbreak of painful shingles, and emotional distress stemming from the incident and subsequent injuries. Defendant filed its answer on 19 March 1999 denying any negligence on its part.

The trial took place during the 29 May 2001 Civil Session of Edgecombe County Superior Court before the Honorable Clifton W. Everett. On 31 May 2001, the jury found that plaintiff was in fact injured by negligence of defendant, and awarded her "medical expenses plus \$6,000.00 pain and suffering for a total of \$8,225.04."

After trial, plaintiff made a motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 in open court. After a hearing on 2 July 2001, Judge Everett entered the judgment from the trial in the amount of \$8,225.04, and an order granting plaintiff's motion in the amount of \$8,000.00. Defendant appeals.

Defendant makes the following arguments on appeal: The trial court erred by (1) admitting the testimony of Dr. R. Brookes Peters with regard to damages resulting from shingles and the causation of said conditions, as it was mere conjecture, surmise and speculation as to causation and thus insufficient evidence as to causation, admitting such testimony was an abuse of discretion; and (2) allowing plaintiff's motion for attorneys' fees as they were excessive and not based upon sufficient findings of fact.

I.

[1] The main thrust of defendant's appeal deals with the admission of testimony from plaintiff's expert, Dr. R. Brookes Peters.

Plaintiff testified that she was experiencing severe headaches in addition to ongoing pain in her neck, shoulder and back in the days after the incident on defendant's premises. As a result, on 24 September 1997, she visited Dr. Peters, her regular physician since 1986. She returned to Dr. Peters on 29 September 1997 as the pain

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continued. At this time, Dr. Peters noticed a rash developing on plaintiff's neck, face and head. He diagnosed the rash as *herpes zoster*, or shingles. Plaintiff's shingles were "all but cleared" on 30 October 1997, and resolved by 12 December 1997.

Dr. Peters was tendered as an expert witness in the general practice of medicine and testified at trial via his videotaped deposition. After speaking of his treatment of plaintiff, Dr. Peters described shingles as being "a very interesting complication of chicken pox," as the chicken pox virus lies dormant in the body's nerve roots. Shingles result when this dormant virus flares up, causing a blistering type rash. As to the causes of these flare-ups, Dr. Peters answered: "It's poorly understood why shingles appear when they appear, but one prevailing thought is that shingles tend to occur at times of stress."

Defendant's appeal centers upon Dr. Peters' testimony as to the relationship between the 22 September 1997 incident, and the shingles that flared up shortly after. Dr. Peters made several comments throughout his testimony as to causation, for instance:

[Plaintiff's Attorney]: Now, did you explain to her any relationship between physical and emotional stress and shingles at this time?

[Dr. Peters]: My statement in the chart was, I listed the diagnoses, which were mild Bell's palsy, resolving shingles. I also mentioned a pharyngitis, which was the sore throat that she talked about. Now, my fourth diagnosis was history of recent trauma. *My statement was, I'm really not sure if these phenomena can all be interrelated. I have explained that physical and emotional stress can certainly be thought to be a trigger for shingles.*

[Plaintiff's Attorney]: Did you have an opinion at that time whether the stresses suffered by Ms. Johnson could have caused or triggered her shingles at that time?

[Dr. Peters]: I—I just read the way I stated it verbatim. And I think that it really is more of an observation than a conclusion.

(Emphasis added.) Further,

[Plaintiff's Attorney]: Okay. Do you have an opinion based on a reasonable degree of medical certainty as to whether Ms. Johnson's injuries were caused by the incident which occurred on September 22nd, 1997, at the Piggly Wiggly.

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[Dr. Peters]: I think it's reasonable that the soft tissue injury described previously . . . the pain and the tenderness, were likely caused or could have been caused by that altercation.

. . . .

[Plaintiff's Attorney]: Okay. Do you have an opinion based on a reasonable degree of medical certainty whether the injuries related to Ms. Johnson's shingles were caused by the incident which happened on September 22nd of 1997 at the Piggly Wiggly?

[Dr. Peters]: *As I stated before, the thinking is that shingles may be related to stress; physical or emotional stress. And to the extent that the incident at the grocery store triggered physical and emotional stress, one could argue that they could be related. Whether or not it's true is hard—hard to say. But it certainly is feasible. It's possible.*

[Plaintiff's Attorney]: Okay, and what is your opinion?

[Dr. Peters]: *Just that: I think it's possible.*

[Plaintiff's Attorney]: And that is possible based on a reasonable degree of medical certainty in your opinion?

[Dr. Peters]: Right.

(Emphasis added.) On cross-examination by defendant, more was said on the subject of causation:

[Defendant's Attorney]: Okay. And then I believe at some point later you provided a follow-up note on May 11, 1998—

[Dr. Peters]: Yes.

[Defendant's Attorney]: —which indicated that that record should read that the shingles were not related to her injury at the grocery store, unless it was the stress of that injury that precipitated an outbreak of shingles?

[Dr. Peters]: Right.

[Defendant's Attorney]: Is that correct?

[Dr. Peters]: Yes.

[Defendant's Attorney]: So, [Plaintiff's Attorney] asked you, towards the end of—of your discussion with her, whether or not you could say within a reasonable degree of medical certainty

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that the shingles were caused by the Piggly Wiggly incident. And I believe your response was it's possible that they were; is that accurate?

[Dr. Peters]: Yes.

[Defendant's Attorney]: Okay, what I want to ask you, then, is, in your medical opinion, to a reasonable degree of medical certainty, can you say that these shingles were indeed caused by the incident at Piggly Wiggly on September 22nd, 1997? Not whether it was possible, but whether or not they were indeed caused by something that happened on that day.

[Dr. Peters]: *The best way I can state that is that it's possible. I cannot say that it was certain, only that it's possible.*

[Defendant's Attorney]: Okay. And my interpretation of what you're saying with that answer is that the answer to my question is no, you cannot say to a reasonable degree of medical certainty that they were indeed caused by incidents that day?

[Dr. Peters]: *I don't think that's accurate. And I'm going to hedge you on this, because I don't think that the question can be answered. I don't think I can say they definitely were caused or they definitely were not caused. It is possible that these—that the stress of the injury, whether it be physical or emotional stress, could have caused the shingles.*

[Defendant's Attorney]: Is it at least equally possible, then, that any of the events surrounding the incident at Piggly Wiggly were not the cause of the shingles?

[Dr. Peters]: *It is possible that the shingles occurred independent of that event.*

[Defendant's Attorney]: And it's that possibility It is equally as possible that it did not happen from the Piggly Wiggly incident as it is that it did occur from the Piggly Wiggly incident?

[Dr. Peters]: *I'm not even going to get into percentages, 50/50 or otherwise. I don't—I mean, I guess that's open to interpretation, and I'm not trying to avoid the question. I don't know that you're going to find any kind of textbook that would answer that percentage question. I think it is possible that it was and it's possible that it wasn't.*

(Emphasis added.) Later, on redirect examination:

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[Plaintiff's Attorney]: Okay. Is there a difference between the term "a reasonable degree of medical certainty" and "an absolute certainty"?

. . . .

[Dr. Peters]: I think there is.

[Plaintiff's Attorney]: And you stated in response to my questions earlier, that in your opinion the stress that Ms. Johnson suffered as a result of the incident that occurred on September 22nd, 1997, in your opinion triggered the outbreak of shingles; is that correct?

. . . .

[Dr. Peters]: I believe I said that it could have.

Essentially, Dr. Peters' testimony amounts to this: It is possible that the incident of 22 September 1997, by causing physical and emotional stress to plaintiff, could have triggered the outbreak of shingles, based on a reasonable degree of medical certainty. Prior to the introduction of Dr. Peters' video testimony, defendant objected with regard to the causal relationship of the incident and condition. This objection was overruled.

Defendant contends this testimony clearly indicates a lack of certainty with regard to any causal relationship between defendant's negligence and plaintiff's injury and, thus, should not have been admitted into evidence and should not have been considered by the jury for damages. At no point was Dr. Peters able to say with any certainty that the shingles were caused by the assault. Defendant relies on case law that stands for the proposition that expert testimony which shows that it is a mere possibility or conjecture that a resulting condition occurred as a direct result of an accident (or some act) is insufficient to base causation and thus should be excluded. *See Lee v. Stevens*, 251 N.C. 429, 434, 111 S.E.2d 623, 627 (1959) (" 'We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury.' "). *Id.* (quoting *Byrd v. Express Co.*, 139 N.C. 273, 275, 51 S.E. 851, 852 (1905) (quoting *State v. Vinson*, 63 N.C. 335, 338 (1869)); *see also Gillikin v. Burbage*, 263 N.C. 317, 324-25, 139 S.E.2d 753, 759-60 (1965); *Garland v. Shull*, 41 N.C. App. 143, 254 S.E.2d 221 (1979); *Hinson v. National Starch & Chemical Corp.*, 99

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N.C. App. 198, 392 S.E.2d 657 (1990). As defendant's appeal is pointed to the admissibility as well as, inherently, the sufficiency of the testimony towards causation, we address both issues.

In *Cherry v. Harrell*, 84 N.C. App. 598, 353 S.E.2d 433, *disc. review denied*, 320 N.C. 167, 358 S.E.2d 49 (1987), this Court addressed the question of whether or not an expert's failure to state his opinion was "reasonably probable" made it properly excludable. The plaintiff in *Cherry* had an automobile accident and was diagnosed with a herniated disk in her back over a year later. The expert in *Cherry* testified that the injury and the accident suffered by plaintiff were "related" and that the accident "most likely" was the cause of the injury. *Id.* at 603, 353 S.E.2d at 436. The defendant in that case argued that the expert had not testified that it was "reasonably probable" that plaintiff's accident "could have" caused her ruptured disk, and thus it was inadmissible.

Cherry noted that case law which necessitated the "formulation that the expert testify it was 'reasonably probable' that an accident 'could have' or 'might have' caused plaintiff's injury" was handed down at the time when experts could not testify as to the ultimate issue in the case, and tended to confuse the question of admissibility with sufficiency. *Id.* at 603-04, 353 S.E.2d at 436-37 (discussing *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964) and *Gillikin*, 263 N.C. at 324-25, 139 S.E.2d at 759-60). These requirements were no longer applicable. *See* N.C. Gen. Stat. § 8C-1, Rule 704 (2001) (expert testimony no longer objectionable because it embraced the ultimate issue to be decided by the trier of fact); *State v. Smith*, 315 N.C. 76, 99-101, 337 S.E.2d 833, 848-49 (1985) (rejecting "could" or "might" phraseology). As such, the *Cherry* Court stated that "[t]he touchstone issue governing the admissibility of . . . expert opinion is instead Rule 702: did [the expert's] testimony on causation assist the jury's understanding of the evidence or determination of a fact in issue?" *Cherry*, 84 N.C. App. at 604, 353 S.E.2d at 437.

Cherry held that the expert's testimony was helpful and of assistance to the jury. Importantly, it noted that just because the expert had stated that events other than the automobile accident could have produced the plaintiff's injury, such did not render his testimony of no assistance to the jury:

[W]hile the existence of other possible causes of plaintiff's [injury] might reduce the weight accorded [the expert's] opinion,

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we hold such other possibilities do not alone render his opinion inadmissible.

Id. at 605, 353 S.E.2d at 437.

Still, it remains that “baseless speculation can never ‘assist’ the jury under Rule 702.” *Id.* at 605, 353 S.E.2d at 438. “Under Rule 705, opposing counsel can challenge the basis of the expert’s opinion by request or through *voir dire* or cross-examination.” *Id.* (The expert’s testimony in *Cherry* was found to have been adequately based on patient treatment under Rule 703.)

Thus, after *Cherry*, as to the admissibility of expert testimony on causation, as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703, the testimony is admissible. No longer is testimony inadmissible for its failure to state it was based on “reasonable medical probability.” The degree in which an expert testifies as to causation, be it “probable” or “most likely” or words of similar import, goes to the weight of the testimony rather than to its admissibility.

Applying this principle to the present case, we believe that the testimony given by Dr. Peters was helpful to the jury. He testified that stress is believed to be a triggering cause of shingles and that it was “possible” that the incident of 22 September 1997 produced the stress that triggered the onset of shingles in plaintiff. We note that Dr. Peters’ testimony was not baseless speculation because his diagnosis was based on his own personal diagnosis and treatment of plaintiff, and the prevailing knowledge on the causes of shingles. While this is not the most definite statement an expert can give, especially in light of his statement that it was “possible” other events could have independently caused the shingles, this goes to the weight to be accorded his testimony by the jury, and not its admissibility.

[2] In addition to the admissibility of the testimony of the expert on causation, we address whether there was sufficient evidence of causation.

“[I]n order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation ‘must indicate a reasonable scientific probability that the stated cause produced the stated result.’” *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (quoting *Hinson*, 99 N.C. App. at 202, 392 S.E.2d at 659), *aff’d*, 343 N.C. 302, 469 S.E.2d 552 (1996). Expert witness testimony regarding causation which is based on mere specula-

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tion or possibility is incompetent. *Poole v. Copland, Inc.*, 125 N.C. App. 235, 241, 481 S.E.2d 88, 92 (1997), *rev'd on other grounds*, 348 N.C. 260, 498 S.E.2d 602 (1998). "However, 'could' or 'might' may be used when the expert witness lacks certainty. Whether 'could' or 'might' will be considered sufficient depends upon the general state of the evidence." *Id.* (citations omitted). Further, our case law reveals that in some instances, "use of the word 'possible' does not render [an expert's] testimony inadmissible[,]" as here too, the sufficiency depends upon consideration of all the testimony. *McGrady v. Quality Motors*, 23 N.C. App. 256, 261, 208 S.E.2d 911, 914, *cert. denied*, 286 N.C. 336, 211 S.E.2d 213 (1974), *cert. denied*, 286 N.C. 545, 212 S.E.2d 656 (1975).

In *Poole*, this Court recognized certain trends in these very factual determinations:

Cases finding 'could' or 'might' expert testimony to be sufficient often share a common theme—additional evidence which tends to support the expert's testimony. *See, e.g., Mann v. Transportation Co. and Tillett v. Transportation Co.*, 283 N.C. 734, 198 S.E.2d 558 (1973) (expert's testimony that preexisting defect "could or might have" caused steering system to fail, along with testimony of driver and plaintiff that driver turned the wheel but bus would not turn, held sufficient to send case to the jury); *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964) (expert psychiatric testimony that accident "may have had an influence" on plaintiff's condition not sufficient standing alone, but when combined with expert's testimony on cross-examination and testimony of other lay witnesses, enough for jury to infer plaintiff's amnesia resulted from the accident); *Kennedy v. Martin Marietta Chemicals*, 34 N.C. App. 177, 237 S.E.2d 542 (1977) (expert testimony that inhaling of gases could have triggered decedent's heart attack, combined with evidence of color of decedent's lungs and quick breathing by decedent, held competent to support Industrial Commission's finding that a sudden deprivation of oxygen accelerated or aggravated decedent's preexisting heart condition). Cases finding "could" or "might" expert testimony insufficient generally have additional evidence or testimony showing the expert's opinion to be a guess or mere speculation. *See, e.g., Maharias v. Storage Company*, 257 N.C. 767, 127 S.E.2d 548 (1962) (expert's testimony that a pile of rags could have caused a fire through spontaneous combustion held insufficient when expert also testified on cross-examination

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that he did not know where the rags were before the fire and that the fire “could have happened from any one of a number of causes”); *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 392 S.E.2d 657 (1990) (expert’s testimony that plaintiff’s inhalation of a chemical could have caused her impairment held insufficient where expert also testified he could not relate plaintiff’s impairment to any specific etiology and that he could not say yes or no whether plaintiff’s decreased pulmonary function resulted from an inhaled chemical).

Poole, 125 N.C. App. at 241-42, 481 S.E.2d at 92-93. This list is not exhaustive. See *Lee*, 251 N.C. 429, 111 S.E.2d 623 (disallowing portions of jury verdict for cerebral hemorrhage where possible causes including weak blood vessels and hardened arteries, and where plaintiff’s expert witness testified only as to the “possibility” that a car accident caused hemorrhage); *Peeler v. Piedmont Elastic, Inc.*, 132 N.C. App. 713, 718-19, 514 S.E.2d 108, 112 (1999) (reversing award of damages for employee’s pulmonary condition as to post-surgical complications when medical testimony showed only that it was “possible” that the continuing problems were caused by the surgery”); *McGrady*, 23 N.C. App. at 261, 208 S.E.2d at 914 (allowing testimony that an accident possibly caused cartilage damage in plaintiff’s knee, taken in conjunction with other testimony explaining the circumstances).

In *Lockwood*, the Supreme Court stated that:

If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted and, if admitted, should be stricken.

Lockwood, 262 N.C. at 669, 138 S.E.2d at 545-46. In that case, the expert witness was asked whether or not the automobile accident that had occurred was a “contributing factor to his [plaintiff’s] attack of amnesia and depression.” *Id.* at 665, 138 S.E.2d at 543. The expert’s answer was that “[the accident] may have had an influence on his condition.” *Id.* at 669, 138 S.E.2d 546. The Court stated that standing alone, the testimony “does not indicate a reasonable scientific probability that the attack of amnesia resulted from plaintiff’s physical injuries.” *Id.* However, after considering this testimony with the rest

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of his testimony, that the amnesia was “induced by a deep sense of insecurity” and that plaintiff’s nature was such that he was prone to such behavior, and the testimony of others, that plaintiff’s nature was intensified by the repercussions of the accident, it was “permissible, but not compulsory, that the jury infer that the physical injuries suffered by plaintiff were the direct cause” of plaintiff’s amnesia. *Id.* at 670, 138 S.E.2d at 547.

In the present case, Dr. Peters testified that it was possible that the stress produced by the incident on 22 September 1997 could have directly caused plaintiff’s shingles. On the other hand, he testified that it was possible that an event independent of 22 September 1997 could have also caused the shingles. This alone, we believe, is insufficient to establish causation.

As in *Lockwood* and *Poole*, we look to the other testimony to see whether the record as a whole lends support to the expert’s qualified opinion. Here the evidence shows that plaintiff had never experienced shingles before and the outbreak occurred just a few days after the incident at defendant’s store. Plaintiff and her daughter testified as to how traumatic the event was and how upset it had made her at that time. Testimony by Dr. Peters revealed that on her visits to his office, plaintiff stated that she was “not emotionally over” the Piggly Wiggly incident and that she had a “generalized malaise” since that event. During cross-examination, plaintiff was asked about other events that occurred in her life near the time the 22 September 1997 incident took place that may have caused her stress. She testified that she did have stressful events that had occurred *after* the event on 22 September 1997. As to *before* 22 September 1997, she testified that while her house getting broken into was not stressful, her granddaughter being born with *spina bifida* and having five operations did cause her stress.

Despite the fact that the expert described the incident as “possibly” being the cause of the shingles outbreak, we believe that his opinion along with his explanation of why the medical community believes shingles occur and the other testimony leaves us in a similar position as the *Lockwood* and *Poole* cases, in that it was “permissible, but not compulsory, that the jury infer” that the incident of 22 September 1997 caused plaintiff physical injuries and emotional stress, which were the direct causes of plaintiff’s shingles. This is so especially in light of the fact that the shingles manifested themselves so close in relation of time to the event.

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Thus we hold that, under the facts of this case, it was not error to admit the expert's testimony on the causation of shingles, and the evidence in the case supports the verdict.

As there was no abuse of discretion, this assignment of error is overruled.

II.

As to the award of attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.1 (2001), given our determination that the testimony was admissible and the verdict sustained, this assignment of error is overruled.

No error.

Judges WALKER and CAMPBELL concurred in this opinion prior to 31 December 2002.

STATE OF NORTH CAROLINA v. RODNEY JAY TUCKER

No. COA02-156

(Filed 4 February 2003)

1. Evidence—defendant's false answers to military regarding past drug use—impermissible character evidence—no prejudicial error

Although the trial court erred in a statutory sexual offense, sexual offense by a person in a parental role in the home of the minor victim, and taking indecent liberties with a minor case by allowing into evidence testimony about defendant's false answers to the military regarding his past drug use since the evidence was impermissible character evidence as this testimony came out in the State's case-in-chief before defendant had put his character in issue, this error alone does not entitle defendant to a new trial when: (1) defendant was not placed in a position in which he could have felt compelled to testify to rebut this character statement; and (2) the evidence did not undermine the fairness of the trial.

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2. Sexual Offenses— statutory—person in a parental role— indecent liberties with a minor—sufficiency of evidence

The trial court did not err by failing to dismiss the charges of statutory sexual offense, sexual offense by a person in a parental role in the home of the minor victim, and taking indecent liberties with a minor case, because: (1) the evidence viewed in the light most favorable to the State showed that defendant had the opportunity to commit the alleged acts; and (2) it was for the jury to determine the credibility of the victim and ultimately whether defendant committed the crimes for which he was indicted.

3. Sentencing— incorrect verdict sheet—inadvertent mislabeling—arrest of judgment

Although the State has conceded error as to 00 CRS 54820 and agrees that defendant's conviction for sexual activity with a person in a parental role in the home of the minor victim under this case number should be arrested based on an incorrect verdict sheet where a count of indecent liberties should have been listed, the inadvertent mislabeling of the fourteen counts against defendant for statutory sexual offense of a thirteen, fourteen, or fifteen-year-old was not a fatal defect requiring arrest of judgment.

4. Sentencing— aggravating factor—took advantage of position of trust or confidence

Although the trial court did not err in 00 CRS 54807 by using the aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence to commit the offenses to aggravate his sentences, the trial court erred by using this aggravating factor to increase the judgments in 00 CRS 54812 and 00 CRS 54815 which included convictions of sexual activity by a person in a parental role in the home of the minor victim.

Appeal by defendant from judgments entered 24 July 2001 by Judge Henry E. Frye, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 17 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Brian Michael Aus for defendant appellant.

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McCULLOUGH, Judge.

Defendant Rodney Jay Tucker was tried before a jury at the 16 July 2001 Criminal Session of Forsyth County Superior Court. Defendant was indicted on 19 February 2001 with fourteen counts of statutory sexual offense of a person aged 13, 14 or 15 (N.C. Gen. Stat. § 14-27.7A(a)), seven counts of sexual offense by a person in parental role in the home of minor victim (N.C. Gen. Stat. § 14-27.7(a)), seven counts of taking indecent liberties with a minor (N.C. Gen. Stat. § 14-202.1)), and one count of attempted statutory rape (N.C. Gen. Stat. § 14-27.7A(a)).

Defendant was born on 10 May 1960. He was over 30 years of age at the time of the alleged acts. The victim in this case was born 1 October 1984.

In this case, defendant was victim's stepfather. He met her mother in 1996 while he was in a drug and alcohol rehabilitation center, His Laboring Few Ministry. Defendant was employed as a long-distance truck driver and had a recurring drug problem.

The testimony at trial revealed disturbing facts about the shattered childhood of the victim. The victim testified that starting when she was 13 years old, defendant began sexually molesting her. On the first occasion when she was thirteen, defendant was driving his truck and picked up the victim from her father, who shortly before trial was proven not to be the victim's biological father, although she was born in wedlock. Defendant allegedly had intercourse with her in the sleeper cab of his truck. The victim testified to frequent sexual molestations including once when she got into bed with her mother and defendant when she was frightened by a storm. On that occasion, defendant digitally penetrated her without her mother's knowledge. Numerous such incidents of fondling, digital penetration, oral sex, and rape by defendant were recounted.

The victim suffered from behavioral disorders and depression, and even attempted suicide in December of 1998. The victim had kept her accusations quiet because defendant was paying for her flying lessons, which was something very important to her. However, the victim did intermittently inform various family members, even her mother at one point, about defendant's actions, but nothing was done about it. While her mother was apparently not convinced that the victim was telling the truth, it did eventually lead to her leaving defend-

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ant. Finally, the victim's stepsister turned defendant in to the authorities in Georgia who investigated the accusations. Defendant turned himself in to the Winston-Salem police once charges were filed.

Other testimony at trial revealed that the victim had sexual contact with several other persons, including a step-grandfather, a couple of cousins, and two other individuals that were her own age. The majority of these encounters were not of the consensual variety. However, the victim had consensual sex at least once.

Several family members and others involved in treating the victim testified to corroborate her story.

At trial, defendant testified and denied all inappropriate touching. Under cross-examination, defendant admitted he was discharged from the U.S. Navy for lying about his drug abuse. Defendant also testified about a letter that he received from the victim where she apologized for all the trouble she caused.

While the attempted statutory rape charge was dismissed, on 23 July 2001 the jury found defendant guilty on fourteen counts of statutory sexual offense of a person aged 13, 14 or 15, eight counts of sexual offense by a person in parental role in the home of minor victim, and six counts of taking indecent liberties with a minor. All these were consolidated into three different judgments: 00 CRS 54807, 00 CRS 54812, and 00 CRS 54815. Defendant had a prior record level of II, and was sentenced to a minimum of 334 months and a maximum of 410 months on each judgment, all to run consecutively.

Defendant makes the following assignments of error: The trial court (I) erred by permitting evidence of defendant's false answers regarding drug use prior to entering military service; (II) erred in denying defendant's motion to dismiss due to insufficiency of the evidence; (III) erred by submitting verdict sheets and accepting guilty verdicts where said verdict sheets presented crimes for which defendant had not been indicted; and (IV) erred in finding that defendant abused a position of trust or confidence and sentencing him in the aggravated range of punishment for his convictions of sexual activity with a person in his custody.

I.

[1] In his first assignment of error, defendant contends that the trial court erred by allowing testimony about his false answers to the military regarding his past drug use into evidence.

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Detective Kelly Wilkinson of the Winston-Salem Police Department testified during the State's case-in-chief that on 31 July 2000, she interviewed defendant at the Winston-Salem Police Station. Defendant's attorney was present at the interview. Exploring his personal history, defendant informed the detective that he had been given a general discharge from the U.S. Navy in 1981. The discharge was based on the fact that he lied about his past drug use and the Navy found out about it. Defendant objected to this testimony, but the trial court allowed the testimony as relevant under Rule 402 because defendant had his attorney present when he made the statement and evidence of his drug use was already in evidence without objection, and admissible under Rule 403 because its probative value outweighed any prejudicial effect. Later in the trial, defendant testified that he was in the U.S. Navy for 4 months before being discharged for lying about the drug use. Defendant argues that this testimony was an impermissible attack on the character of defendant.

Evidence of an accused's character is not admissible for any purpose if the accused has neither testified nor introduced evidence of his character in his own behalf. However, the State may produce evidence relevant for some other purpose which incidentally bears upon the character of the accused.

State v. Oxendine, 303 N.C. 235, 241, 278 S.E.2d 200, 204 (1981) (citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 404 (2001).

While this testimony was presumably admissible as to defendant's drug use, its secondary effect was that defendant was untruthful. The State, as noted by the trial court, already had ample testimony in evidence that defendant had an extensive drug problem via the testimony of the victim's mother. Thus, this evidence was cumulative as to the drug use point. It could be inferred then that the State wanted this evidence to be heard by the jury to show that he had lied to the U.S. military. Such does not incidentally bear upon his character, and therefore it was impermissible character evidence, as this testimony came out in the State's case-in-chief before defendant had put his character in issue. *See State v. Freeman*, 313 N.C. 539, 548, 330 S.E.2d 465, 473 (1985); *State v. Morgan*, 111 N.C. App. 662, 668, 432 S.E.2d 877, 881 (1993).

Although the admission of this evidence was error, we hold that this error alone does not entitle defendant to a new trial. Defendant was not placed in a position in which he could have felt compelled to testify to rebut this character statement. While the jury

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did hear evidence that he was untruthful before he put on evidence, it did not undermine the fairness of the trial. *See Freeman*, 313 N.C. 539, 330 S.E.2d 465. We see no reasonable probability that, in the absence of this evidence, the jury would have said differently.

This assignment of error is overruled.

II.

[2] In his second assignment of error, defendant contends that the trial court erred by not dismissing all the charges for lack of substantial evidence that any kind of sexual assault occurred.

The trial court must determine whether the State presented substantial evidence on every essential element and that defendant is the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982); *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001). Evidence is to be viewed in the light most favorable to the State. *State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 588 (1997). All contradictions are to be resolved in favor of the State, and all reasonable inferences based upon the evidence are to be indulged in. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). 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).

Defendant acknowledges the case against him was based on the victim's testimony, and most all other testimony was to corroborate such. He points out that the victim did not disclose the alleged sexual assaults until shortly before trial, and that she did not inform her clinical social worker until she had convinced her mother. Defendant highlights the social worker's acknowledgment that children can "purposefully lie" in these situations. Further, no physical evidence was offered to substantiate the allegations of sexual assault.

Testimony of a prosecuting witness alone is sufficient to support a charge as the jury must weigh any contradictions or discrepancies in that testimony. *State v. Guffey*, 265 N.C. 331, 332, 144 S.E.2d 14, 16 (1965); *see also State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993). There was sufficient evidence at trial on each element of the crimes charged. Evidence, shown in the light most favorable to the State, showed that defendant had the opportunity to commit the acts alleged. It was for the jury to determine the credibility of the victim,

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and ultimately whether defendant committed the crimes for which he was indicted. This assignment of error is overruled.

III.

[3] In his next assignment of error, defendant contends that the trial court erred in using incorrect verdict sheets.

As set forth above, defendant was indicted on several violations of N.C. Gen. Stat. §§ 14-27.7A(a) (statutory sexual offense of 13, 14 or 15 year old), -27.7(a) (sexual offense by a person in parental role in the home of minor victim), and -202.1 (indecent liberties with minor). The trial court properly instructed the jury as to each of the above, respectively. However, the trial court submitted verdict sheets to the jury which contained fourteen counts of N.C. Gen. Stat. § 14-27.4 (first degree sexual offense) where the statutory sexual offense of a 13, 14 or 15 year old counts should have been. Further, the trial court submitted a verdict sheet in case number 00 CRS 54820 that listed a count of sexual offense by parent in the home of minor victim where a count of indecent liberties should have been. Regardless, the trial court accepted the verdict sheets after being rendered by the jury without objection by any party.

Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment. . . . When such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.

State v. Wilson, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (footnote omitted), *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998); *see also State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982).

Initially, this Court notes that the State has conceded error as to 00 CRS 54820 and agrees that defendant's conviction for sexual activity with a person in a parental role in the home of minor victim under this case number should be arrested.

As to the fourteen counts of statutory sex offense of a 13, 14 or 15 year old, the State does not concede error and contends that the inadvertent mislabeling of the counts against defendant is not a fatal defect requiring arrest of judgment.

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This Court has held that a verdict is sufficient if it “can be properly understood by reference to the indictment, evidence and jury instructions.” *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff’d*, 319 N.C. 392, 354 S.E.2d 568 (1987). In *Connard*, the verdict form reflected that the jury found defendant “Guilty of Possession of Personal Property of Ronald Hewitt.” *Connard*, 81 N.C. App. at 335, 344 S.E.2d at 574. While defendant in that case argued that this was not a crime, this Court noted in affirming the trial court that “[t]he record, including the indictment and the instructions, makes it abundantly clear, beyond mistake by the jury, that knowing possession of stolen goods from Hewitt was at issue.” *Id.* at 336, 344 S.E.2d at 574.

This Court has somewhat recently had occasion to visit this issue. In *State v. Gilbert*, 139 N.C. App. 657, 535 S.E.2d 94 (2000), the caption on the verdict sheet was of a name different than the defendant. This Court, in surveying other jurisdictions, stated that “unless the error is fundamental . . . errors will not be considered prejudicial[.]” *Id.* at 673-74, 535 S.E.2d at 103. The *Gilbert* Court held that, because the verdict sheet contained “the proper file number for the case, and the proper charges listed are consistent with the evidence presented at trial and with the court’s instructions,” the transcript was replete with the correct name of the defendant, and the verdict was unanimous, then there was no prejudicial error. *Id.* at 675, 535 S.E.2d at 104.

In the present case, the jury heard evidence and was properly instructed on three different crimes that defendant was alleged to have committed. The jury found defendant guilty of taking indecent liberties with a minor, sexual offense by a parent in the home of minor victim, and the third sexual offense crime on which they were instructed. The State contends that this gave the trial court a proper basis to pass judgment and sentence defendant appropriately. See *Lyons v. State*, 690 So.2d 695 (1997) (finding no prejudicial error in verdict form that listed “conspiracy to commit robbery” instead of “conspiracy to commit armed robbery or robbery with a dangerous weapon”); *Broadus v. State*, 487 N.E.2d 1298 (1986) (error in indicating “burglary” instead of “robbery” on verdict sheet was harmless where jury was well acquainted with crime charged).

We agree with the State and find that this was not fundamental error requiring arrest of judgment. While the jury returned verdict sheets stating that defendant was guilty of the crime of first degree sexual offense, the jury had been “well-acquainted” with the charge

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of statutory sexual offense of a 13, 14 or 15 year old. The jury had heard the indictments which included that crime, heard the evidence, and were properly instructed on that crime. Thus, this assignment of error is overruled in part and sustained in part.

IV.

[4] In his last assignment of error, defendant contends that the trial court erred in using the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offenses to aggravate his sentences for the convictions of sexual offense by a person in parental role in the home of minor victim.

To be guilty of a violation of N.C. Gen. Stat. § 14-27.7(a), sexual offense by a person in parental role in the home of minor victim, a defendant must have “assumed the position of a parent in the home of a minor victim.” N.C. Gen. Stat. § 14-27(a) (2001). Thus, to prove one element of this offense, it was necessary to establish the parent-child relationship, which is in itself a position of trust.

Defendant's sentence was aggravated by the trial court by use of N.C. Gen. Stat. § 15A-1340.16(d)(15) (2001), that “[t]he defendant took advantage of a position of trust or confidence to commit the offense.” Also included in N.C. Gen. Stat. § 15A-1340.16(d) is the following prohibition:

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 14-2.2 may not be used to prove any factor in aggravation.

N.C. Gen. Stat. § 15A-1340.16(d) (emphasis added).

Defendant argues that evidence necessary to prove an element of the offense for which one is convicted may not be used to prove any sentencing factor in aggravation, and thus the trial court erred by doing so. *See State v. Raines*, 319 N.C. 258, 266, 354 S.E.2d 486, 491 (1987); *State v. Hughes*, 114 N.C. App. 742, 745, 443 S.E.2d 76, 78, *disc. review denied*, 337 N.C. 697, 448 S.E.2d 536 (1994). We agree.

The State contends that “[e]vidence used to prove an element of one offense may also be used to support an aggravating factor of a separate joined offense.” *State v. Crockett*, 138 N.C. App. 109, 119, 530 S.E.2d 359, 365, *disc. review denied*, 352 N.C. 593, 544 S.E.2d 790

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(2000). In *Crockett*, the defendant was convicted of two counts of statutory rape and four counts of sexual activity by a custodian. *Id.* at 112, 530 S.E.2d at 361. The two counts of statutory rape were consolidated for judgment. *Id.* The sentence for this judgment was increased by the trial court upon finding that defendant in that case took advantage of a position of trust. This Court, as stated above, held that this was permissible.

Crockett is not controlling in the present case. In that case, it appears that the trial court consolidated the statutory rape charges. It is unknown whether or not the four convictions of sexual activity by a custodian were consolidated with each other or not. Yet it seems that the convictions of the different charges were kept separate. That Court held that an element of the sexual activity charge, the abuse of a position of trust, could be used to elevate a “separate joined offense.” We do not interpret this to mean that a conviction for sexual activity by a custodian can be joined with a separate offense, such as statutory rape, and be elevated by the aggravating factor of abusing a position of trust. The prohibition against elevating the punishment for a crime by one of its already established elements is not that easy to circumvent.

In the present case, there were three judgments. The first, 00 CRS 54807, included five convictions of taking indecent liberties with a minor and five convictions of sexual offense of a 13, 14 or 15 year old. This judgment was properly increased upon the finding of the aggravating factor of abusing a position of trust. *See State v. Caldwell*, 85 N.C. App. 713, 355 S.E.2d 813 (1987) (A familial relationship is not required for indecent liberties, and aggravating the sentence because defendant abused a position of trust was proper.). However, the other two judgments, 00 CRS 54812 and 00 CRS 54815, included convictions of sexual activity by a person in a parental role in the home of minor victim. These judgments were improperly increased upon the finding of the aggravating factor of abusing a position of trust. Thus, we remand for a new sentencing hearing. *See State v. Corbett*, 154 N.C. App. 713, 718, 573 S.E.2d 210, 214 (2002).

We hold that while defendant received a fair trial, judgment in case number 00 CRS 54820 as to defendant’s conviction in violation of N.C. Gen. Stat. § 14-27.7(a) is arrested. Further, we remand for resentencing case numbers 00 CRS 54812 and 54815 in a manner not inconsistent with this opinion.

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Arrested in part; remanded for resentencing in part; no error in part.

Judges WALKER and CAMPBELL concurred in this opinion prior to 31 December 2002.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. AIRLIE PARK, INC., AND DON
PENDLETON AND NATIONSBANK OF NORTH CAROLINA, N.A., DEFENDANTS

No. COA02-766

(Filed 4 February 2003)

1. Appeal and Error— appealability—condemnation—title and area taken

An order determining that certain parcels of land do not constitute a unified tract for purposes of condemnation by the Department of Transportation was immediately appealable, even though it was not a final determination of all of the issues. N.C.G.S. § 136-108.

2. Eminent Domain— DOT condemnation—unity of ownership

Unity of ownership for a Department of Transportation condemnation did not exist in three parcels of land owned by two separate corporations, even though the same individual had been the sole shareholder and director of both corporations before his death, and had intended to turn the tracts into a single industrial park. Defendant presented no persuasive grounds for piercing of the corporate veil.

Appeal by defendant Airlie Park, Inc. from order entered 4 March 2002 by Judge Richard D. Boner in Lincoln County Superior Court. Heard in the Court of Appeals 8 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General J. Bruce McKinney, for plaintiff appellee.

Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt, Blake W. Thomas, and Angelique R. Vincent.

TIMMONS-GOODSON, Judge.

Airlie Park, Inc. (“defendant”) appeals from an order of the trial court determining that certain parcels of real property owned by

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defendant did not constitute one unified tract for purposes of condemnation by the North Carolina Department of Transportation (“plaintiff”). For the reasons stated herein, we affirm the order of the trial court.

The facts and procedural history of the instant case are as follows: Defendant is a North Carolina corporation, organized and incorporated by David Clark, Sr. (“Clark”) in Lincoln County, North Carolina, for the purpose of land acquisition and investment. Under Clark’s direction, defendant acquired a 35.65-acre tract of land in Lincoln County on 17 February 1993. On 25 October 1999, plaintiff filed a condemnation action against defendant, seeking to condemn the 35.65-acre tract.

On 17 December 2001, defendant filed a “Motion to Determine Interest and Area Taken by Condemnation” pursuant to section 136-108 of the North Carolina General Statutes. In its motion, defendant argued that the condemned parcel was part of a larger unified tract of land owned by defendant that should be included in plaintiff’s condemnation action. In support of its motion, defendant filed several affidavits attesting to the fact that, before his death in 1997, Clark directed and was the sole shareholder of several corporations, including defendant corporation and a second corporation, Catawba Springs Land Company, Inc. (“Catawba”). The affidavits further averred that the condemned parcel owned by defendant had once belonged to Catawba before it transferred its interest in the property to defendant in 1993. At the time plaintiff filed its condemnation action, Catawba owned a 107.65-acre tract of land adjacent to the condemned property. According to defendant, Clark intended to develop both of these properties, along with a third, 52.74-acre tract of land also owned by defendant, into a single industrial park. The properties were never so developed, however, and ownership of the three parcels remained divided between defendant and Catawba.

Defendant’s motion came before the trial court on 11 February 2002, at which time the trial court made the following pertinent findings of fact:

1. The parcel of land in the present case is titled in the name of Airlie Park, Inc.
2. One additional parcel listed by the defendants which they requested in their motion to be deemed a part of the property

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taken is a 107.65 acre tract title[d] to Catawba Springs Land Company Inc., which abuts the parcel named above.

3. Another parcel which defendants moved to be included in the area taken is a 52.74 acre tract of land titled to Airlie Park, Inc., which abuts the parcel titled to Catawba Springs, but is not contiguous with the original Airlie Park Inc. parcel as described by the Department of Transportation on the plat or map filed in this case on or about the 27th day of September 2000.

4. Airlie Park Inc. and Catawba Springs Land Company, Inc., are two distinct corporations, and therefore, two separate entities.

Based on these findings, the trial court concluded that the three parcels described in defendant's motion did not constitute a single tract for purposes of condemnation, as they possessed neither unity of ownership nor physical unity. The trial court entered an order determining that the interest and area taken by plaintiff in its condemnation action included only the original 35.65-acre tract. From this order, defendant appeals.

The primary issue on appeal is whether the trial court erred in determining that the three parcels of land were separate for purposes of condemnation. After careful consideration, we affirm the order of the trial court.

[1] We first note that, although the order from which defendant appeals is not a final determination of all of the issues between the parties and is thus interlocutory, defendant's appeal is nevertheless properly before this Court. Section 136-108 of the North Carolina General Statutes requires parties to a condemnation proceeding to resolve all issues other than damages at a hearing as follows:

After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2001). Orders from a condemnation hearing concerning title and area taken are "vital preliminary issues" that must be immediately appealed pursuant to section 1-277 of the General Statutes, which permits interlocutory appeals of determina-

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tions affecting substantial rights. *See Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999); *Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). Because defendant's present appeal specifically contests the trial court's determination of the area affected by the taking, which is a "vital preliminary issue," such appeal is properly before this Court.

[2] Defendant argues that the trial court erred in determining that the three disputed tracts of land were not unified for purposes of condemnation. Section 40A-67 of the North Carolina General Statutes provides that, "[f]or the purpose of determining compensation under this Article, all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." N.C. Gen. Stat. § 40A-67 (2001). "This statute is a codification of a portion of the common law of condemnation known as the 'unity rule.'" *Town of Hillsborough v. Crabtree*, 143 N.C. App. 707, 711, 547 S.E.2d 139, 141, *disc. review denied*, 354 N.C. 75, 553 S.E.2d 213 (2001); *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 344, 451 S.E.2d 358, 362 (1994), *disc. reviews denied*, 340 N.C. 110, 260, 456 S.E.2d 311, 519 (1995). The "unity rule" was articulated by our Supreme Court in *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E.2d 219 (1959), as follows:

There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.

The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract. Under some circumstances the fact that the land is acquired in a single transaction will strengthen the claim of unity. But the fact that the land was acquired in small parcels at different times does not necessarily render the parcels separate and independent. However, there must be a substantial unity of own-

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ership. *Different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages.*

Id. at 384, 109 S.E.2d at 224-25 (citations omitted) (emphasis added).

Although *Barnes* sets forth unity of ownership as only one of three factors in the unity test, *Barnes* clearly requires that *some* type of unity of ownership be established, however tenuous, in order to declare separate parcels of land united for purposes of condemnation. Our Supreme Court reaffirmed this requirement in *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E.2d 390 (1978), in which the Court stated that, “[a]bsent unity of ownership, . . . two parcels of land cannot be regarded as a single tract for the purpose of determining a condemnation award.” *Id.* at 26, 249 S.E.2d at 395. Appellate decisions following *Barnes* have consistently required some evidence of unity of ownership in order to establish unity of land. *See, e.g., Martin*, 296 N.C. at 28, 249 S.E.2d at 396 (holding that “a parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages”); *Dept. of Transportation v. Nelson Co.*, 127 N.C. App. 365, 367, 489 S.E.2d 449, 450 (1997) (applying *Barnes* and holding that unity of ownership was present between two parcels of property owned by partnership members); *Yarbrough*, 117 N.C. App. at 345, 451 S.E.2d at 362 (reviewing *Barnes* and holding that the inchoate dower interest between spouses was sufficient to provide a husband and wife with “some quality of interest” in the other’s property to establish substantial unity of ownership between two tracts of land). Defendant has cited no authority, nor have we discovered any case in which unity of land was established without some grounds for unity of ownership.

The evidence before the trial court in the instant matter tended to show that the three disputed parcels of land are owned by two corporations, namely defendant and Catawba. Defendant argues that, as the two corporations were directed by Clark before his death, and as he was the sole shareholder in both corporations, substantial unity of ownership existed between the three parcels. We disagree.

A corporation is treated as an entity separate from its stockholder or stockholders under all ordinary circumstances. *See, e.g., Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (describing the

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general rule of a corporation as a distinct legal entity and the primary exception from that rule, the doctrine of “piercing the corporate veil”); *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 669-70, 157 S.E.2d 352, 358 (1967) (reciting the general rule); *Nelson Co.*, 127 N.C. App. at 367, 489 S.E.2d at 450 (noting that a corporation is a “legal entity, totally separate from the individual shareholder”). Although certain exceptions to the general rule exist under some circumstances, “[a] corporation’s separate and independent existence is not to be disregarded lightly.” Russell M. Robinson, II, *Robinson on North Carolina Corporation Law*, § 2.10 (7th ed. 2002). Courts will only “pierce the corporate veil” where applying the corporate fiction would “‘defeat public convenience, justify wrong, protect fraud or defend crime.’” *Martin*, 296 N.C. at 28, 249 S.E.2d at 395 (quoting *Sams v. Redevelopment Authority*, 431 Pa. 240, 244, 244 A.2d 779, 781 (1968)). In such cases, “[t]hose who are responsible for the existence of the corporation are . . . prevented [by the courts] from using its separate existence to accomplish an unconscionable result.” *Id.* at 27, 249 S.E.2d at 395 (quoting *Jonas v. State*, 19 Wis.2d 638, 644, 121 N.W.2d 235, 238-39 (1963)).

In the present case, defendant asks the Court to disregard the corporate enterprise, which was voluntarily formed by Clark in order to enjoy the advantages flowing from its existence as a separate entity, in order to receive increased damages as a result of the present condemnation proceedings. *See Martin*, 296 N.C. at 27-28, 249 S.E.2d at 395. This is known as “reverse piercing,” “an argument that is rarely sustained.” Robinson at § 2.10(1).

As previously noted, the *Martin* Court expressly held “that a parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the *sole* or principal shareholder *cannot be treated as a unified tract for the purpose of assessing condemnation damages.*” *Martin*, 296 N.C. at 28, 249 S.E.2d at 396 (emphasis added). Defendant’s attempts to distinguish *Martin* on a factual basis are unpersuasive in light of *Martin*’s unequivocal holding. Defendant further argues that “the *Martin* Court’s broad statements regarding unity of ownership were unnecessary and are not binding precedent.” We fail to perceive how our Supreme Court’s direct resolution of this issue can be anything other than binding precedent. Moreover, defendant has advanced no persuasive grounds for the application of the doctrine of piercing the corporate veil. The evidence before the trial court tended to show that Clark was an attorney, as well as a seasoned and highly success-

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ful land developer. “Where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so.” *Martin*, 296 N.C. at 29, 249 S.E.2d at 396.

Because the three parcels were owned by two separate corporations, which were distinct legal entities, we agree with the trial court’s conclusion that unity of ownership did not exist on the date of the taking. Because no grounds for mutual ownership existed, defendant failed to establish unity of land. *See* N.C. Gen. Stat. § 40A-67 (requiring “same ownership” in order for separate parcels of land to be treated as a single tract); *Barnes*, 250 N.C. at 384, 109 S.E.2d at 225 (“Different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages.”).

Given the lack of unity of ownership between the three parcels, no physical unity existed between the two parcels owned by defendant. The two parcels owned by defendant are completely separated by the 107.65-acre tract owned by Catawba. With neither unity of ownership nor physical unity, we conclude that the trial court did not err in determining that “[t]he three parcels described in defendants’ motion do not constitute one tract for the purposes of condemnation.” We therefore affirm the order of the trial court.

Affirmed.

Judges TYSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. MAURICE SHEPHERD

No. COA02-219

(Filed 4 February 2003)

**1. Sexual Offenses— first-degree statutory sexual offense—
sufficiency of short-form indictment**

The short-form indictment used to charge defendant with first-degree statutory sexual offense was constitutional even though it did not allege all of the elements of the crime.

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2. Evidence— expert opinion testimony—sexual abuse

The trial court did not err in a first-degree sexual offense and taking indecent liberties with a child case by allowing an expert to testify as to her opinion that the minor child had been sexually abused, because the expert's opinion was based on both a physical examination and resulting findings and a review of the minor child's medical history.

3. Evidence— hearsay—medical history—not offered for truth of matter asserted

The trial court did not err in a first-degree sexual offense and taking indecent liberties with a child case by allowing a doctor's testimony as to what the minor child had told her during the medical examination even though defendant contends it was inadmissible hearsay, because: (1) the minor child's statements were made during the gathering of information to obtain her medical history; and (2) the statements were not offered for the truth of the matter asserted but to illustrate the type of information the doctor collected in order to diagnose the minor child.

4. Evidence— expert opinion testimony—no expression of defendant's guilt

A doctor did not express an opinion as to defendant's guilt so as to invade the province of the jury in a prosecution for first-degree sexual offense and taking indecent liberties with a child when she testified that she had recommended that the minor child "have no further contact with the alleged perpetrator" and that "the legal system would not try someone if the medical opinion were not supportive of that."

5. Appeal and Error— appealability—issue already decided

Although defendant contends the trial court committed plain error by instructing the jury on the offense of first-degree statutory sexual offense and defining a sexual act as either fellatio or anal intercourse, this assignment of error is overruled because: (1) another panel of the Court of Appeals has already decided this same issue against defendant; and (2) defendant offered no argument for a deviation from established precedent.

Appeal by defendant from judgments dated 19 September 2001 by Judge Cy A. Grant, Sr. in Northampton County Superior Court. Heard in the Court of Appeals 7 January 2003.

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

Belser & Parke, P.A., by David G. Belser, for defendant appellant.

BRYANT, Judge.

Maurice Shepherd (Defendant) appeals from judgments dated 19 September 2001 entered consistent with a jury verdict finding him guilty of two counts of first-degree sexual offense and three counts of taking indecent liberties with a child. We find no error.

At trial, Dr. Rebecca Coker (Dr. Coker), who had examined the minor child¹ approximately four months after the alleged sexual abuse, testified as an expert in the field of pediatrics with special expertise in the evaluation of child abuse cases. Dr. Coker stated in the case of penile anal and oral penetration, as alleged in this case, “[i]f there[has] been a significant delay in terms of the disclosure, any kinds of physical findings might not be present.” Furthermore, “seventy-five percent of the time even when there is confessed penetration, there may be no physical findings.” Apart from any physical evidence, other factors that indicate sexual abuse in children include their behavioral changes and their ability to describe what happened.

Dr. Coker testified that during her examination of the minor child, she did find “changes in the tissues around . . . and below the hymen that were consistent with trauma” and could have been caused by attempted anal penetration. Dr. Coker reviewed the minor child’s medical history, which included (1) previous interviews between the minor child, her mother, and a social worker regarding the abuse and (2) a list of the behavioral changes the minor child had experienced since the alleged abuse. The behavioral changes consisted of sleep disturbance, sexualized behavior in the school environment, fear, and post-traumatic stress symptoms such as her fear of walking through the house alone. As part of her medical history, the minor child also described to Dr. Coker how Defendant “had penetrated her orally with his penis and had attempted to penetrate her anally.”

Dr. Coker opined: “In this case, medical history is probably the most determinative factor in making a diagnosis [the minor child] had

1. At the time of the offenses, the minor child was seven years old.

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indeed experienced sexual contact that was inappropriate for her developmental stage.” Dr. Coker noted “the clarity of the history, the nature of the disclosure, and the behavioral changes that [the minor child] exhibited” and, over Defendant’s objection, concluded “there ha[d] been sexual contact that was inappropriate.” As part of her treatment plan for the minor child, Dr. Coker recommended she receive counseling and “have no further contact with the alleged perpetrator.” When asked on cross-examination why she was more often asked to testify for the State, Dr. Coker explained that “the legal system would not try someone if the medical opinion were not supportive of that.”

At the end of all the evidence, the trial court instructed the jury that in order to find Defendant guilty of first-degree statutory sexual offense, one factor the State had to prove was the commission of a sexual act. The trial court then defined a sexual act as either fellatio or anal intercourse.

The issues are whether: (I) the short-form indictments insufficiently allege the elements of first-degree statutory sexual offense and are therefore unconstitutional; (II) there was an insufficient foundation to allow Dr. Coker to express her expert opinion that the minor child had been sexually abused; (III) Dr. Coker’s testimony as to what the minor child had told her during the medical examination was inadmissible hearsay; (IV) Dr. Coker’s testimony amounted to an expression on Defendant’s guilt or innocence; and (V) the trial court committed plain error in instructing the jury on the offense of first-degree statutory sexual offense.

I

[1] Defendant first argues the short-form indictments against him insufficiently allege the elements of first-degree statutory sexual offense and are therefore invalid. Defendant acknowledges in his brief to this Court that our Supreme Court has previously held short-form indictments, including those for first-degree sexual offense, that comply with the statutes authorizing short-form indictments but fail to allege all the elements of the crime charged to be constitutional. *See State v. Wallace*, 351 N.C. 481, 503-08, 528 S.E.2d 326, 341-43 (2000) (noting the “overwhelming case law approving the use of short-form indictments and the lack of a federal mandate to change that determination”); N.C.G.S. § 15-144.2 (2001). As we are bound by our Supreme Court’s holding, this assignment of error is overruled.

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II

[2] Defendant next contends Dr. Coker's expert opinion that the minor child had been sexually abused lacked the requisite foundation as there was no physical evidence in support thereof.

It is well established that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(a) (2001). Expert opinion testimony, however, is inadmissible to establish the credibility of the victim as a witness. *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002) (per curiam). Accordingly, "those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). With respect to expert testimony in child sexual abuse prosecutions, our Supreme Court has approved the admission of expert testimony if based upon a proper foundation. *See, e.g., State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) (finding expert testimony on sexual abuse inadmissible where there was no physical evidence to support opinion but holding erroneous admission harmless). Such a foundation may be based on the testifying physician's medical examination and review of the victim's medical history. *See State v. Brothers*, 151 N.C. App. 71, 78, 564 S.E.2d 603, 608 (2002) (expert opinion on sexual abuse admissible where based on medical examination indicating trauma and victim's medical history); *see also State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (expert opinion on abuse admissible where based on doctor's medical examination of the victim, extensive personal experience examining children who had been sexually abused, knowledge of child sexual abuse studies, and a colleague's notes from an interview with the victim).

In this case, Defendant contends Dr. Coker's opinion of sexual abuse was not based on any physical evidence but turned solely on the minor child's medical history. While Dr. Coker did state that "[i]n this case, medical history is probably the most determinative factor in making a diagnosis [of sexual abuse]," Defendant's interpretation of the evidence completely ignores Dr. Coker's additional testimony that during her physical examination of the minor child she found changes in the tissue near the hymen that were consistent with trauma and

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could have been caused by attempted anal penetration. Thus, the foundation for Dr. Coker's opinion was based on both a physical examination and resulting findings and a review of the minor child's medical history. The medical history was part of the medical examination and revealed a pattern of behavioral changes in the minor child indicative of sexual abuse. As such, there was a sufficient foundation for Dr. Coker's expert opinion, and the trial court properly admitted the testimony. *See Brothers*, 151 N.C. App. at 78, 564 S.E.2d at 608.

III

[3] Defendant further asserts the minor child's statements to Dr. Coker as to how Defendant had sexually abused her constituted inadmissible hearsay. "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.G.S. § 8C-1, Rule 801(c) (2001). An out-of-court statement offered for a purpose other than to prove the truth of the matter asserted is not considered hearsay. *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000). Thus, "testimony as to information relied upon by an expert when offered to show the basis for the expert's opinion is not hearsay, since it is not offered as substantive evidence." *State v. Huffstetler*, 312 N.C. 92, 107, 322 S.E.2d 110, 120 (1984). Such evidence is admissible for the limited purpose for which it is offered and not as an exception to the hearsay rule. *Id.*

In this case, the minor child's medical history formed part of the basis for Dr. Coker's diagnosis of sexual abuse. As the minor child's statements were made during the gathering of information to obtain her medical history, they were not offered for the truth of the matter asserted but to illustrate the type of information Dr. Coker collected in order to diagnose the minor child. Accordingly, the statements were not hearsay, and the trial court properly admitted them into evidence. *See id.*

IV

[4] In his next assignment of error, Defendant argues the trial court committed plain error in allowing Dr. Coker to testify as to his guilt or innocence by stating: (1) she had recommended the minor child receive counseling and to "have no further contact with the alleged perpetrator" and (2) "the legal system would not try someone if the medical opinion were not supportive of that." Defendant relies on the principle that an expert witness should not express an opinion

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on the very issue to be decided by the jury and thereby invade the jury's province. *State v. Wilkerson*, 295 N.C. 559, 567, 247 S.E.2d 905, 910 (1978).

We hold that Dr. Coker's testimony did not express an opinion of guilt so as to invade the jury's province. First of all, Dr. Coker's recommendation for the minor child to "have no further contact with the alleged perpetrator" does not amount to an expression of guilt. Instead, it was part of the minor child's treatment plan and probably served as an additional precaution to create distance between the victim and the alleged perpetrator until his guilt or innocence was determined. Dr. Coker's second statement was equally harmless as she simply stated her view of the importance of medical opinion in the legal system. Furthermore, this statement, which was elicited by Defendant on cross-examination, was only offered to explain why Dr. Coker tended to testify more often for the State. Thus, the trial court did not err in admitting Dr. Coker's statements.

V

[5] Finally, Defendant contends the trial court committed plain error by instructing the jury on the offense of first-degree statutory sexual offense and defining a sexual act as either fellatio or anal intercourse. Defendant acknowledges this Court has previously held that a defendant may be convicted of first-degree sexual offense even if the trial court instructs the jury that more than one sexual act may comprise an element of the offense, *see State v. Yearwood*, 147 N.C. App. 662, 669, 556 S.E.2d 672, 677 (2001), but urges this Court to reconsider its holding. We first note that Defendant in his brief to this Court offers no argument for such a deviation from established precedent. *See* N.C.R. App. P. 28(6) ("[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). Moreover, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, this assignment of error is also overruled.

No error.

Judges WYNN and GEER concur.

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[156 N.C. App. 76 (2003)]

BRENDA MACON PHILLIPS, PLAINTIFF v. JESSE CORNELIEUS BRACKETT,
DEFENDANT

BRENDA PHILLIPS, PLAINTIFF v. JESSE CORNELIEUS BRACKETT, DEFENDANT

No. COA02-385

(Filed 4 February 2003)

1. Costs— attorney fees—personal injury action—judgment amount controls

The trial court did not err by awarding attorney fees in a personal injury action where the plaintiff initially demanded \$38,750 in compensation, but the judgment was for \$3,829 in damages and was thus within the range that invokes N.C.G.S. § 6-21.1.

2. Appeal and Error— preservation of issues—failure to object at trial

Defendant did not object at trial and did not preserve for appeal its contention that a ruling on plaintiff's motion for attorney fees was an improper advisory opinion because that ruling came before a ruling on plaintiff's prior motion for a new trial.

3. Costs— attorney fees—personal injury action—findings

Any error in the trial court's reliance on affidavits concerning defendant-insurer's claims practices when awarding attorney fees for plaintiff was harmless because the findings on the remaining factors from *Washington v. Horton* were satisfactory.

4. Costs— attorney fees—personal injury claim—lack of settlement offers

The trial court did not abuse its discretion in a personal injury action by awarding plaintiff attorney fees based in part on lack of settlement offers, even though plaintiff had not provided documentation for her lost wage claim, because there were no offers for the claims for which defendant received timely support.

5. Costs—attorney fees—findings—time and labor

The trial court's findings concerning the time and labor expended by plaintiff's counsel in a personal injury action were sufficient to support the award of attorney fees where the findings reflected the tasks performed and the hours spent. The court was not obligated to break down the number of hours allocated to each activity.

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[156 N.C. App. 76 (2003)]

Appeal by defendant from judgment filed 24 August 2001 and order filed 24 August 2001 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 7 January 2003.

Carruthers & Roth, P.A., by Kenneth R. Keller and J. Patrick Haywood, for plaintiff appellee.

Teague, Rotenstreich & Stanaland, L.L.P., by Stephen G. Teague, for defendant appellant.

BRYANT, Judge.

Jesse Cornelieus Brackett (Defendant) appeals a judgment filed 24 August 2001 awarding Brenda Macon Phillips (Plaintiff) damages and attorney's fees and a concurrent order denying Defendant's motions for relief from order and for reconsideration. We affirm.

On 3 March 2000, Plaintiff filed a complaint seeking "an amount in excess of \$10,000" in damages for Defendant's negligent driving resulting in a collision with Plaintiff's vehicle. In his answer filed 3 April 2000, Defendant admitted negligence but denied Plaintiff's allegations of injuries, medical expenses, and lost income. Following trial, the jury entered a verdict for Plaintiff in the amount of \$3,829.98 as compensation for her personal injuries. Plaintiff moved for a new trial. Before the trial court ruled on the motion, Plaintiff suggested the trial court first hear her motion for attorney's fees as this might alleviate the need to move for a new trial. The trial court inquired whether Defendant had any objection to this, and Defendant answered he did not. In support of her motion for attorney's fees, Plaintiff submitted affidavits from her counsel and other attorneys familiar with Defendant's insurer. The affidavits outlined the work performed by Plaintiff's counsel, the hours expended, and his customary rate. They also described: (1) the actions and posture of Defendant's insurer and counsel in this case, (2) Defendant's insurer's general claims practices, (3) observations associated with Defendant's insurer with respect to other claims, including its tendency to litigate small claims to the appellate stage, and (4) web sites dedicated to alleged abuses by Defendant's insurer.

In a judgment filed 24 August 2001, the trial court found in pertinent part:

1. This is a personal injury action arising out of a vehicular collision in which . . . Defendant admittedly failed to reduce the speed

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of his vehicle to the extent necessary to avoid contact with the rear of the vehicle being operated by . . . Plaintiff while Plaintiff's vehicle was stopped pursuant to a duly erected traffic control signal at an intersection on March 30, 1998.

2. [Plaintiff] . . . and her husband . . . have been clients of the firm of Carruthers & Roth, P.A. for many years.

. . . .

4. [Plaintiff's counsel] first met with [Plaintiff] on April 28, 1998 in connection with her claims arising out of the collision.

5. After meeting with [Plaintiff], Carruthers & Roth, P.A. obtained copies of medical records on [Plaintiff] from all treating medical providers

. . . .

7. After obtaining medical records and bills, [Plaintiff's counsel] prepared a demand letter summarizing the liability and damages information on [Plaintiff] and forwarded this letter on August 11, 1999 to [Defendant's insurer].

8. The initial demand letter submitted on behalf of [Plaintiff] was \$38,750.00.

9. On October 28, 1999, in response to requests from [Defendant's insurer], [Plaintiff's counsel] forwarded . . . copies of W-2 forms for [Plaintiff] for 1996, 1997 and 1998, and requested an offer from [Defendant's insurer] in settlement of [Plaintiff's] claim.

10. Plaintiff received no offer from [Defendant's insurer] on [her] claim and filed suit in Guilford County Superior Court on March 3, 2000.

11. During the course of handling this case, Carruthers & Roth responded to various discovery requests from [Defendant's insurer] and, on February 20, 2001, defended the depositions of [Plaintiff] and her husband . . . taken by counsel retained by [Defendant's insurer] to represent . . . Defendant.

. . . .

13. Mediation of this matter was held on April 5, 2001.

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14. During the period of approximately three years prior to the mediation on April 5, 2001, neither [Defendant's insurer] nor counsel retained by [Defendant's insurer] made any offers of settlement on [Plaintiff's] claim, despite admitting that [Defendant] was negligent.

15. During mediation . . . [Defendant's insurer's] adjuster and counsel retained by [Defendant's insurer] communicated, for the first time, an offer of \$6,000.00 to settle [Plaintiff's] claim. Counsel for [Plaintiff] understood that the offer was non-negotiable.

16. On April 5, 2001, counsel retained by [Defendant's insurer] to defend . . . Defendant filed a pleading entitled "Offer of Judgment" which stated that . . . Defendant "offers to allow Judgment to be taken against him in the amount of \$6,001.00, which amount includes all attorneys fees and costs of court accrued to the date of the making of this offer and interest as may be allowed pursuant to G.S. § 24-5."

17. On May 2, 2001, counsel for . . . Plaintiff communicated to counsel for . . . Defendant an offer by . . . Plaintiff to accept a total of \$9,000.00 in settlement of her claim.

18. Counsel retained by [Defendant's insurer] to represent . . . Defendant made no counter[-]offers.

The trial court entered findings with respect to the hours expended by Plaintiff's counsel and his staff, his hourly rate, and the customary fees for such work. The trial court also made note of the affidavit assertions regarding Defendant's insurer's claims practices and concluded Defendant's insurer had engaged in the unjust exercise of superior bargaining power in this case. The trial court then entered judgment for compensatory damages in the amount of \$3,829.98 and awarded Plaintiff \$15,231.50 in attorney's fees.

The issues are whether: (I) the trial court's award of attorney's fees contravened public policy and the purpose of N.C. Gen. Stat. § 6-21.1; (II) Defendant preserved for appeal the question whether the trial court's ruling on Plaintiff's motion for attorney's fees was an improper advisory opinion; (III) Defendant waived any assignment of error with respect to the trial court's reliance on affidavit assertions relating to Defendant's insurer's general or past claims practices; (IV) the award of attorney's fees punished proper case investigation and

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discovery; and (V) the trial court made sufficient findings as to the time and labor expended by Plaintiff's counsel in this case.

I

[1] Defendant first contends the trial court's award of attorney's fees contravened public policy and the purpose of section 6-21.1. Section 6-21.1 provides:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit

N.C.G.S. § 6-21.1 (2001). Defendant argues that because Plaintiff initially demanded \$38,750.00 in compensation, Plaintiff's claim does not fall within the purview of this section and the trial court should therefore have denied her request for attorney's fees. We disagree. It is "[t]he amount of the judgment obtained, not the amount of the judgment sought, [that] governs applicability of the statute." *Purdy v. Brown*, 56 N.C. App. 792, 796, 290 S.E.2d 397, 399, *rev'd on other grounds*, 307 N.C. 93, 296 S.E.2d 459 (1982). The judgment for recovery of damages obtained in this case was \$3,829.98 and thus within the range that invokes operation of the statute. Consequently, this assignment of error is overruled.

II

[2] Defendant next argues the trial court's ruling on Plaintiff's motion for attorney's fees was an improper advisory opinion that served to guarantee attorney's fees. Defendant, however, did not object to the trial court's ruling on the motion for attorney's fees prior to ruling on Plaintiff's initial motion for a new trial. Accordingly, Defendant failed to preserve this issue for appellate review. *See* N.C.R. App. P. 10(b)(1) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion").

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III

[3] Defendant further asserts the trial court's reliance on the affidavit assertions relating to Defendant's insurer's general claims practices amounted to an abuse of discretion. We first note that Defendant did not cite any relevant authority in his brief to this Court in support of his argument and thereby has waived appellate review of this issue. See N.C.R. App. P. 28(b)(6). Moreover, even assuming the trial court erred in relying on the affidavit assertions in question, such error was harmless. Although the trial court, in order to award attorney's fees, needed to make findings with respect to the factors listed in *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334-35 (1999), including any exercise of superior bargaining power, the existence of such a use of bargaining power is not required for a fee award, see *Robinson v. Shue*, 145 N.C. App. 60, 66-69, 550 S.E.2d 830, 834-36 (2001) (finding no abuse of discretion in trial court's award of attorney's fees where parties conceded there had been no unjust exercise of superior bargaining power). As long as the trial court's consideration of the other relevant *Washington* factors justifies an award of attorney's fees under section 6-21.1, there is no abuse of discretion. See *id.* In this case, we are satisfied with the trial court's remaining findings on the *Washington* factors and find no abuse of discretion.

IV

[4] Defendant also contends the award of attorney's fees punished proper case investigation and discovery by Defendant's insurer. Specifically, Defendant argues Plaintiff's failure to provide documentary support for her claim of lost wages, which was part of her overall claim for damages, was the reason Defendant was unable to make any settlement offers prior to mediation. While Defendant's argument carries some weight as far as the disputed lost wage claim, it does not explain the absence of any settlement offers with respect to damages for which Defendant did receive timely documentary support, such as Plaintiff's medical expenses. This Court has previously held that the trial court properly awarded attorney's fees pursuant to section 6-21.1 where a "defendant's refusal to pay at least the undisputed amount of [the] loss to [the] plaintiff was unwarranted." *PHC, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 129 N.C. App. 801, 806, 501 S.E.2d 701, 704 (1998). As Defendant in this case offered no justification for his failure to make a settlement offer prior to mediation reflecting the damages for which there was documentary support, the trial court

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did not abuse its discretion in noting Defendant's lack of settlement offers and awarding Plaintiff attorney's fees in part on this basis.

V

[5] In his last assignment of error, Defendant argues the trial court made insufficient findings as to the time and labor expended by Plaintiff's counsel in this case.

We agree with Defendant that “[i]f the trial court elects to award attorney fees, it must also enter findings of fact as to the time and labor expended.” *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572, 551 S.E.2d 852, 856 (2001). In this case, the trial court's findings reflect the various tasks performed by Plaintiff's counsel during the course of his representation of Plaintiff's claim. These tasks include obtaining and forwarding Plaintiff's medical records, drafting a demand letter, corresponding with Defendant's insurer and his counsel, replying to interrogatories, defending depositions, participating in mediation, and going to trial. The trial court then listed the hours spent by Plaintiff's counsel and his staff with respect to this matter. Although the trial court made the requisite findings as to time and labor, Defendant contends the trial court was further obligated to specifically break down the number of hours allocated to each activity. Such detail, however, is not required to support an award of attorney's fees. *See, e.g., Mickens v. Robinson*, 103 N.C. App. 52, 59, 404 S.E.2d 359, 363 (1991) (where the trial court was not required to make findings allocating the time spent on the case between work required to defend against the plaintiff's claim and that required to forward the defendant's counterclaim). As the trial court's findings were sufficient, there was no abuse of discretion in awarding Plaintiff the requested attorney's fees.¹

Affirmed.

Judges WYNN and GEER concur.

1. We have carefully reviewed the remaining issues raised by Defendant in his brief to this Court and find them to be without merit.

LYNCH v. PRICE HOMES, INC.

[156 N.C. App. 83 (2003)]

L. C. LYNCH D/B/A STONE BY LYNCH, PETITIONER-APPELLANT V. PRICE HOMES, INC.; GWC ROOFING COMPANY D/B/A GWC, INC.; MILLER REFRIGERATION; JAMES D. SWORDS D/B/A SWORDS DRYWALL COMPANY; BARBEE CONCRETE, INC.; CECIL DARREN BROOKS D/B/A TILE BY DESIGN; WILLIAM R. WHITESIDE, SR.; DESIGN CENTERS INTERNATIONAL, LLC; WATSON WELDING COMPANY, INC.; TILE COLLECTION, INC.; AND R. H. PAINTING COMPANY, INC., RESPONDENTS-APPELLEES

No. COA02-586

(Filed 4 February 2003)

Liens— materialman's—discharge— failure to timely file action

The trial court did not err by concluding that petitioner's materialman's lien was discharged because he did not timely file an action to enforce the lien where there was no prohibition against an enforcement action and several other lien holders began actions within the requisite period. Petitioner was therefore not entitled to any of the surplus funds remaining from foreclosure of the property. N.C.G.S. § 44A-13.

Appeal by petitioner from order entered 26 February 2002 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 January 2003.

James, McElroy & Diehl, P.A., by Richard B. Fennell, for petitioner-appellant.

Knox, Brotherton, Knox, & Godfrey, by Lisa C. Godfrey, for respondent-appellee Tile Collection, Inc.

Mitchell, Rallings & Tissue, PLLC, by James L. Fretwell, for respondent-appellee William R. Whiteside Sr.

Weaver, Bennett & Bland, P.A., by Roderick Ventura, for respondent-appellee James D. Swords d/b/a Swords Drywall Company.

McGEE, Judge.

Price Homes, Inc. (Price Homes) was the owner of real property located at 11551 James Richard Drive, Charlotte, North Carolina (the property). L.C. Lynch d/b/a Stone by Lynch (petitioner) is a sole proprietor who owns and operates a stone masonry business. Petitioner and Price Homes entered into a contract whereby petitioner would provide labor and deliver materials to improve the property.

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Petitioner first furnished materials on 15 September 2000. Petitioner last furnished materials to Price Homes on 24 November 2000. Petitioner filed a claim of lien for \$55,359.00 on 28 December 2000 with the Clerk of Superior Court for Mecklenburg County. Central Carolina Bank & Trust Company (CCB) held a deed of trust on the property dated 1 May 2000. CCB foreclosed on its deed of trust and petitioner purchased the property at a foreclosure sale on 9 February 2001. After the proceeds were applied to satisfy CCB's deed of trust, a surplus of \$30,218.97 was deposited with the Clerk of Superior Court for Mecklenburg County.

Petitioner filed a petition dated 24 May 2001 requesting that the trial court determine the priority of claims to the surplus funds. Five parties, being William R. Whiteside, Sr.; Tile Collection, Inc.; GWC Roofing Company d/b/a GWC, Inc.; Watson Welding Company, Inc.; and James D. Swords d/b/a Swords Drywall Company (collectively respondents), filed responses claiming entitlement to at least a portion of the surplus funds. All of the respondents except Watson Welding Company, Inc. had previously filed suit pursuant to N.C. Gen. Stat. § 44A-13(a) to enforce their liens within the 180-day period following the date each last provided labor or materials respectively. Petitioner never filed suit to enforce its lien.

Respondent James D. Swords filed his own petition on 20 November 2001, seeking disbursement of the surplus funds. The trial court entered an order on 26 February 2002, concluding, *inter alia*, that the claim by petitioner was discharged pursuant to N.C. Gen. Stat. § 44A-16 because a civil action was not filed by petitioner within 180 days of petitioner's last date of furnishing labor or materials, and therefore petitioner was not entitled to any of the surplus funds remaining from the foreclosure sale of the property. Petitioner appeals.

Petitioner argues that the trial court erred in its finding of fact and conclusion of law that petitioner was not entitled to a share of the surplus funds because he had not filed an action to foreclose his lien within 180 days of the last day he provided labor or materials to the property.

A petitioner holds a valid lien against property if: (1) petitioner furnished labor or materials to improve the property pursuant to a contract with the owner, and (2) petitioner has taken the steps necessary to perfect his lien under N.C. Gen. Stat. § 44A-8 (2001). *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 492, 411 S.E.2d 916,

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920-21 (1992); *Conner Co. v. Spanish Inns*, 294 N.C. 661, 667, 242 S.E.2d 785, 789 (1978).

It is undisputed that petitioner delivered materials beginning 15 September 2000 to Price Homes pursuant to contract, and that these materials were used to improve the property. Therefore petitioner satisfied the first requirement for a valid lien.

Petitioner also properly perfected his lien under North Carolina law. To perfect a materialman's lien, the claimant must file a claim of lien in the county where the real property is located within 120 days after the last furnishing of labor or materials to the site. N.C. Gen. Stat. § 44A-12 (2001). Petitioner last furnished materials to Price Homes on 24 November 2000. Petitioner filed a claim of lien for \$55,359.00 on 28 December 2000 with the Clerk of Superior Court for Mecklenburg County. Therefore, petitioner satisfied the requirements of N.C.G.S. § 44A-12 and perfected his lien as of 28 December 2000.

However, in order to enforce a perfected lien, a lien claimant must commence an action within 180 days after the last furnishing of labor or materials. N.C. Gen. Stat. § 44A-13 (2001). Petitioner was therefore required to commence an action to enforce his lien within 180 days of 24 November 2000. If a lien claimant fails to do so, his lien will be discharged. N.C. Gen. Stat. § 44A-16(3) (2001). Petitioner never commenced such an action.

Our Supreme Court noted an exception to this 180-day requirement in *RDC, Inc. v. Brookleigh Builders*, 309 N.C. 182, 185, 305 S.E.2d 722, 724 (1983). In *RDC, Inc.*, the Court held that while "[t]he 180-day period is not a statute of limitations" and thus is "not tolled by [a] bankruptcy proceeding," where a lien claimant is prohibited from enforcing its lien by the automatic stay of bankruptcy proceedings which were abandoned following the expiration of the 180-day period, the lien claimant should not "be deprived of its lien for reasons beyond its control." *Id.*; see also *United Carolina Bank v. Rouse (In re Rouse)*, 1998 Bankr. LEXIS 281, *20 (Bankr. E.D.N.C. 1998) ("If the owner of the property has filed bankruptcy, the claimant may enforce its lien by filing a proof of claim with the bankruptcy court within the 180 day period.").

In the present case, petitioner was not prohibited from commencing an action within the 180-day period following its last provision of materials. There was no stay in effect to prevent petitioner

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from commencing an action. Further, several lien holders commenced actions within the 180-day period following each of their last provision of labor or materials, even though CCB had already filed a foreclosure proceeding.

The surplus funds from a foreclosure sale stand in place of the encumbered property with regard to certain claims of lien filed pursuant to N.C.G.S. § 44A-12. *Merritt v. Edwards Ridge*, 323 N.C. 330, 335, 372 S.E.2d 559, 563 (1988) (“As a general rule, proceeds of a foreclosure sale are, constructively at least, real property and stand in place of the land.”); *In re Castillian Apartments*, 281 N.C. 709, 711, 190 S.E.2d 161, 162 (1972); see N.C. Gen. Stat. § 44A-14(b) (2001) (“The rights of all parties shall be transferred to the proceeds of the sale.”). Petitioner must meet the requirements of N.C.G.S. § 44A-13 to enforce a perfected lien on the surplus funds, in the same manner required to enforce a perfected lien against the property.

Petitioner argues that once foreclosure proceedings were begun, there was no need for him to commence a civil action to enforce his lien. Petitioner cites *Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954) in support of this position. However, we find this case to be distinguishable in that it involved the recovery by a county of amounts paid as old age assistance to a deceased beneficiary. *Id.* In *Lenoir County*, the petitioner, a governmental entity, claimed a lien on surplus funds from a foreclosure sale pursuant to N.C. Gen. Stat. § 108-30.1 (repealed) which stated that:

“There is hereby created a general lien, enforceable as hereinafter provided, upon the real property of any person who is receiving or who has received old age assistance, to the extent of the total amount of such assistance paid to such recipient from and after October 1, 1951. Before any application for old age assistance is approved under the provisions of this article, the applicant shall agree that all such assistance paid to him shall constitute a claim against him and against his estate, enforceable according to law by any county paying all or part of such assistance. . . . The statement shall be filed in the regular lien docket, . . . and same shall be indexed in the name of the lienee in the defendants’, or reverse alphabetical, side of the cross-index to civil judgments; in said index, the county shall appear as plaintiff, or lienor; . . . From the time of filing, such statement shall be and constitute due notice of a lien against the real property then owned or thereafter acquired by the recipient and lying in such county to the extent of

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the total amount of old age assistance paid to such recipient from and after October 1, 1951. The lien thus established shall take priority over all other liens subsequently acquired and shall continue from the date of filing until satisfied: Provided, that no action to enforce such lien may be brought more than ten years from the last day for which assistance is paid nor more than one year after the death of any recipient.”

Id. at 100, 84 S.E.2d at 332-33 (quoting N.C.G.S. § 108-30.1 (repealed)).

Under this statute, our Supreme Court determined that when the property in question was foreclosed upon by the holder of a deed of trust and surplus funds remained, the county’s lien, resulting from old age assistance payments, remained in force without the county filing foreclosure proceedings on its own account. *Id.* at 101, 84 S.E.2d at 333-34. The Court held that the lien had priority over all other liens subsequently acquired. *Id.* However, the Court noted that “[n]o action to enforce such lien . . . in any event may be maintained after the expiration of ten years from the last day for which assistance was paid. The statute so provides.” *Id.* at 101, 84 S.E.2d at 333.

There are differences between the statute involved in *Lenoir County* and North Carolina’s materialman’s lien statutes which distinguish *Lenoir County* from the present case. While no statute existed that required the discharge of a lien created pursuant to N.C.G.S. § 108-30.1 if not enforced within a certain time period, the materialman’s lien statutes, pursuant to N.C. Gen. Stat. § 44A-16(3), expressly require that a lien be discharged for failure to enforce the lien within the time required by Article 44A. This time requirement is found in N.C.G.S. § 44A-13, which provides that no action to enforce a lien created under Article 44A “may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.” In addition, the lien in *Lenoir County* could continue in force for the ten-year period after the last provision of old age support payments by the county without the taking of any other action by the petitioner in that case. *See Lenoir County*, 241 N.C. at 100-01, 84 S.E.2d at 332-33. In the case of liens under Chapter 44A, a record lien will be discharged for a variety of reasons, including the failure to commence an enforcement action within 180 days. N.C.G.S. §§ 44A-13 and 16. Finally, the nature of the statute and the lien claimant in *Lenoir County* were quite different than the materialman’s lien statutes and the private parties involved in the present case. We thus find that *Lenoir County* does not obviate

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the need to follow the clear terms of N.C.G.S. §§ 44A-13 and 16(3) to enforce a valid claim of lien on surplus funds.

Chapter 44A contains a framework for predictably ascertaining the result when disputes arise. We decline to create an exception to the clear language of the statutes set forth in Chapter 44A. With no prohibition against commencement of an enforcement action, petitioner's failure to commence such an action within the time required by the materialman's lien statutes prevents him from enforcing his lien. The trial court did not err when it concluded that petitioner's lien had been discharged under N.C.G.S. § 44A-16. We affirm the order of the trial court.

Petitioner has failed to make an argument in support of his second and sixth assignments of error. Pursuant to N.C.R. App. P. 28(a), these assignments of error are deemed abandoned. *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 593-94 (1975).

Affirmed.

Judges HUNTER and CALABRIA concur.

LARRY TABOR, AMANDA TABOR, HENRY ALVIN TABOR, AND NORMA JEAN TABOR,
PLAINTIFFS V. COUNTY OF ORANGE, ORANGE COUNTY HEALTH DEPARTMENT,
ORANGE COUNTY PLANNING DEPARTMENT, DAVID HECHT IN HIS CAPACITY AS
ENVIRONMENTAL HEALTH SPECIALIST OF THE ORANGE COUNTY HEALTH DEPARTMENT,
DEFENDANTS

No. COA02-423

(Filed 4 February 2003)

**1. Appeal and Error— appealability—interlocutory order—
denial of summary judgment—substantial right—sovereign
immunity**

Although defendants' appeal from the partial denial of summary judgment is an appeal from an interlocutory order, appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.

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2. Immunity—sovereign—approval or denial of septic tank permits—governmental function

The trial court erred in a negligent misrepresentation case concerning whether certain property was suitable for supporting a septic tank for a mobile home by denying defendants' motion for summary judgment on the basis of sovereign immunity, because the function of approving or denying septic tank permits is a governmental function.

Appeal by defendants from order entered 21 February 2002 by Judge Wade Barber, Superior Court, Orange County. Heard in the Court of Appeals 7 January 2003.

Steffan & Associates, P.C., by Kim K. Steffan for plaintiffs.

Womble Carlyle Sandridge & Rice, PLLC, by Mark A. Davis and Tamara P.W. Desai for defendants.

WYNN, Judge.

In North Carolina, the doctrine of sovereign immunity generally bars actions against governmental entities and public officers for acts arising out of their performance of governmental functions. The plaintiffs brought the subject action alleging that defendants negligently misrepresented whether certain property was suitable for supporting a septic tank for a mobile home. Because we hold that the function of approving or denying septic tank permits is a governmental function, we reverse the trial court's denial of summary judgment, and remand for entry of summary judgment in favor of defendants.

The underlying facts to this appeal show that Larry Tabor and his wife, Amanda, wanted to subdivide their property in Orange County and place a mobile home on the property for their parents, Henry Alvin Tabor and his wife Norma Jean. Before embarking upon the approval process with the Orange County Planning Department, the Tabors submitted an improvement permit application to the Orange County Health Department for a determination of whether the soil could support another septic system. David Hecht, an Environmental Health Specialist for the Orange County Health Department, conducted the site evaluation. The results of Mr. Hecht's analysis are in dispute. Whereas the Tabors contend Mr. Hecht represented the septic tank permit would be approved, the governmental-entity defendants contend Mr. Hecht informed them he would need certain information from the survey before a determination could be made.

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Nevertheless, the Tabors continued with their plans by starting the approval process with the planning department, constructing a road, and buying a mobile home for the property. The planning department sent a letter to the Tabors containing a list of preconditions for the approval of their minor subdivision application, which included the approval of the final plat by the Orange County Health Department. Afterwards however, the Health Department denied their application giving rise to this action against defendants for negligent misrepresentation. In response, defendants claimed sovereign immunity and on their motion for summary judgment, the trial court dismissed all claims except for the Tabors' negligent misrepresentation claim. Defendants appeal.

[1] As an initial matter, we note defendants' appeal of the order partially denying summary judgment is interlocutory. However "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000). Accordingly, defendants' appeal is properly before this court.

[2] "As a general rule, the doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Messick v. Catawba County, North Carolina*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993). "This doctrine applies where the entity sued is being sued for the performance of a governmental, rather than a proprietary, function." *Id.* "It is inapplicable, however, where the state has consented to suit or has waived its immunity through the purchase of liability insurance." *Messick*, 110 N.C. App. at 714, 431 S.E.2d at 493-94. "Absent consent or waiver, the immunity provided by the doctrine is absolute and unqualified." *Messick*, 110 N.C. App. at 714, 431 S.E.2d at 494.

Plaintiffs have not alleged defendants consented to suit or waived their immunity. Therefore, for plaintiffs' suit to proceed, defendants must have been engaged in a proprietary, rather than a governmental, function. See *Clark v. Burke Cty.*, 117 N.C. App. 85, 450 S.E.2d 747 (1994) (explaining that "absent an allegation to the effect that immunity has been waived, the complaint fails to state a cause of action against the county"); *Hickman v. Fuqua*, 108 N.C. App. 80, 83, 422 S.E.2d 449, 451 (1992) (stating "governmental immunity does not apply when the municipality engages in a proprietary function"). Indeed, on appeal, plaintiffs contend that defendants are not entitled

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to the benefits of sovereign immunity because they engaged in proprietary functions rather than governmental functions.

The test for determining whether an activity is governmental or proprietary is "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." *Hickman*, 108 N.C. App. at 83, 422 S.E.2d at 451. Plaintiffs argue that although permit approval or denial may be governmental, the specific duties performed by sanitarians, including those outlined in N.C. Gen. Stat. § 130A-336 et seq., should be classified as proprietary because a fee was charged and because private soil scientists could advise whether the soil is suitable for a septic system. We disagree.

Plaintiffs stated goal was to obtain an opinion as to whether a permit for septic tank installation would be approved by the county health department prior to making any changes to their property; thus, the present lawsuit for negligent misrepresentation arises out of defendants' alleged opinion as to whether the permit would be approved. Our legislature has vested the Department of Health and Human Services via the local boards of health with the authority to approve and regulate wastewater systems, including septic tank systems. See N.C. Gen. Stat. § 130A-334 et seq. (2001); *EEE-ZZZ Lay Drain Co. v. North Carolina Dept. of Human Resources*, 108 N.C. App. 24, 28, 422 S.E.2d 338, 341 (1992), *overruled on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997) (recognizing the local health departments as the agencies responsible for approving or rejecting improvement permits and regulating sanitary sewage systems). Thus, we conclude that the function of approving or denying permits for septic tank systems is a governmental function. Accordingly, plaintiffs' misrepresentation claim against the subject defendants is barred by sovereign immunity. See *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 349, 451 S.E.2d 358, 365 (1994) (holding that sovereign immunity applies to the tort of negligent misrepresentation).

Reversed and remanded.

Judges BRYANT and GEER concur.

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SAMUEL SMITH, PLAINTIFF v. N.C. DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA02-146

(Filed 18 February 2003)

1. Tort Claims Act— train and tractor-trailer accident—contributory negligence

The Industrial Commission did not err by finding that plaintiff was not contributorily negligent in an action brought under the Tort Claims Act for an accident between a train and plaintiff's tractor-trailer where plaintiff's truck was struck while it was stuck on railroad tracks even though defendant contends plaintiff violated N.C.G.S. § 20-116(h) by taking the wrong truck route and generally did not exercise due care in crossing the railroad tracks, because: (1) plaintiff was on the truck route when he turned onto the road with the railroad crossing; (2) the pertinent truck route sign at the intersection failed to give required weight maximums; and (3) there were no signs warning defendant of any danger from crossing except a sign located on the other side of the crossing, plaintiff was a commercial driver with thirty years of experience and determined that the crossing was safe after he studied the crossing momentarily, and other commercial drivers had also determined that the same crossing was safe to cross.

2. Tort Claims Act— requirements—specific negligent act by a specific state employee—name of negligent employee of State agency

The Industrial Commission did not err in an action arising out of an accident between a train and a tractor-trailer at a railroad crossing by allegedly failing to follow the requirements of the Tort Claims Act under N.C.G.S. §§ 143-291 and 143-297 to find a specific negligent act by a specific state employee and to name in the claimant's affidavit the negligent employee of the State agency, because: (1) the names and information provided in plaintiff's affidavit gave defendant sufficient information to enable the agency to investigate the employee actually involved rather than all employees; (2) it was not necessary under the circumstances for plaintiff to have included the name of the employee in charge of placing the signage at the railroad crossing; and (3) the Industrial Commission found that defendant Department of Transportation's failure to erect adequate signage was the proximate cause of plaintiff's accident.

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3. Tort Claims Act— train and tractor-trailer accident—negligent maintenance of railroad crossing

The Industrial Commission did not err in an action brought under the Tort Claims Act arising out of an accident between a train and a tractor-trailer at a railroad crossing by finding that defendant Department of Transportation was negligent in its maintenance of the pertinent railroad crossing even though defendant asserts it took all reasonable and prudent steps to protect the public by creating a truck route, because: (1) there was sufficient evidence in the record to support the findings that defendant had a duty to ensure safety in the area of the railroad crossing, breached that duty, and caused the damages to plaintiff; and (2) the truck route sign that plaintiff encountered did not indicate the weight limits of this particular route, and the proximate cause remains the lack of signage warning plaintiff of the low drag risk immediately prior to the crossing.

4. Damages and Remedies— reduction—trailer loss, wrecker costs, site cleanup and storage fees

The Industrial Commission erred in an action brought under the Tort Claims Act arising out of an accident between a train and a tractor-trailer at a railroad crossing by reducing the damages awarded for plaintiff's trailer loss, wrecker costs, site cleanup and storage fees, because: (1) while the full Commission is the factfinder and makes the determinations as to credibility, the invoices and estimates introduced through plaintiff's testimony were allowed into evidence without objection from defendant; and (2) nothing in the record supports the approximately fifty percent devaluation of the deputy commissioner's award.

5. Damages and Remedies— reduction—lost income and additional costs

The Industrial Commission erred in an action brought under the Tort Claims Act arising out of an accident between a train and a tractor-trailer at a railroad crossing by reducing the damages awarded for plaintiff's lost income and additional costs, because: (1) defendant cannot assert the lack of competency of this evidence rendered by plaintiff's own testimony as grounds to reduce the award as there was no objection to its receipt; (2) there is no evidence that such a reduction would equal fifty percent of the total award as only income or profits are subject to such calcu-

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lations; and (3) plaintiff's testimony is not too speculative to establish damage.

Judge TYSON concurring in a separate opinion.

Appeal by plaintiff and defendant from Opinion and Award entered 29 November 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2002.

Morris York Williams Surlles & Barringer, LLP, by Gregory C. York, for plaintiff appellant-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Richard L. Harrison, for defendant appellant-appellee.

McCULLOUGH, Judge.

This appeal arises out of a collision between a Norfolk-Southern train and plaintiff Samuel Smith's tractor-trailer on 22 September 1994. Plaintiff filed a complaint under the N.C. Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.*, on 19 September 1997 against defendant N.C. Department of Transportation (NCDOT), alleging that Garland B. Garrett (Sec. of Transportation), David Allsbrook (Engineering Division 5 Manager), Patrick B. Simmons (Director of NCDOT Rail Division), and other "unknown persons" of NCDOT were allegedly negligent in maintaining the safety of the railroad crossing at which the accident occurred. Defendant filed an answer on 29 October 1997, denying any negligence on its part and further asserting the defense of contributory negligence.

Plaintiff is an independent tractor-trailer operator from New York and has driven commercial trucks for over 30 years. On 22 September 1994, he was leased to Allied Van Lines to transport household goods from New Jersey to Cary, North Carolina. The only directions to the final destination plaintiff had were those given to him by the customer. Following those, he exited off of Interstate 40 onto southbound Aviation Parkway. Aviation Parkway intersects with Highway 54 at a T-intersection. A regulatory truck route sign directed trucks to turn right onto eastbound Highway 54 at that intersection, yet plaintiff turned left, onto westbound Highway 54. Shortly thereafter, plaintiff made a right onto southbound Morrisville-Carpenter Road. This road is on an incline. After turning onto this road, he quickly came upon a railroad crossing. When plaintiff attempted to go over the crossing, the underside of his trailer dragged and became lodged on

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the tracks. Plaintiff could not undo what had been done. Shortly, a train came and being unable to stop, crashed into plaintiff's vehicle. Plaintiff himself was unhurt in the accident, but alleged damages in the amount of \$82,892.63.

This matter was heard before Deputy Commissioner Amy Pfeiffer on 16 October 2000. In an Opinion and Award entered 18 May 2001, the Deputy Commissioner found that defendant was negligent for failing to erect adequate signage on southbound Aviation Parkway or on Highway 54 to warn of the danger of low vehicles dragging due to the grade of the road, and that this was the proximate cause of the accident and damages. Damages were awarded to plaintiff in the amount of \$84,053.63, which exceeded the amount claimed by plaintiff and the amounts in the evidence of record.

Defendant appealed to the Full Commission and hearing was held on 29 October 2001. In an Opinion and Award entered 29 November 2001, the Full Commission held that "[t]he appealing party has not shown good ground to reconsider the evidence, receive further evidence or to amend the [Deputy Commissioner's] Opinion and Award except with respect to the measure of damages."

As to contributory negligence, the Commission found that there were no signs on the route taken by plaintiff sufficient to give notice that the grade crossing was low and that he was in danger of dragging. Further, the Commission found that the evidence was insufficient to show by the greater weight that plaintiff violated N.C. Gen. Stat. § 20-116(h) (trucks must follow designated truck routes), noting that plaintiff had directions which gave only one route to his destination, he was unfamiliar with North Carolina roads, and that his job frequently required him to drive on routes not designated as truck routes. Further, the Commission also found that plaintiff was not negligent by crossing over the tracks because no sign indicating maximum weight was passed prior to the crossing and that plaintiff did not recognize the crossing as dangerous.

As to defendant's negligence, the Commission found that it had a duty and responsibility to inspect railroad crossings for safety and to erect "adequate signage" marking the crossings that may pose a danger to vehicles. Defendant was on notice that the crossing at issue was dangerous. A similar incident involving a tractor-trailer being lodged on the tracks and being struck by a train occurred on 29 November 1993. Apparently, there once were "risk of drag" signs along that strip of road. However, commercial drivers so often

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ignored the signs, that they removed them, and opted to make a mandatory truck route on eastbound Highway 54 to lead trucks away from the area. Thus

[d]espite being aware of the potential danger to motorists, and despite its duty to do the same, defendant through its employees and agents failed to place adequate signage at and near the Aviation Parkway/Highway 54 intersection that would warn motorists traveling from this direction, or those motors [sic] traveling southbound on Aviation Parkway, that a potentially dangerous railroad crossing was imminent. This failure to erect adequate signage was the proximate cause of plaintiff's September 22, 1994 accident.

As to damages, the Commission found that the reasonable damages were as follows:

To the Tractor:	\$ 5,973.63
To the Trailer:	\$ 9,625.00
Equipment Lost and Expenses in Locating a Substitute Trailer:	\$ 4,500.00
Wrecker Fees, Site Clean-up Costs, and Storage Fees:	\$ 1,700.00
Lost Income for 22 September 1994 through 18 November 1994:	\$21,000.00

The Commission awarded plaintiff \$42,498.63, although the above numbers add up to \$42,798.63. The Commission noted that plaintiff's estimates were based on gross income rather than net income as to the lost income calculation, basing its award on net income.

Defendant appeals from the Full Commission's Opinion and Award. Defendant makes several assignments of error and brings forth the following questions on appeal: (I) Was plaintiff's contributory negligence of failing to take proper and reasonable care and intentionally disregarding the regulatory traffic signs the proximate cause of his accident? (II) Did the Full Commission err when it failed to follow the requirements of N.C. Gen. Stat. § 143-291, *et seq.*, which requires the finding of a specific act of negligence, committed

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by a negligent state employee, acting within the scope of their employment? (III) Did the Industrial Commission err when finding negligence where the evidence revealed that defendant had taken all reasonable and prudent steps to protect the public?

I.

[1] Defendant first contends that the Full Commission erred by finding that plaintiff was not contributorily negligent.

Under the Tort Claims Act, “when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission’s findings of fact, and (2) whether the Commission’s findings of fact justify its conclusions of law and decision.” In a proceeding under the Tort Claims Act, “[f]indings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding.”

Fennel v. N.C. Dep’t of Crime Control & Pub. Safety, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002) (citations omitted); *see* N.C. Gen. Stat. § 143-293 (2001). “Negligence and contributory negligence are mixed questions of law and fact and, upon appeal the reviewing court must determine whether facts found by the Commission support its conclusion of . . . negligence.” *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972).

Defendant argues that evidence in the record established that plaintiff was contributorily negligent because he violated N.C. Gen. Stat. § 20-116(h) and generally did not exercise due care in crossing the railroad tracks. As such, contrary to the findings of the Full Commission, defendant contends that plaintiff’s recovery is barred by his contributory negligence. *See* N.C. Gen. Stat. § 143-291 and -299.1 (2001).

As to violation of N.C. Gen. Stat. § 20-116(h), which establishes truck routes and makes it a Class 2 misdemeanor for vehicles that are over posted maximum weight limits to drive on the posted routes, defendant points out that plaintiff failed to avoid the railroad crossing by disregarding the visible truck route sign and failing to find an alternative route to his destination. *See* N.C. Gen. Stat. § 20-116(h) (while mandating the adherence to posted truck routes, it also provides that no violation of this statute occurs when trucks drive on

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prohibited roads “when its destination is located solely on that highway, road or street.”). Indeed, evidence in the record showed that plaintiff turned left onto Highway 54, while a truck route sign, although with no weight limit on it, directed him to turn right. Further, evidence showed that plaintiff did not look for an alternate route to his final destination, as plaintiff did not avail himself of an office of Allied Van Lines which was nearby.

While we note that some evidence in the record may have supported findings contrary to that of the Full Commission, our standard of review is such that the existence of contrary evidence is irrelevant if there was also competent evidence to support the Full Commission’s findings. The record does provide competent evidence to this effect, as it was shown that the statutory truck route extended not only to the right of the Aviation Parkway/Highway 54 intersection, but also to the left. In fact, it extended beyond the intersection of Highway 54 and Morrisville-Carpenter Road. Therefore, plaintiff was on the truck route when he turned onto the road with the railroad crossing. Further, evidence showed that the truck route sign at the Aviation Parkway/Highway 54 intersection failed to give required weight maximums. The findings of the Full Commission that plaintiff did not violate N.C. Gen. Stat. § 20-116(h) were based on competent evidence, and these findings supported its conclusions of law.

As to whether plaintiff exercised reasonable care by proceeding over the railroad crossing, defendant reiterates that plaintiff ignored the regulatory sign. In addition, plaintiff proceeded over the railroad crossing even after he had inspected it for several moments before turning onto Morrisville-Carpenter Road, noting that this road was on an incline and that from his vantage point in his cab, he could not see the road on the other side of the crossing. There was a steep down-slope, and he knew that his trailer only had a clearance of one-foot. Defendant points out that on the other side of the crossing was a weight limit sign for the crossing. Had plaintiff seen the sign, he would have known that he exceeded the weight limit. Thus plaintiff should have ascertained the risk of drag, and was negligent in not doing so.

The record shows that there were no signs warning defendant of any danger from the crossing except that one sign located on the other side of it. Plaintiff, a commercial driver with 30 years of experience, studied the crossing momentarily and deemed it safe to cross. Nothing warned him otherwise, as he would have expected if there was any danger to be encountered. Evidence showed that other com-

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mercial drivers had also determined that the same crossing was safe to cross. It was noted that defendant, in delivering household furnishings, often ventured onto smaller roads and was experienced in doing so. The Full Commission, as fact-finder, made its determinations and concluded that his determination was warranted. As above, there is competent evidence in the record to support the findings of the Full Commission and those findings support its conclusions of law. This assignment of error is overruled.

II.

[2] Defendant next argues that the Full Commission erred by failing to follow the requirements of the Tort Claims Act. N.C. Gen. Stat. § 143-291, *et seq.* Defendant contends that the Tort Claims Act requires a finding of a specific act of negligence committed by a negligent state employee acting within the scope of their employment. Defendant contends that, since the Full Commission failed to do so, its Opinion and Award must be reversed.

In N.C. Gen. Stat. § 143-291, the establishing statute of the Act, it is set forth that the Industrial Commission “shall determine whether or not each individual claim [against the State or its agencies] arose as a result of the negligence of any officer, employee . . . under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.” N.C. Gen. Stat. § 143-291(a) (2001). Dealing with procedures of such claims, N.C. Gen. Stat. § 143-297 provides requirements of a valid claim under the Act, namely the filing of an affidavit including the name of the claimant, name of the negligent state parties, and other general information about the accident and injury. N.C. Gen. Stat. § 143-297 (2001).

The purpose of G.S. 143-297(2), requiring a claimant under the Tort Claims Act to name in the affidavit the negligent employee of the State agency, is to enable the agency to investigate the employee actually involved rather than all employees.

Northwestern Distributors, Inc. v. North Carolina Dept. of Transp., 41 N.C. App. 548, 551-52, 255 S.E.2d 203, 206, *cert. denied*, 298 N.C. 367, 261 S.E.2d 123 (1979).

Defendant argues that plaintiff has not complied with these requirements, and further that the Full Commission has erred by not finding a specific negligent act by a specific state employee. We cannot agree.

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Plaintiff's affidavit read in pertinent part:

That [Samuel Smith] hereby files a claim against the North Carolina Department of Transportation . . . for damages resulting from the negligence of Garland B. Garrett, Secretary of Transportation; David Allsbrook, Engineering Division 5 Manager; Patrick B. Simmons, Director of the NCDOT Rail Division; and unknown employees of the Department of Transportation who were directly responsible for maintaining the safety of the Morrisville Carpenter Road railroad crossing, #734753J.

These names and information gave defendant sufficient information to "enable the agency to investigate the employee actually involved rather than all employees." *Id.* It was not necessary under the circumstances for plaintiff to have included the name of Brian Pleasants, the employee in charge of placing the signage at the crossing.

As to the Full Commission being required to find a specific act by a specific state employee, its Opinion and Award, after listing the names in plaintiff's affidavit, made the following findings of fact:

23. The Department of Transportation employee, Brian Pleasants, who was responsible for placing signage in the general area that is the subject of this claim, was not instructed to place a warning sign at the intersection of Aviation Parkway and Highway 54. There is no physical reason why the appropriate signage could not have been placed either at the intersection in question or elsewhere on southbound Aviation Parkway.

24. Despite being aware of the potential danger to motorists, and despite its duty to do the same, defendant through its employees and agents failed to place adequate signage at and near the Aviation Parkway/Highway 54 intersection that would warn motorists traveling from this direction, or those motors [sic] traveling southbound on Aviation Parkway, that a potentially dangerous railroad crossing was imminent. This failure to erect adequate signage was the proximate cause of plaintiff's September 22, 1994 accident. Plaintiff's expert witness corroborates this assessment.

We recognize that "[b]efore an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State." *Taylor v. Jackson*

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School, 5 N.C. App. 188, 191, 167 S.E.2d 787, 789 (1969). We fail to see how the Full Commission has failed to comply with the statute. This assignment of error is overruled.

III.

[3] Lastly, defendant contends that the Full Commission erred by finding that it was negligent in its maintenance of the railroad crossing. Our standard of review here is the same as under section I.

Defendant asserts that it had taken all reasonable and prudent steps to protect the public by creating the truck route. Defendant supports this proposition with the fact that it was aware of the drag risk at the crossing and had put up signs warning of that risk. N.C. Gen. Stat. § 136-18(5) (2001) (Dept. of Transportation is empowered to make rules, regulations, and ordinances for the use of the State highways.). When these warnings went unheeded by some commercial drivers resulting in the same sort of accident as in the present case, defendant made the decision to design and implement a designated truck route to divert trucks away from the crossing. *Id.*; N.C. Gen. Stat. § 20-116(h). Thus, defendant contends its duty to provide for safe travel was met when the truck route was created.

However, there is sufficient evidence in the record to support the findings of the Full Commission that defendant had a duty to ensure safety in the area of the railroad crossing, breached that duty, and caused the damages to plaintiff. The evidence showed that the State knew the railroad crossing presented a hazardous situation through earlier accidents and analysis from engineers, but there were no signs on the path that plaintiff took to warn him of the low drag risk presented at the railroad crossing. At one time there were such low drag signs, but the State removed them and opted to create the truck route to divert traffic away. However, it has already been noted that the truck route sign that plaintiff encountered did not indicate the weight limits of this particular route, plus the truck route included the stretch of Highway 54 that intersects with Morrisville-Carpenter Road. The only signs posting weight limits was located on the opposite side of the railroad crossing from the direction that plaintiff was traveling. Signs warning of the low drag risk were to be placed at certain points to warn drivers, in addition to the truck route, according to the area supervisor. Yet, either through a lack of communication or outright failure, these signs were never erected even though they were said to be needed "ASAP" in 1991. Finally, supervisors of the area failed to inspect the area for the signs. This being so, the proxi-

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mate cause remains the lack of signage warning plaintiff of the low drag risk immediately prior to the crossing.

There is competent evidence in the record to support the findings of the Full Commission and those findings support its conclusions of law. This assignment of error is overruled.

Plaintiff also appeals from the Full Commission's Opinion and Award. Plaintiff makes several assignments of error and brings forth the following questions on appeal: (I) Did the Full Commission err in not accepting as fact the stipulated damages for plaintiff's trailer and with respect to wrecker costs, site cleanup, and storage fees? (II) Did the Full Commission err in not accepting as fact the uncontradicted evidence of plaintiff regarding lost income and additional tractor repair costs?

Additional facts are necessary for this portion of the opinion. Prior to the hearing, the parties stipulated that certain damage invoices and estimates were admissible into evidence. ("The parties stipulate that the following documents and/or physical evidence are admissible into evidence: (a) Damage invoices . . ."). These included estimates for the repair of plaintiff's tractor, (*one for \$5,973.63, and another for \$6,604.44*), a total loss evaluation for the trailer in the amount of \$18,625.00, and wrecker fee costs, site clean-up costs and storage fees totaling \$3,455.00. In addition, plaintiff contends that testimony proved (1) his lost income to be in the amount of \$42,000.00; (2) additional costs for location and replacement of damaged equipment in the amount of \$9,000.00; and (3) additional tractor damage repair in an amount of \$5,000.00.

The Opinion and Award of the Full Commission listed the stipulations of the parties. It noted that "[t]he parties stipulated into the evidence in this matter exhibits one through three, which consist of damages invoices . . ." However, it also included a disclaimer that read, "[t]he Industrial Commission is not bound by the stipulation of the parties, however, and is free to make its own findings with respect to the stipulated damages."

The Full Commission, instead, found as fact that the reasonable damages to the tractor were \$5,973.63, to the trailer were \$9,625.00, for wrecker fees, site cleanup, and storage fees were \$1,700.00. As to lost income, the Full Commission awarded \$21,000.00, and stated that "[t]he damages estimated by plaintiff were based on gross income rather than net income and the Full Commission based its

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damage award on net income.” As to additional costs for location and replacement of damaged equipment, the Full Commission awarded \$4,500.00.

These findings as to damages were significantly lower than the findings of the Deputy Commissioner, which found that the damages to the tractor to be \$10,973.63, to the trailer to be \$18,625.00, fees and clean-up costs to be \$3,455.00, as to lost income \$42,000.00, and additional costs for location and replacement of damaged equipment to be \$9,000.00.

I.

[4] Plaintiff’s first argument is that the Full Commission erred by superseding its authority in reducing the damages awarded for plaintiff’s trailer loss, wrecker costs, site cleanup and storage fees. The standard of review from defendant’s appeal applies equally to plaintiff’s appeal.

Plaintiff argues that the disregard for the stipulations as to the trailer loss, wrecker costs, site cleanup and storage fees is inconsistent with prior decisions of this Court and prays that this Court reinstate the damages found by the Deputy Commissioner. Stipulation to a particular fact has the effect of “‘eliminat[ing] the necessity of submitting that issue of fact to the [fact-finder].’” *Blackmon v. Bumgardner*, 135 N.C. App. 125, 134, 519 S.E.2d 335, 341 (1999) (quoting *Smith v. Beasley*, 298 N.C. 798, 800-01, 259 S.E.2d 907, 909 (1979)). “Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury.” *Blair v. Fairchilds*, 25 N.C. App. 416, 419, 213 S.E.2d 429, 430-31, cert. denied, 287 N.C. 464, 215 S.E.2d 622 (1975). Defendant admits that the parties stipulated to certain documents, but only as to their admissibility. Defendant offered no rebuttal evidence as to plaintiff’s damages.

Testimony reveals that the existence of damages was certainly stipulated to, including the fact that plaintiff’s trailer was split in half. The direct examination of plaintiff is replete with references by his counsel that these damages were stipulated to, without any objection from defendant.

However, regardless of the determination of whether the invoices were stipulated to as their admissibility only or as to the amounts that they represented, or whether or not the Full Commission is allowed to disregard stipulations by the parties, it is certain that the invoices and estimates were introduced through plaintiff’s testimony into evi-

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dence. They constitute the only evidence in the record as to damages of plaintiff. While the Full Commission is the fact-finder and makes the determinations as to credibility, these documents were allowed into evidence without objection from defendant. Nothing in the record supports the approximately 50% devaluation of the Deputy Commissioner's award by the Full Commission. There is, therefore, no competent evidence in the record to support the award by the Full Commission, and we vacate as to the damages of the trailer, wrecker costs, site cleanup and storage fees, and remand for further proceedings.

II.

[5] Plaintiff's final contention deals with the award of damages for lost income and additional costs, as they too were cut in half by the Full Commission.

As to lost income, plaintiff testified that he had made "personal notes" regarding his damages. He testified that he had deduced, "based upon [his] earnings for the last few years prior to this accident," that he had an average weekly wage of \$5,200.00. Plaintiff confirmed that he was out of work for eight weeks, and that he normally works 36 to 40 weeks out of the year. In those eight weeks, plaintiff opined that he would have worked the entire time, as he travels "back and forth from the east coast to the west coast," and "missed about two full trips plus a little extra due to this accident." By this information, plaintiff derived the amount for his total loss of income to be about \$42,000.00.

As to the time spent by plaintiff in procuring equipment necessary for his moving business and additional tractor damages, plaintiff testified that he had estimated that he lost \$7,000.00 worth of equipment, spent \$2,000.00 in locating a substitute trailer, and \$5,000.00 of additional tractor damage repair.

We note that, as in the previous section, defendant never made an argument against these damages, nor introduced evidence that contradicted it. Further, there is no mention in the record as to the Full Commission's finding, in relation to lost income, that "[t]he damages estimated by plaintiff were based on gross income rather than net income and the Full Commission based its damage award on net income."

Defendant contends that plaintiff's own testimony is insufficient to support any finding of damages as to lost income and additional

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costs, since an award of damages may not rest upon a mere guess or an estimate not based on fact. *See Rankin v. Helms*, 244 N.C. 532, 538, 94 S.E.2d 651, 656 (1956); *Daly v. Weeks*, 10 N.C. App. 116, 118-19, 178 S.E.2d 30, 31-32 (1970). Testimony similar to that rendered by plaintiff has been deemed proper when provided by the owner or employer, noting that defendant was given ample opportunity to cross-examine, but did not. *See Peterson v. Johnson*, 28 N.C. App. 527, 531, 221 S.E.2d 920, 924 (1976); *Smith v. Corsat*, 260 N.C. 92, 131 S.E.2d 894 (1963). In any event, defendant cannot assert the lack of competency of this evidence as grounds to reduce the award as there was no objection to its receipt. *See* N.C. Gen. Stat. § 8C-1, Rule 103(a) (2001).

The concurring opinion states that the Commission may reduce tort damage awards to a net income amount. While this may be correct, insofar as it relates to loss of income or profits, any "net" amount must be supported by evidence of record and cannot reflect an arbitrary number chosen without a basis in the record itself. Further, there is still no evidence that such a reduction would equal 50% of the total award as only income or profits are subject to such calculations. Finally, as to the concurrence's statement that the Commission may ignore "speculative" damages, we have held that plaintiff's testimony is not too speculative to establish damage. *Smith v. Corsat*, 260 N.C. 92, 131 S.E.2d 894 (1963).

As the only evidence on damages was either stipulated to by the parties or unobjected to, and as there is no evidence in the record to support the Commission's reductions to plaintiff's demands, this case is remanded to the Full Commission for an award of damages consistent with the evidence of record.

Affirmed in part, vacated in part and remanded.

Judge BRYANT concurs.

Judge TYSON concurs in the result with separate opinion.

TYSON, Judge, concurring in part, concurring in the result in part.

I concur with parts I, II, and III of the majority's opinion affirming the Full Commission's finding that plaintiff complied with the requirements of the Tort Claims Act, that defendant was negligent, and that plaintiff was not contributorily negligent.

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I also concur in the result to vacate the damage award and remand to the Full Commission for further determination. I write separately to state that on remand the Full Commission may ignore speculative evidence and resolve any conflicts and inconsistencies in the record evidence.

The Commission may “weigh the evidence [presented to the deputy commissioner] and make its own determination as to the weight and credibility of the evidence.” The Commission may strike the deputy commissioner’s findings of fact even if no exception was taken to the findings.

Jenkins v. Piedmont Aviation Servs., 147 N.C. App. 419, 427, 557 S.E.2d 104, 109 (2001), *disc. review denied*, 356 N.C. 303, 570 S.E.2d 724 (2002) (quoting *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992)).

Plaintiff outlined the damages specifically in the last paragraph of the complaint: semi-tractor damages of \$11,537.34, semi-trailer damages of \$18,625.00, moving equipment lost or destroyed totaling \$7,000.00, site clean-up, tow and wrecker fees totaling \$2,294.00, lost wages in the amount of \$42,000.00, and incidental expenses of \$2,000.00. Although these damages total \$83,456.34, plaintiff’s prayer for relief is to recover damages of \$82,892.63 plus interest and attorneys’ fees.

At the hearing before the Deputy Commissioner, plaintiff testified to his damages. Plaintiff stated that damages to the tractor were stipulated to and were found under Tab B. The estimate under Tab B for damages to the tractor is \$5,973.63. Plaintiff explained to the Deputy that after the tractor was repaired, he experienced new problems involving the cab’s electrical system and leaks. The repairs to the cab totaled another \$5,000.00. Damage to the trailer under Tab C, which was not stipulated to but was not contested, determined to be a total loss of \$18,625.00. Plaintiff requested this number be reduced by the salvage value of \$787.00. Plaintiff also testified that there were wrecker fees but did not explain the amount or where to find those. The invoice for the wrecker fee is contained under Tab D, but the estimate is not readable. As for site clean-up, plaintiff pointed to Tab E but specifically requested \$2300.00. Plaintiff requested the storage fees stipulated to under Tab F which was \$960.00, and lost income in the amount of \$42,000.00. The lost income determination was based upon plaintiff’s testimony of yearly income divided by approximate

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number of weeks worked a year multiplied by the number of weeks plaintiff was out of work due to the loss of his trailer. Plaintiff asked for damages in the amount of \$7,000.00 for lost moving equipment and \$2,000.00 for incidental expenses in locating a new trailer and equipment. These damages total \$83,071.63, an amount higher than he demanded in the complaint.

The Deputy Commissioner awarded plaintiff \$84,053.63, more than plaintiff asked for in his complaint or testified to at the hearing. The Deputy's recommended decision quantified the following: \$10,973.63 for damage to the tractor, \$18,625.00 for damage to the trailer, \$9,000.00 for equipment lost and expenses incurred in finding a new trailer and equipment, and \$3,455.00 for wrecker, site clean-up, and storage fees. The Deputy failed to subtract the \$787.00 from the trailer damage for salvage, and found the expenses for wrecker, site clean-up, and storage to be greater than the amounts alleged in the complaint and testified to by plaintiff.

In the area of state tort claims, wide discretion is given to the Commission in its determination of damages. *See Brown v. Board of Education*, 269 N.C. 667, 671, 153 S.E.2d 335, 339 (1967). This broad discretion allows the Commission to weigh the evidence and award appropriate damages. The findings of fact which support the award should be based upon competent evidence in the record. *Bullman v. Highway Comm.*, 18 N.C. App. 94, 98, 195 S.E.2d 803, 806 (1973).

The Commission's finding of fact that plaintiff had stated and the Deputy had found gross and not net income loss is supported by an inference that statements of yearly income or salary are generally expressed as gross amounts. The Commission may properly determine whether plaintiff's lost income estimates were expressed as gross or net income in making its award. On remand, the Commission is free to ignore any speculative damages, resolve the inconsistencies, accept or reject the record evidence, and issue an award consistent with the competent evidence in the record.

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JOSEPH HUMMEL, PLAINTIFF v. THE UNIVERSITY OF NORTH CAROLINA AND
THE UNIVERSITY OF NORTH CAROLINA D/B/A THE UNIVERSITY OF NORTH
CAROLINA AT CHAPEL HILL, DEFENDANTS

No. COA02-398

(Filed 18 February 2003)

1. Tort Claims Act— findings by Commission—deputy commissioner's findings—disregarded

In a Tort Claims case, the Industrial Commission may disregard the findings of the deputy commissioner and substitute its own findings on appeal. Here, the Commission did not err by reducing a Tort Claims award of \$500,000 for future loss of earning capacity for a doctor who had been injured as a college wrestler where the Commission found that the testimony did not support the award.

2. Constitutional Law— North Carolina—law of the land clause—plaintiff not surprised

The Industrial Commission did not violate the law of the land clause of the North Carolina Constitution in reducing a Tort Claims award for a doctor who had been injured as a college wrestler where it could not be said that new or surprising evidence was sprung upon plaintiff.

3. Tort Claims Act— discretion of Commission—findings—stipulation

It was within the Industrial Commission's discretion in a Tort Claims case to find that a doctor injured as a college wrestler had failed to prove loss of future income despite a stipulation that the accident had proximately caused plaintiff severe and permanent injuries. The Commission specifically found unconvincing plaintiff's evidence of reduced future earning capacity.

4. Tort Claims Act— award reduced by full Commission—credibility of evidence

The Industrial Commission in a Tort Claims case may choose to find facts in contradiction to the evidence presented by plaintiff even when the opposing party offers no contradictory evidence. Here, the Commission did not err by reducing a deputy commissioner's award of \$500,000 for a doctor injured as a college wrestler to \$50,000 where the Commission specifically found that plaintiff's evidence of future lost earnings was not

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credible but that his testimony about his physical impairment was credible.

5. Tort Claims Act— pain and suffering award—evidence credible

The Industrial Commission did not err in a Tort Claims case by awarding plaintiff \$50,000 in damages where the evidence supporting the award for pain and suffering, mental anguish, and physical impairment is credible and supports the finding.

Judge HUDSON concurring.

Appeal by plaintiff from opinion and award entered 14 January 2002 by the North Carolina Industrial Commission. Cross-appeal by defendants from opinion and award. Heard in the Court of Appeals 13 November 2002.

Martin A. Rosenberg for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorneys General Thomas Ziko and Robert T. Hargett, for the State.

EAGLES, Chief Judge.

Joseph J. Hummel (“plaintiff”) appeals from an opinion and award by the North Carolina Industrial Commission ordering the University of North Carolina at Chapel Hill (“defendant”) to pay plaintiff \$50,000. Defendant cross-appeals from this opinion and award. After careful review of the record and briefs, we affirm the Industrial Commission’s opinion and award and deny defendant’s cross-appeal.

Plaintiff was a wrestler on defendant’s collegiate wrestling team. He joined the wrestling team as a “walk-on” participant during his freshman year in college in 1994. Plaintiff had been ranked as the first or second place wrestler in his weight class in the state of New Jersey throughout his senior year in high school. Plaintiff wrestled on the university intercollegiate team during his freshman and sophomore years in college.

On 6 July 1996, plaintiff was lifting weights at the Student Recreation Center on the campus of UNC-Chapel Hill. Plaintiff was severely injured when a cable came loose on a “lat-pull” machine plaintiff was using. Because of the loose cable, a weight bar hit plaintiff’s head forcefully at a great speed. The weight bar itself was not heavy, but was linked to weights of between 285 and 300 pounds. The

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weight machine plaintiff was using had been maintained negligently. Plaintiff described the accident as follows:

And when I pulled down, the cable pulled out, and I hit myself on the head. I was knocked unconscious, had a little bit of bleeding at my head. My roommate, workout partner, drove me home, and I slept for about twenty-three or twenty-four hours straight. They kind of left and went and did their thing and came back, and I was still sleeping. And at that time they woke me up and decided it was time that I go to the doctor.

On 10 July 1996, plaintiff reported his accident to a physical therapist at UNC-Chapel Hill's Wrestling Camp. Plaintiff's regular physician, Dr. Greg Tuttle, was out of town at the Olympics in Atlanta when plaintiff was injured. Dr. Tuttle suggested that plaintiff see a physician at the Student Health Center, which plaintiff did on 23 July 1996. Plaintiff complained of headache, dizziness, nausea, and tinnitus. The Student Health physician diagnosed plaintiff with post-concussive syndrome. Upon his return, Dr. Tuttle examined plaintiff and concurred in that diagnosis. Dr. Tuttle described post-concussive syndrome as a "loss of normal brain function or regulation of the brain following some type of trauma where there may be increased pressure within the brain or auto-regulation of the brain."

Plaintiff's injury and subsequent headaches caused him to sit out the 1996-1997 wrestling season with a medical "redshirt." Dr. Alan Finkel of the UNC-CH Headache Clinic began seeing plaintiff as a result of his headache symptoms in November 1996. Dr. Finkel found some improvement in plaintiff's headache symptoms, but found that plaintiff suffered from headaches when he attempted to run or when he lifted weights. Dr. Finkel was unsure how long plaintiff would be required to forgo participation in the University's wrestling program or plaintiff's normal exercise routine.

Plaintiff returned to his home for Christmas break in 1996. While at home in New Jersey, plaintiff's old wrestling coach visited him. On one occasion, the coach grabbed plaintiff in a playful manner on the back of plaintiff's neck. As a result of this light contact, plaintiff states that he "[got] woozy or dizzy or swimmy-headed and [had] a headache for probably a week or two after that [incident] continuously."

Upon his return to North Carolina in January 1997, plaintiff underwent an MRI. This test showed that plaintiff was suffering from

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multiple mild degenerative changes and disk bulges in his cervical spine. Plaintiff's symptoms improved over the next few months, and he was cleared to wrestle in the 1997-1998 season. Plaintiff wrestled in twenty matches during that season and was knocked unconscious in six of those matches. Plaintiff was hit in the back of his head during a 20 February 1998 match at North Carolina State University. As a result of the hit, plaintiff suffered a concussion. Plaintiff also decided, based upon his doctors' advice, to end his wrestling career. At the time plaintiff decided to stop wrestling, he was ranked twelfth nationally and ranked first in the Atlantic Coast Conference ("ACC"). Plaintiff missed the ACC and National Collegiate Athletic Association ("NCAA") Tournaments because of his injuries. Beginning in March 1998, plaintiff complained of having "racing thoughts" and irritability, which Dr. Finkel diagnosed as hypomania.

Plaintiff began medical school at UNC-Chapel Hill in the fall of 1998. In November 1998, plaintiff experienced incontinence several times while lifting weights. Plaintiff testified that he has lost control of his bladder and urinated on himself in public several times, as well as suffering from "impact-induced seizures." Dr. Tuttle testified that plaintiff's symptoms were related to his post-concussive brain injury.

An MRI in December 1998 showed additional degeneration of plaintiff's cervical spine. Plaintiff continued to have headaches after vigorous exercise or activity. A spinal tap procedure in February 1999 revealed that plaintiff's cerebral spinal fluid pressure was elevated. After a second spinal tap procedure confirmed that plaintiff's pressure was elevated, he began to take medication for that condition.

When plaintiff graduated from high school and throughout college, he intended to become a surgeon. Plaintiff began his surgical rotations during his third year of medical school. Plaintiff received honors in all three of his surgical rotations (orthopedics, pediatric surgery and plastic surgery) and was encouraged by his professors to become a surgeon. However, plaintiff did not pursue a specialization in surgery:

During the surgery—some of [them are] particularly long. I was on one surgery that was about twelve hours. I'm—I have a difficult time with pain in my neck, standing kind of in the position that you do surgery in. For some of the shorter surgeries . . . I tolerated those all right. But for the majority of surgeries, which

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range . . . from two to about six hours . . . my neck gets this kind of dull pain, and it heads down in kind of both of my shoulders and makes my hands and fingers tingle a little bit. I often get headaches . . . during those times as well. So those things kind of discouraged me from pursuing surgery.

Because of the discomfort plaintiff experienced during surgical procedures, plaintiff felt that surgery was no longer an option for him as a career. Plaintiff decided to specialize in family medicine rather than surgery.

Plaintiff initiated a lawsuit against defendant pursuant to the North Carolina Tort Claims Act. Plaintiff served the first set of interrogatories on defendant on 5 August 1999. Defendant failed to answer these interrogatories despite an order from the deputy commissioner to do so. Plaintiff moved for sanctions as a result of defendant's failure to answer interrogatories four times. As a sanction, defendant's responsive pleading was stricken, and defendant was ordered to pay \$600 in plaintiff's attorney fees. On 5 March 2000, a deputy commissioner issued an order awarding plaintiff \$500,000. Defendant appealed to the full Industrial Commission, which reduced plaintiff's award to \$50,000. From this opinion and award, both parties appeal.

I.

[1] Plaintiff argues that the full Industrial Commission committed reversible error in reducing plaintiff's award from \$500,000 to \$50,000 because it disregarded expert testimony on plaintiff's behalf. We disagree.

Plaintiff's first argument concerns the standard of review applicable to a deputy commissioner's opinion in a Tort Claims Act hearing. Plaintiff questions the full Industrial Commission's ability to disregard the findings of fact included in the deputy commissioner's opinion. Specifically, plaintiff claims that the Industrial Commission disregarded the expert opinions offered by plaintiff's witnesses and formed its own expert opinions. This Court can review the decision of the full Industrial Commission "for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." G.S. § 143-293 (2001). If the full Commission applied an incorrect standard of review to the deputy commissioner's findings, this Court

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could reject the full Commission's findings and conclusions as errors of law.

This Court has compared the powers available to the full Industrial Commission on an appeal under the Tort Claims Act as opposed to an appeal under the Workers' Compensation Act. The full Commission's review of a Tort Claims case is not as highly structured as the review of a Workers' Compensation case. *See Brewington v. N.C. Dept. of Correction*, 111 N.C. App. 833, 433 S.E.2d 798, *disc. review denied*, 335 N.C. 552, 439 S.E.2d 142 (1993). When hearing an appeal in a Workers' Compensation case, the full Commission "shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." G.S. § 97-85 (2001) (emphasis added). This statute has been interpreted to mean that the deputy commissioner's findings of fact are not binding nor conclusive on appeal in Workers' Compensation cases. *See Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999); *Keel v. H & V, Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992). In a Workers' Compensation case, the full Commission can review determinations of the deputy commissioner on weight of evidence and credibility of witnesses. *See Pollard v. Krispy Waffle*, 63 N.C. App. 354, 304 S.E.2d 762 (1983). In Workers' Compensation cases, "[i]t is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988).

Alternatively, the language of G.S. § 143-292 does not require the Industrial Commission to issue its own findings of fact or conclusions of law when reviewing Tort Claims cases:

Such appeal, when so taken, shall be heard by the Industrial Commission, sitting as a full Commission, on the basis of the record in the matter and upon oral argument of the parties, and said full Commission may amend, set aside, or strike out the decision of the hearing commissioner and may issue its own findings of fact and conclusions of law.

G.S. § 143-292 (2001). G.S. § 143-292 allows but does not require the full Commission to make its own factual determinations and weigh the evidence. Therefore, the Tort Claims Act appears to give the Commission as much freedom as the Workers' Compensation Act.

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The full Commission may disregard the findings of the deputy commissioner and substitute its own factual findings on appeal.

One case, in contravention of the Tort Claims Act, contained language that stated: “[T]he responsibility of weighing the credibility of the witnesses lies solely with the hearing commissioner.” *Brewington v. N.C. Dept. of Correction*, 111 N.C. App. 833, 839, 433 S.E.2d 798, 801 (1993). However, *Brewington* is easily distinguished from the present case. In *Brewington*, the full Industrial Commission adopted the decision and order of the deputy commissioner as its own opinion. *Brewington*, 111 N.C. App. at 837, 433 S.E.2d at 800. Therefore, in *Brewington*, the weighing of the evidence was delegated to the deputy commissioner because the full Commission chose not to exercise its ability to amend, set aside, or strike out the decision of the hearing commissioner and issue its own findings of fact. *See id.*, G.S. § 143-292.

Additionally, the statement from *Brewington* has been found to be dicta that is not binding precedent. *See Fennell v. N.C. Dep’t of Crime Control & Pub. Safety*, 145 N.C. App. 584, 591, 551 S.E.2d 486, 491 (2001), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002). The express language of G.S. § 143-292 allows the full Commission to make its own findings of fact. *See Fennell*, 145 N.C. App. at 591, 551 S.E.2d at 491. “[T]he Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner.” *Fennell*, 145 N.C. App. at 590, 551 S.E.2d at 491 (quoting *McGee v. N.C. Dep’t of Revenue*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87 (1999)).

Here, the full Commission decided not to allow plaintiff to collect the amount of \$500,000 awarded by the deputy commissioner. Instead, the Commission reduced the amount of plaintiff’s award to \$50,000. The Commission was not bound to accept the expert testimony offered by plaintiff on the valuation of plaintiff’s future income merely because it formed part of the deputy commissioner’s opinion and award. We hold that the full Commission appropriately reviewed the deputy commissioner’s findings of fact and chose to issue its own findings of fact in compliance with G.S. § 143-292. In addition, the Commission’s conclusions of law were supported by its findings of fact. The full Commission found that the economic evidence from Dr. Albrecht regarding plaintiff’s diminished future earning capacity was not based upon credible assumptions about plaintiff’s future earnings or disability. However, the Commission did find that plaintiff had

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presented evidence of pain and suffering and mental anguish stemming from the accident in July 1996. There was no evidence about past or future medical expenses. Plaintiff also “establish[ed] a period of temporary impairment for the period from July 1996 to January 1997 which resulted from the July 1996 injury.” This finding supports the Commission’s award of \$50,000 for plaintiff’s “physical pain, mental anguish, impairment, and other damage.” Contrary to plaintiff’s argument, the Industrial Commission has not proffered its own medical opinion as to the causation of plaintiff’s injury. Instead the Commission found that “[t]here is no credible evidence that plaintiff’s cumulative condition, let alone that directly associated with his July 1996 injury, would prevent plaintiff from pursuing a career in surgery.” To support this finding of fact, the Commission cited evidence presented regarding plaintiff’s excellent scores in his surgical rotations, the encouragement he received from his professors to pursue surgery as a career, and his continued high academic performance in medical school. The Industrial Commission has judged the credibility of the expert medical and economic witnesses in combination with the remaining evidence and found that the testimony presented does not support an award of \$500,000 for future loss of earning capacity. Plaintiff’s first assignment of error is overruled.

II.

[2] Plaintiff next assigns error to the full Commission’s opinion based upon the “law of the land” clause in the North Carolina Constitution. Plaintiff argues that the Commission raised facts and issues which were not raised by defendant and deprived plaintiff the right to be heard upon those issues. We disagree.

The North Carolina Constitution provides:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.

N.C. Con. Art. I, § 19. Plaintiff states that he was deprived of his rights contrary to the law of the land because the full Commission formed its own medical opinions contrary to the only medical expert testimony offered and did not give plaintiff an opportunity to present evidence contrary to the Commission’s opinion. This assignment of error has no merit.

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Plaintiff correctly asserted that “where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain or rebut it.” *Shepherd v. Shepherd*, 273 N.C. 71, 76, 159 S.E.2d 357, 361 (1968) (quoting *In re Custody of Gupton*, 238 N.C. 303, 77 S.E.2d 716 (1953)). Here, plaintiff had an adequate and fair hearing on all the evidence presented in this case. Plaintiff’s assignment of error does not point out with particularity what he characterizes as inappropriate evidence relied on by the full Commission to form its conclusions of law. Instead, plaintiff takes issue with the Commission’s conclusions that were based on evidence the plaintiff introduced. Defendant did not present any evidence at the hearing and defendant’s responsive pleading had been stricken as a sanction. Here, it cannot be said that new or surprising evidence was sprung upon plaintiff in violation of the law of the land. Instead, plaintiff had access to all of the evidence presented on his behalf. For this reason, the full Commission’s opinion did not violate the North Carolina Constitution. This assignment of error is overruled.

III.

[3] Plaintiff further argues that the Industrial Commission committed reversible error by failing to find that plaintiff was permanently injured when defendant stipulated to that fact before the hearing by the deputy commissioner. We disagree.

Plaintiff correctly states that both parties stipulated that the 7 July 1996 accident “proximately caused the plaintiff to suffer severe and permanent injuries.” However, the Commission also stated that it did not find “that plaintiff has any permanent diagnosis for these conditions that was significantly caused by the July 1996 injury, that plaintiff would not have sustained these same conditions absent the injury of July 1996, or that these conditions were permanently disabling.” The full Commission’s finding that plaintiff had no disability means that he had not proven a loss of wage earning capacity. It was within the full Commission’s discretion to find that plaintiff failed to prove loss of future income despite his permanent injury. Although a stipulation had been entered, plaintiff still bore the burden of proving his damages:

No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency

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thereof unless the claimant establishes his claim or right to relief by evidence.

G.S. § 1A-1, Rule 55(f) (2001). The full Commission specifically found unconvincing plaintiff's evidence on reduced future earning capacity. The full Commission's findings of fact support its conclusions of law. Therefore, the full Commission did not err by failing to rule that plaintiff deserved compensation for reduced future earning capacity. This assignment of error is overruled.

IV.

[4] Plaintiff argues that the Industrial Commission committed reversible error by reducing plaintiff's award based upon future earning capacity. Plaintiff contends that defendant did not offer any evidence to contradict plaintiff's evidence and that the award of \$500,000 by the deputy commissioner should stand. We disagree.

Even when the opposing party offers no evidence to contradict that evidence offered by plaintiff, the Industrial Commission may choose to find facts in contradiction to the evidence presented by plaintiff. The Industrial Commission has the responsibility to weigh the evidence presented and determine the credibility of witness testimony. Here, defendant's responsive pleading was stricken as a sanction. Therefore the only evidence of damages was the plaintiff's request for the full amount available to him as a result of defendant's negligence under the Tort Claims Act, which was \$500,000. Plaintiff also presented evidence regarding his pain and suffering as a result of the accident, in addition to expert testimony on plaintiff's loss of future earning capacity. While the Commission found plaintiff's testimony about his physical impairment from July 1996 to January 1997 to be credible, it specifically did not find the evidence regarding his future lost earnings to be credible. Since the determination of evidence credibility is within the power of the Industrial Commission according to the Tort Claims Act, the Commission did not err in its decision not to award plaintiff damages for future loss of earnings. This assignment of error is overruled.

V.

[5] Defendant cross-appeals the opinion and award of the full Commission. Defendant contends that the Commission erred in awarding plaintiff \$50,000 in damages because there was no competent evidence to support that finding. We disagree.

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A finding of fact by the full Commission is not reversible on appeal unless there is no competent evidence to support that finding. See G.S. § 143-293(2001); *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968). Here, the Industrial Commission found that plaintiff's injury on 6 July 1996 was a "significant causative factor" for plaintiff missing a season of wrestling, suffering headaches, and limitation of his normal physical routine for at least six months. This finding of fact was supported by plaintiff's own testimony, as well as the testimony of his physician. The evidence regarding defendant's award for pain and suffering, mental anguish, and physical impairment is credible and supports the Commission's finding. Therefore, this assignment of error is overruled.

For the reasons stated, we affirm the opinion and award issued by the full Commission awarding defendant \$50,000. In addition, we deny defendant's cross-appeal.

Affirmed.

Judge MCGEE concurs.

Judge HUDSON concurs in the result in a separate opinion.

HUDSON, Judge, concurring in result.

While I agree with the result reached by the majority, I do not agree with the analysis of the difference between the role of the full commission in a case proceeding under the Tort Claims Act as compared to one under the Workers' Compensation Act. For the reasons discussed in my concurring opinion in *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 593, 551 S.E.2d 486, 492 (2001), cert. denied, 355 N.C. 285, 560 S.E.2d 800 (2002), I believe that the General Assembly envisioned different roles for the full commission in the two types of claims, and that in a tort claim the full commission must defer to credibility determinations based on the hearing deputy's opportunity to observe the demeanor of witnesses. However, the full commission in this case acted appropriately when it made its own findings of fact and conclusions of law based on its review of the record before it, including the medical records and transcripts of the hearing and deposition testimony of Dr. Tuttle, who did not appear before the deputy commissioner. Thus, where the deputy commissioner did not actually view the demeanor of Dr. Tuttle or the other physicians whose records were in evidence, the full commission was

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as well situated to assess this evidence as was the deputy commissioner. Thus, the findings of the full commission based on the medical evidence were within the scope of its role as defined by N. C. Gen. Stat. § 143-292 (2001).

STATE OF NORTH CAROLINA v. DWIGHT RAYMOND PHELPS

No. COA02-149

(Filed 18 February 2003)

1. Confessions and Incriminating Statements— possession of crack cocaine—officer’s statement—interrogation—defendant’s response—absence of Miranda warnings—harmless error

An officer’s post-arrest statement to defendant that defendant “needed to let me know right now before we went past the jail door if he had any kind of illegal substance or weapons on him, that it was an automatic felony no matter what it was” constituted interrogation within the meaning of the Miranda decision because the officer knew or should have known that his statement was reasonably likely to evoke an incriminating response, and defendant’s response that he had crack cocaine in his pocket was improperly admitted in defendant’s trial because the officer failed to give defendant the Miranda warnings prior to the custodial interrogation. However, the admission of defendant’s statement was harmless error because (1) the illegal substance was found in the pocket of the coat worn by defendant, and there was no evidence to suggest that defendant did not own the coat or that the coat had only recently come into his possession; and (2) there is no reasonable possibility that the exclusion of defendant’s statement would have resulted in a different verdict.

2. Confessions and Incriminating Statements— voluntariness—coercion—failure to give Miranda warnings—exclusionary rule—motion to suppress cocaine

The trial court did not err in a felony possession of cocaine case by denying defendant’s motion to suppress cocaine obtained as a result of an alleged coerced statement without the benefit of a Miranda warning when an officer had a friendly conversation with defendant during the ride to jail explaining to defendant that

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defendant needed to let the officer know if defendant had any illegal substances or weapons on him and defendant told the officer he had crack cocaine in his coat pocket, because: (1) there was not any evidence of coercion on the part of the officer when during the ride to jail and prior to searching defendant, the officer did not threaten or promise defendant anything, and defendant was calm during the ride to the jail and while admitting to the officer that he had cocaine in his pocket; and (2) even if defendant's statement was coerced, the cocaine would have been admissible under the inevitable discovery doctrine which allows admission of evidence which was illegally obtained when the evidence ultimately or inevitably would have been discovered by lawful means since defendant's clothing would have been searched and the cocaine would have been found at the jail in accordance with police procedure.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 11 September 2001 by Judge Richard L. Doughton in Superior Court, Forsyth County. Heard in the Court of Appeals 13 November 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Marc Bernstein, for the State.

Marjorie S. Canaday for defendant-appellant.

WYNN, Judge.

Defendant, Dwight Raymond Phelps, presents two issues on appeal arising from his conviction of felony possession of cocaine: (I) Did the trial court commit reversible error in denying defendant's motion to suppress a statement made to the police because defendant's constitutional right against self-incrimination as protected by *Miranda v. Arizona* was violated; and (II) Did the trial court commit reversible error in denying defendant's motion to suppress physical evidence obtained as a result of a coerced statement? We find no prejudicial error in defendant's trial.

On 5 February 2001, defendant was charged with one count of possession of a Schedule II Controlled Substance (cocaine) and being an habitual felon. Subsequently, defendant moved to suppress the cocaine seized from him as well as his statement to Officer Chad Mashni that he had crack cocaine in his coat pocket. Following the

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trial court's denial of that motion, a jury found defendant guilty of felony possession of cocaine. Thereafter, defendant pled guilty to the habitual felon charge, but reserved his right to appeal the order denying the motion to suppress and the conviction of felony possession of cocaine. Defendant was sentenced to seventy to ninety-three months imprisonment.

The evidence tended to show that on 23 December 2000 at approximately 1:00 p.m., Officer Mashni, from the Winston-Salem Police Department, was dispatched to investigate a larceny at an apartment, in which defendant and his girlfriend resided. Upon determining from his patrol car computer that defendant had two outstanding warrants for his arrest, Officer Mashni placed defendant under arrest and performed an exterior search on defendant's person for weapons and contraband items. None were discovered.

Following the search, Officer Mashni placed defendant in his patrol car and drove him to the county jail. According to Officer Mashni, while in transit, he and defendant had a "friendly conversation" because Officer Mashni knew defendant's brother, who was a police officer. Officer Mashni testified during the hearing on defendant's motion to suppress that defendant's emotional state was fairly stable during the course of the ride. When asked at the hearing what he said to defendant in the parking lot of the jail, Officer Mashni responded:

I explained to him that he needed to let me know right now before we went past the jail doors if he had any kind of illegal substances or weapons on him, that it was an automatic felony no matter what it was, so he better let me know right now.

Officer Mashni had not read defendant his *Miranda* rights before making this statement to defendant. Defendant told Officer Mashni that he had some crack in his coat pocket and Officer Mashni then retrieved three rocks, which he believed were crack cocaine, from defendant's left front coat pocket. A chemist at the State Bureau of Investigation later confirmed that the rocks were crack cocaine. According to Officer Mashni, from the time that he arrested defendant up until he found the cocaine, he did not make any promises to defendant concerning the particular charges that would be brought against defendant.

Defendant also testified at the hearing on his motion to suppress. He stated that while in the parking lot of the jail, Officer Mashni told

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him: “[I]f you have any drugs or weapons on you, and you submit them at this time I won’t charge you with them.” According to defendant, after he told Officer Mashni that he had some crack in his pocket, Officer Mashni replied: “[I]t’s good that you told me that, because . . . if you would have took [sic] them on the other side of them doors in the jail, they would charge you with a felony.” Defendant stated that he believed that he would not be charged with a felony if he told Officer Mashni about the crack in his pocket. Defendant also testified at the hearing that while riding to the jail in Officer Mashni’s patrol car, he became upset and began crying.

At trial, the trial court admitted into evidence defendant’s statement to Officer Mashni that he had some crack cocaine in his coat pocket, and the crack cocaine rocks. Defendant appeals from his conviction of felony possession of cocaine.

I.

[1] Defendant first assigns error to the trial court’s denial of his motion to suppress his statement to Officer Mashni regarding the crack cocaine. In reviewing a trial court’s ruling on a motion to suppress, the trial court’s findings of fact “are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994). However, a trial court’s legal conclusions are fully reviewable on appeal. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992). “[T]he trial court’s conclusions . . . must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

Defendant specifically argues that his statement regarding the location of the crack cocaine was inadmissible because he was not read his *Miranda* warnings prior to the statement being made and the statement was obtained during custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 726 (1966) (holding a defendant’s statements elicited during a custodial interrogation are not admissible unless the State demonstrates that *Miranda* warnings were given prior to the statement being made).

“[I]nterrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301,

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64 L. Ed. 2d 297, 308 (1980) (footnotes omitted); *see also State v. Washington*, 102 N.C. App. 535, 539, 402 S.E.2d 851, 854 (1991) (Greene, J. dissenting), *rev'd per curiam*, 330 N.C. 188, 189, 410 S.E.2d 55, 56 (1991) (reversing the decision of the Court of Appeals on the basis of the dissent filed in *State v. Washington*).

In the present case, there is no question that defendant was in custody at the time his statement was made. Therefore, the key inquiry becomes whether Officer Mashni's statement to which defendant responded that he had crack in his coat pocket was "interrogation" within the meaning of *Miranda*. Officer Mashni testified at the hearing on defendant's motion to suppress as follows:

I explained to [defendant] that he needed to let me know right now before we went past the jail doors if he had any kind of illegal substances or weapons on him, that it was an automatic felony no matter what it was, so he better let me know right now.

Defendant, however, testified at the hearing that Officer Mashni told him: "[I]f you have any drugs or weapons on you, and you submit them at this time I won't charge you with them."

The trial court concluded in its order denying defendant's motion to suppress that Officer Mashni merely made a statement to defendant informing him of the law pertaining to possession of controlled substances in jail and that this statement did not constitute interrogation as defined by case law for the purposes of the *Miranda* decision. The trial court further concluded that the statements made by Officer Mashni were not designed to elicit an incriminating response. We disagree.

In this case, Officer Mashni knew or should have known that his statement was reasonably likely to evoke an incriminating response. Officer Mashni's objective purpose was to obtain defendant's admission or denial of the possession of contraband. Therefore, we conclude the trial court erred in admitting defendant's incriminating statement because the officer failed to advise defendant of his *Miranda* warnings prior to the custodial interrogation. *See State v. Banks*, 322 N.C. 753, 759, 370 S.E.2d 398, 402 (1988).

Nonetheless, the State asserts that even if this Court concludes that defendant's statement was improperly admitted, the trial court's error was harmless. We agree. N.C. Gen. Stat. § 15A-1443(b) (2001) provides:

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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.

“ ‘Harmless beyond a reasonable doubt’ has been interpreted to mean that ‘there is no reasonable possibility’ that the erroneous admission of evidence ‘might have contributed to the conviction.’ ” *State v. Hooper*, 318 N.C. 680, 682, 351 S.E.2d 286, 288 (1987) (quoting *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974)).

In order to convict a defendant of felony possession of a controlled substance, the State must prove beyond a reasonable doubt the defendant knowingly possessed the substance. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989). It is well established that “knowledge is a mental state that may be proved by offering circumstantial evidence to prove a contemporaneous state of mind. Jurors may infer knowledge from all the circumstances presented by the evidence.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). Knowledge may be shown even where the defendant's possession of the illegal substance is merely constructive rather than actual. *See, e.g., State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

Where, as in the instant case, the evidence before the jury tended to show that the illegal substance was found in the pocket of the coat worn by defendant, and there was no evidence to suggest that defendant did not own the coat, or that the coat had only recently come into his possession, there is no reasonable possibility that the exclusion of defendant's statement would have resulted in a different verdict. Accordingly, the trial court's error was harmless beyond a reasonable doubt.

II.

[2] Defendant also contends the court erred in admitting the cocaine into evidence because the cocaine was found as a result of an interrogation that violated *Miranda*. We disagree.

Our Supreme Court has previously stated that “[i]f the record shows there was no actual coercion but only a violation of the *Miranda* warning requirement, it is not necessary to give too broad an application to the exclusionary rule.” *State v. May*, 334 N.C. 609, 612, 434 S.E.2d 180, 182 (1993), *cert. denied*, 510 U.S. 1198, 127 L. Ed. 2d 661 (1994). Under the exclusionary rule, “[w]hen evidence is

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obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). In *May*, the Court concluded that on the facts of that case, physical evidence which was found as a result of a *Miranda* violation, but not as the result of actual coercion which violated the rights of the defendant, was admissible. *May*, 334 N.C. at 613, 434 S.E.2d at 182. The *May* Court relied on the United States Supreme Court's recognition "that the failure to give *Miranda* warnings is not itself the violation of a person's right against self-incrimination."¹ *May*, 334 N.C. at 612, 434 S.E.2d at 182 (citing *Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182 (1974) and *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985)). "[D]etermining whether evidence discovered as the result of a *Miranda* violation should be admitted depends on whether its exclusion would serve to deter improper police conduct or assure the trustworthiness of the evidence." *May*, 334 N.C. at 613, 434 S.E.2d at 182.

In determining whether defendant's statement in the instant case was voluntary, we must review the totality of the surrounding circumstances in which the statement was made. *State v. Brewington*, 352 N.C. 489, 499, 532 S.E.2d 496, 502 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). A statement is involuntary or coerced if it is the result of government tactics so oppressive that the will of the interrogated party "has been overborne and his capacity for self-determination critically impaired . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973). Our Supreme Court has listed several factors that should be considered in determining the voluntariness of statements:

[W]hether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

1. We note that this rationale may be called into doubt by *Dickerson v. United States*, 530 U.S. 428, 147 L. Ed. 2d 405 (2000), in which our United States Supreme Court held that *Miranda* was a constitutional decision. However, any possible impact of *Dickerson* on *May* would have to be addressed by the Supreme Court of North Carolina because we are bound by *May* until our State's highest Court holds otherwise.

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In the case *sub judice*, the trial court concluded there was not any evidence of coercion on the part of the officer and therefore, even if a *Miranda* violation had occurred, the crack cocaine was still admissible. The court made findings to support this conclusion of law and those findings are supported by competent evidence. The trial court found that during the ride to the jail and prior to searching defendant, the officer did not threaten or promise defendant anything. Additionally, the trial court found that defendant was calm during the ride to the jail and while admitting to the officer that he had cocaine in his pocket. We acknowledge that defendant's testimony conflicts with the trial court's findings as well as Officer Mashni's testimony. However, our review is restricted to determining whether the trial court's findings are supported by competent evidence. We conclude the trial court's findings are supported by competent evidence (Officer Mashni's testimony) and these findings, in turn, support the trial court's conclusion that there was not any evidence of coercion on the part of the officer. Therefore, in following *May*, we conclude that although Officer Mashni violated the prophylactic rule of *Miranda*, the evidence found as a result of this violation was properly admitted since defendant's statement was not the product of coercion.

Furthermore, even assuming defendant's statement was coerced, the cocaine would have been admissible under the inevitable discovery doctrine, which allows the admission of evidence which was illegally obtained, when the evidence ultimately or inevitably would have been discovered by lawful means. *See State v. Pope*, 333 N.C. 106, 423 S.E.2d 740 (1992). In this case, defendant had been arrested pursuant to two outstanding warrants and was being transported to jail for processing when he made the statement regarding the cocaine and the officer retrieved the crack from defendant's coat. In accordance with police procedure, during processing, defendant's clothing would have been searched and the cocaine would have been found. *See State v. Steen*, 352 N.C. 227, 241, 536 S.E.2d 1, 10-11 (2000) (stating "It is well settled in North Carolina that clothing worn by a person while in custody under a valid arrest may be taken from him for examination.") Accordingly, the cocaine was properly admitted.

No prejudicial error.

Judge TIMMONS-GOODSON concurs.

Judge HUNTER concurs in part and dissents in part.

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

I agree with the majority's conclusion that the trial court erred in admitting defendant's statement to Officer Mashni that he had some crack in his coat pocket because the officer failed to advise defendant of his *Miranda* warnings prior to the custodial interrogation. However, I disagree with the majority's holding that the trial court's erroneous admission of defendant's incriminating statement was harmless beyond a reasonable doubt. See N.C. Gen. Stat. § 15A-1443(b) (2001). In addition, I concur with the majority's conclusion that the cocaine, which was found as a result of the *Miranda* violation, was properly admitted since defendant's statement was not the product of coercion. However, I disagree with the majority's determination that "even assuming defendant's statement was coerced, the cocaine would have been admissible under the inevitable discovery doctrine" Therefore, I respectfully dissent and would vacate defendant's conviction and remand for a new trial.

A violation of a defendant's rights under the Constitution of the United States is prejudicial unless the State demonstrates that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b). In order for an Appellate Court to conclude that the State has met its burden of proving that the error was harmless beyond a reasonable doubt, the Court must be convinced "that 'there is no reasonable possibility' that the erroneous admission of evidence 'might have contributed to the conviction.'" *State v. Hooper*, 318 N.C. 680, 682, 351 S.E.2d 286, 288 (1987) (quoting *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974)). The presence of overwhelming evidence of guilt may render a constitutional error harmless beyond a reasonable doubt. *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

In the instant case, the admission of defendant's statement to Officer Mashni that he had some crack in his coat pocket was highly inflammatory on the issue of whether defendant knowingly possessed the cocaine. The State's evidence as to whether defendant knowingly possessed the cocaine, excluding defendant's statement, is hardly overwhelming. In fact, the only evidence against defendant is that cocaine, discovered as a result of a *Miranda* violation, was found inside the coat defendant was wearing. Thus, without the admission of defendant's incriminating statement, there is a reasonable possibility that the jury would have had reasonable doubt as to whether defendant knowingly possessed the cocaine and returned a different

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verdict. Therefore, I conclude the State has not met its burden of proving that the error was harmless beyond a reasonable doubt, by showing that there is no reasonable possibility that the erroneous admission of the statement might have contributed to the conviction. Accordingly, I would vacate defendant's conviction and remand for a new trial.

I concur with the majority's conclusion that defendant's statement was not the product of coercion and therefore, the cocaine found as a result of the *Miranda* violation was properly admitted. However, I respectfully dissent from the majority's determination that "even assuming defendant's statement was coerced, the cocaine would have been admissible under the inevitable discovery doctrine" Pursuant to the inevitable discovery doctrine,

evidence which would otherwise be excluded because it was illegally seized may be admitted into evidence if the State proves by a preponderance of the evidence that the evidence would have been inevitably discovered by the law enforcement officers if it had not been found as a result of the illegal action.

State v. Pope, 333 N.C. 106, 114, 423 S.E.2d 740, 744 (1992) (citing *Nix v. Williams*, 467 U.S. 431, 81 L. Ed. 2d 377 (1984)).

In the case *sub judice*, during the hearing on defendant's motion to suppress, the State did not present evidence material to, nor did the trial court address, the inevitable discovery doctrine. Our Supreme Court has previously stated: "Whether this exception [to the exclusionary rule] is applicable is initially a question to be addressed by the trial court" *State v. Pope*, 333 N.C. 116, 117, 423 S.E.2d 746, 746 (1992). Since the inevitable discovery doctrine was never raised in defendant's motion hearing not its applicability considered by the trial court, it is improper for this Court to determine that "even assuming defendant's statement was coerced, the cocaine would have been admissible under the inevitable discovery doctrine" In addition, during the suppression hearing, the State failed to present any evidence that the cocaine would have been inevitably discovered. Thus, the State did not meet the necessary burden of proving by a preponderance of the evidence that the cocaine would have been inevitably discovered by the law enforcement officers if it had not been found as a result of the *Miranda* violation. Therefore, I disagree with the majority's conclusion that even if the statement had been coerced, the evidence would have been admissible under the inevitable discovery exception.

MELTON v. FAMILY FIRST MORTGAGE CORP.

[156 N.C. App. 129 (2003)]

NELLIE H. MELTON, PLAINTIFF v. FAMILY FIRST MORTGAGE CORPORATION, FLAGSTAR BANK, FSB, UNION PLANTERS BANK NA, T. DAN WOMBLE AS TRUSTEE ON A DEED OF TRUST MADE BY THE PLAINTIFF, AND LORI MELTON FRYE, DEFENDANTS

No. COA02-221

(Filed 18 February 2003)

1. Unfair Trade Practices— mortgage—no contact between mortgage purchaser and borrower

The trial court correctly granted summary judgment for defendant Flagstar Bank on an unfair and deceptive practices claim arising from plaintiff's allegation that her granddaughter moved in with her and acted to defraud her of assets, including inducing her to borrow money on her home. Flagstar, which purchased the mortgage soon after its execution, had no contact with plaintiff and there is no evidence that the lender was acting as an agent for Flagstar.

2. Appeal and Error— preservation of issues—failure to cite authority

Plaintiff did not cite legal authority and abandoned on appeal her argument that a lender's conduct amounted to an unfair or deceptive practice (which allowed her granddaughter to engage in fraud) by not questioning the circumstances of a loan on plaintiff's house.

3. Civil Procedure— summary judgment—allegation as to what testimony would be—insufficient

The trial court did not err by granting summary judgment for defendant Family First (the lender) in an action arising from a loan on plaintiff's house where plaintiff contended that a retired banker would have testified that there should have been an in-person interview before execution of the mortgage. No affidavit or other form of sworn testimony was submitted to the trial court in which the witness testified that industry standards had been violated.

4. Mortgages and Deeds of Trust— lending fees—disclosed

A lender did not fail to act in good faith by not disclosing the percentage of the loan proceeds that would be paid to the broker and mortgage company where plaintiff testified that she was provided with a list of all fees at the closing, and the

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closing attorney testified that he reviewed the fees and loan documents with plaintiff.

5. Unfair Trade Practices— mortgage—forged signature—allegation insufficient

The trial court did not err by granting summary judgment on an unfair and deceptive practices claim for defendant Family First where plaintiff contended that defendant either forged plaintiff's name or accepted a forged signature, but provided no substantial evidence of the forgery.

6. Unfair Trade Practices— summary judgment—no evidence of harm

The trial court did not err by granting summary judgment on an unfair and deceptive practices claim for defendant Family First where plaintiff argued that Family First improperly back-dated loan application documents, but plaintiff failed to present any evidence of harm.

7. Unfair Trade Practices— summary judgment—kickback

The trial court did not err by granting summary judgment on an unfair and deceptive practices claim for defendant Family First, which loaned plaintiff money on her house at her granddaughter's inducement, where plaintiff argued that Family First had failed to disclose that it would receive a kickback from the bank to whom it sold the mortgage.

8. Unfair Trade Practices— mortgages—failure to recommend alternative

A lender's failure to recommend a reverse mortgage was not an unfair or deceptive practice.

9. Mortgages and Deeds of Trust— use of regular closing attorney—not an unfair practice

There was no merit to plaintiff's claim that a lender committed an unfair or deceptive practice by sending plaintiff to an attorney who regularly closed loans for defendant and who had no incentive to disclose alleged irregularities to plaintiff.

10. Mortgages and Deeds of Trust— rescission—no return of proceeds—fraud in treaty

The trial court correctly determined that a mortgage was not void and subject to rescission where plaintiff was not prepared to return the loan proceeds. The mortgage would be binding in any

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case because plaintiff knew she was mortgaging her house and did not take issue with the loan documents; fraud in the treaty (arising from representations by plaintiff's granddaughter) renders the loan voidable between the parties but binding in the hands of an innocent purchaser of the mortgage.

Judge TIMMONS-GOODSON concurring in part and dissenting in part.

Appeal by plaintiff from an order entered 6 November 2001 by Judge Beverly T. Beal in Forsyth County Superior Court. Heard in the Court of Appeals 13 November 2002.

Hough & Rabil, P.A., by S. Mark Rabil for plaintiff-appellant.

Allman Spry Leggett & Crumpler, P.A., by W. Rickert Hinnant, for defendant-appellee Family First Mortgage Corporation.

Kilpatrick Stockton, L.L.P., by Richard J. Keshian, for defendant-appellees Flagstar Bank, FSB and Union Planters Bank, NA.

Jerry D. Jordan for defendant-appellee Lori Melton Frye.

T. Dan Womble, Trustee.

HUNTER, Judge.

Nellie H. Melton ("plaintiff") appeals from the trial court's order of summary judgment in favor of defendants Family First Mortgage Corporation ("Family First"), Flagstar Bank, FSB ("Flagstar") and Union Planters Bank NA ("Union Planters"). We affirm for the reasons set forth herein.

Plaintiff, a borrower under a note secured by a deed of trust ("mortgage"), brought suit against Family First (plaintiff's lender); Flagstar (a bank that purchased the mortgage soon after its execution); Union Planters (another bank that subsequently purchased the mortgage from Flagstar); and Lori Melton Frye (plaintiff's adult granddaughter, hereinafter "Frye"). Plaintiff alleged in her complaint that defendant Frye engaged in a pattern of activity designed to defraud plaintiff of certain of her assets. Plaintiff specifically alleged that Frye, after moving in with plaintiff, administered medications to her and gained control over plaintiff's finances, using them for her own benefit and to the detriment of plaintiff. Plaintiff alleged that Frye, in August of 1997, completed an application for a \$50,000.00

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loan on plaintiff's home. Plaintiff claimed that Frye, without plaintiff's knowledge, instructed Family First to process the loan application and, upon its approval, arranged to close the loan. Plaintiff alleged that Frye persuaded her to obtain the loan by falsely telling her that her son had incurred substantial debt in plaintiff's name and that plaintiff needed to borrow the money to pay off this debt.

Plaintiff claimed that she was entitled to damages for unfair and deceptive practices by Family First and Flagstar (based on excessive loan fees or discounts, knowing and willful disregard of the North Carolina reverse mortgage statute, and fraud); common law fraud by Family First and Flagstar (based on alleged failure to make disclosures to plaintiff); and civil conspiracy by Family First and Flagstar to commit unfair trade practices and common law fraud. Plaintiff further sought rescission of the mortgage which was currently held by Union Planters.

Defendants Family First, Flagstar, and Union Planters moved for summary judgment. After a hearing was held on the motions, the trial court entered summary judgment in favor of defendants Family First, Flagstar, and Union Planters on 6 November 2001 as to all claims against those defendants. On 29 April 2002, a consent order of dismissal as to plaintiff's pending claims against defendant Frye was entered pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure. Plaintiff appeals from the order of summary judgment.

We initially note that plaintiff has only presented arguments in her brief regarding her claims of unfair or deceptive practices and rescission of the mortgage. Accordingly, our review will be limited to those issues. *See* N.C.R. App. P. 28(b)(6).

I.

[1] We will first address whether summary judgment was proper on the claims against Flagstar for unfair and deceptive practices. "Under N.C. Gen. Stat. § 75-1.1, the question of what constitutes an unfair or deceptive trade practice is an issue of law." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 363, 533 S.E.2d 827, 830 (citation omitted), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). Therefore, the determination of whether an act or practice is unfair or deceptive is generally made by the trial court based on the jury's findings. *Id.* However, a court may grant summary judgment on a claim of unfair and decep-

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tive practices when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See id.* A defendant moving for summary judgment bears the burden of showing: “(1) that an essential element of plaintiff’s claim is nonexistent; (2) that discovery indicates plaintiff cannot produce evidence to support an essential element; or (3) that plaintiff cannot surmount an affirmative defense.” *Id.* After a defendant has met that burden, the plaintiff must forecast evidence establishing that a *prima facie* case exists. *Id.*

Under N.C. Gen. Stat. § 75-1.1(a) (2001), unfair or deceptive acts or practices in or affecting commerce, are unlawful. The necessary elements for a claim under N.C. Gen. Stat. § 75-1.1 are: “(1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant.” *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 35, 568 S.E.2d 893, 901 (2002). “A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). A practice is deceptive if it “possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception.” *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981).

After carefully reviewing the record, we conclude that the trial court’s grant of summary judgment in favor of Flagstar was proper since Flagstar had no dealings with plaintiff in connection with the execution of the mortgage. Plaintiff did not meet with any Flagstar representative, did not correspond with Flagstar, and had no relationship with Flagstar until Flagstar bought the mortgage subsequent to plaintiff’s execution of the mortgage. Plaintiff indicated that she never had any dealings with Flagstar. Moreover, Family First’s employee, Leann Dunagan, and the closing attorney indicated in their depositions that as far as they knew, Flagstar had not had any contact with plaintiff. In addition, there is no evidence suggesting that Family First was acting as an agent for Flagstar. In fact, the mortgage purchase agreement includes a provision which states that the mortgage purchase agreement and transactions entered into pursuant thereto shall not create an agency relationship between seller and buyer. Therefore, there is no evidence that Flagstar committed improprieties with regard to the execution of the mortgage. Accordingly, we conclude the trial court was proper in granting summary judgment in favor of defendant Flagstar.

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II.

[2] We now turn to whether summary judgment was properly entered on plaintiff's claims against Family First for unfair and deceptive practices. Plaintiff sets out numerous allegations in her brief which she claims constitute unfair and deceptive practices. However, after reviewing the record and plaintiff's list of grievances, we conclude that plaintiff has failed to show any improper conduct on Family First's part, amounting to unfair or deceptive practices contemplated by N.C. Gen. Stat. § 75-1.1.

Plaintiff first asserts that Family First intentionally refused to investigate numerous red flags of fraud and undue influence and allowed defendant Frye to engage in fraud. Plaintiff claims that the failure of Family First to question the circumstances of the loan were a breach of industry standards and common decency. However, plaintiff has failed to cite any legal authority to support her argument. Therefore, this argument is deemed abandoned. *See* N.C.R. App. P. 28(b)(6).

[3] Plaintiff next contends Family First's failure to conduct an in-person interview of plaintiff before the execution of the mortgage constituted an unfair or deceptive act or practice. Plaintiff has failed to provide, and we have failed to find, any cases in which a Court has held that such a failure violates N.C. Gen. Stat. § 75-1.1. Plaintiff points to plaintiff's discovery responses which suggest that Mattie Barney ("Barney"), a retired banker, "would testify" that there should have been an in-person interview. However, no affidavit nor other form of sworn testimony was submitted to the trial court in which Barney testified that industry standards had been violated. Thus, the trial court did not find plaintiff's discovery responses regarding what Barney "would testify" competent evidence from which it could rely. We conclude plaintiff has presented no competent evidence that Family First's failure to interview plaintiff in-person constitutes an unfair or deceptive act or practice.

[4] Plaintiff additionally argues Family First failed to act in good faith by not disclosing that more than ten percent (10%) of the loan proceeds would be paid to the broker and mortgage company as fees and expenses. However, we note that plaintiff testified that she was provided with a list of all fees at the closing, and knew and understood the consequences of the fees. Further the closing attorney testified that he reviewed the fees and loan documents with plaintiff and

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that those documents were valid. Therefore, plaintiff's argument lacks merit.

[5] Plaintiff next asserts that Family First either forged plaintiff's name to a document, or accepted a forged signature for processing her application. However, plaintiff has provided no substantial evidence of such forgery. She merely provided the trial court with two credit authorization forms containing plaintiff's purported signature and argues that only one could have been signed by plaintiff since the signatures are so different. Moreover, plaintiff presented no evidence that Family First was aware of the purported forgery nor evidence that plaintiff would not have consented to the credit authorizations. Therefore, we conclude this allegation lacks merit.

[6] Plaintiff also argues that Family First improperly backdated loan application documents. Assuming that the loan application documents were backdated, however, plaintiff has failed to present any evidence of harm. As stated previously, a necessary element for a claim under N.C. Gen. Stat. § 75-1.1 is that the unfair or deceptive act or practice proximately caused actual injury to the claimant. *Boyce*, 153 N.C. App. at 35, 568 S.E.2d at 901. We therefore conclude that plaintiff has failed to forecast evidence supporting the essential elements of a claim under N.C. Gen. Stat. § 75-1.1 based on this allegation.

[7] Plaintiff next asserts that Family First failed to disclose that Flagstar would pay Family First a "yield spread premium" or kick-back in violation of federal law. Plaintiff relies on *Moses v. Citicorp Mortg., Inc.*, 982 F. Supp. 897 (E.D.N.Y. 1997), to support her argument. We find the instant case distinguishable. The Court in *Moses* held that a suit regarding "yield spread premiums" brought by mortgage borrowers against lenders for unfair trade practices under New York law was not subject to dismissal for failure to state a claim. *Id.* In *Moses*, the plaintiffs alleged that

defendants had agreements with mortgage brokers . . . under which plaintiffs were not advised "of the actual interest rates and loan terms they were approved for, but instead [they were] advised . . . that they had been approved at interest rates and points which were higher than the actual rates [defendants were] prepared to charge."

Id. at 903. In the instant case, plaintiff has made no such allegation nor provided evidence to support such an allegation. Thus, plaintiff's reliance on *Moses* is misguided.

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[8] Plaintiff contends Family First failed to recommend that plaintiff investigate a reverse mortgage which plaintiff claims constitutes an unfair or deceptive act or practice. Reverse mortgages are governed by N.C. Gen. Stat. § 53, Article 21. There is no provision under N.C. Gen. Stat. § 53, Article 21, requiring a lender to recommend a reverse mortgage. In addition, plaintiff has failed to cite, and we have not found, any authority supporting her argument that a lender's failure to recommend a reverse mortgage is an unfair or deceptive act or practice. Therefore, we conclude this argument has no merit.

[9] Plaintiff finally claims that Family First sent plaintiff to a closing attorney who regularly closed loans for Family First and Flagstar and had no incentive to disclose the alleged irregularities of the mortgage to plaintiff. However, we have found no irregularities with regard to the mortgage that the closing attorney had a duty to disclose. In addition, plaintiff has not cited any authority supporting her claim that it is improper for a closing attorney to represent both the borrower and the lender. Thus, we again conclude plaintiff's claim has no merit.

For the foregoing reasons, we conclude plaintiff has failed to show any improper conduct on Family First's part, amounting to unfair or deceptive practices under N.C. Gen. Stat. § 75-1.1. Accordingly, we hold the trial court properly granted Family First's motion for summary judgment.

III.

[10] Finally, plaintiff claims the trial court erred in determining that the mortgage was not void and subject to rescission. During the summary judgment hearing, the court asked plaintiff's counsel if plaintiff was prepared to give money or other valuable consideration to Union Planters in exchange for the rescission of the mortgage. Plaintiff's counsel responded that plaintiff was not prepared to exchange money or other valuable consideration for the rescission of the mortgage. Our Supreme Court has previously stated: "A complainant who seeks to have an instrument, obligation, or transaction canceled or set aside must return or offer to return whatever he may have received from the defendant." *York v. Cole*, 254 N.C. 224, 225, 118 S.E.2d 419, 420 (1961) (*per curiam*). " '[A]s a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed.' " *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 65, 344 S.E.2d 68, 74 (1986) (quoting *Bolich v. Insurance Company*, 206 N.C. 144, 156, 173 S.E. 320, 327 (1934)).

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Since plaintiff in this case is unable to return the loan proceeds, the court correctly determined that plaintiff was not entitled to rescission of the mortgage.

In addition, even if plaintiff was prepared to return the loan proceeds, the mortgage would still be binding. Plaintiff contends that this case involves fraud in the *factum* which would be sufficient to void the mortgage even in the hands of an innocent third party. *See Jarvis v. Parnell*, 4 N.C. App. 432, 167 S.E.2d 3 (1969). We disagree.

Fraud in the *factum* “arises from a want of identity or disparity between the instrument executed and the one intended to be executed. . . .” *Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 369, 183 S.E.2d 115, 120 (1971) (quoting *Furst v. Merritt*, 190 N.C. 397, 401, 130 S.E. 40, 43 (1925)). In the case *sub judice*, plaintiff testified in her deposition that she knew that she was obtaining a mortgage on her house, that the closing attorney explained the loan documents to her, and that she did not take issue with the loan or the loan documents. Therefore, this is not a case of fraud in the *factum*.

If there was any fraud involved in the execution of the mortgage, it was limited to Frye’s alleged false representations that motivated plaintiff to obtain the mortgage which would be fraud in the treaty. Fraud in the treaty arises “[w]here a party knowingly executes the very instrument he intended but is induced to do so by some false and fraudulent representation” *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 544 (1963). Further, our Supreme Court has stated that “[i]f . . . the evidence discloses only fraud in the treaty, the note and deed of trust would be voidable as between the original parties thereto, but binding in the hands of a third person who was the innocent holder thereof.” *Parker v. Thomas*, 192 N.C. 798, 802, 136 S.E. 118, 120 (1926). In this case, the evidence shows that Union Planters is an innocent purchaser of the mortgage. Therefore, rescission is unavailable, even if plaintiff was prepared to return the loan proceeds.

For the reasons stated herein, we affirm the trial court’s order of summary judgment in favor of defendants Family First, Flagstar and Union Planters.

Affirmed.

Judge WYNN concurs.

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Judge TIMMONS-GOODSON concurs in part and dissents in part in a separate opinion.

TIMMONS-GOODSON, Judge, concurring in part and dissenting in part.

Because I disagree with the majority's conclusion that defendant, Family First Mortgage Corporation, was entitled to summary judgment, I respectfully dissent. I concur with the conclusion of the majority that all other named defendants were entitled to summary judgment.

North Carolina General Statutes section 75-1.1 declares unlawful "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a) (2001). "Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (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." *Mitchell v. Linville*, 148 N.C. App. 71, 73-74, 557 S.E.2d 620, 623 (2001) (quoting *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991)). Section 75-1.1 provides two distinct grounds for relief. *Id.* "If a practice has the capacity or tendency to deceive, it is deceptive for the purposes of the statute. *Id.* "Unfairness" is a broader concept than and includes the concept of "deception." *See id.* "A practice is unfair when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *See id.*

In the instant case, plaintiff asserts numerous allegations to establish that Family First engaged in unfair and deceptive practices. I conclude that there exist genuine issues of material fact in at least three of plaintiff's assertions. First, plaintiff argues that Family First failed to conduct an in-person interview with plaintiff. Plaintiff further contends that the majority of the contact made was with her granddaughter. As noted in the majority opinion, plaintiff fails to provide, and we fail to find any cases in which a court has held that such an interview is necessary or proper. As stated *supra*, when considering whether a practice is unfair or deceptive, it is proper to consider the facts of the individual case. Therefore, it is proper for a jury to consider (1) whether, under the facts of this case, the failure of

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Family First to conduct an in-person interview with plaintiff affected commerce; (2) the impact of such a practice on the marketplace; and (3) whether the practice caused injury to plaintiff.

Second, plaintiff argues that her name was either forged by Family First or that Family First accepted forged documents. The majority asserts that plaintiff failed to provide sufficient evidence of forgery; the record, however, reflects that plaintiff provided evidence that the signature on the document differed from her own signature. A jury could conclude that accepting forged documents offends public policy, is unethical and can substantially injure consumers. In determining what is unfair and deceptive, the “intent or good faith belief of the actor is irrelevant,” and the “effect of the actor’s conduct on the consuming public is relevant.” *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. I agree with plaintiff’s contention that it is for a jury to decide whether the documents were forged and whether such a forgery should have caused Family First to question the circumstances of the loan.

Finally, plaintiff contends that the loan application documents were backdated. Whether backdating documents in a business transaction could have the tendency to deceive and be unfair to the consumer is an issue for the trier of fact. As noted earlier, unfairness is a concept that includes deception.

In light of the fact that plaintiff provided evidence presenting genuine issues of material fact regarding potential violations of section 75-1.1, I would hold that the trial court erred in granting summary judgment in favor of Family First.

STATE OF NORTH CAROLINA v. IDELLA SARAH GLOVER

No. COA02-447

(Filed 18 February 2003)

**1. Motor Vehicles— misdemeanor death by motor vehicle—
motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant’s motion to dismiss the charge of misdemeanor death by motor vehicle, because: (1) defendant’s statement was sufficient to establish that she was the driver of the vehicle which collided with a truck;

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(2) the State presented sufficient evidence on the issue of decedent's identity as the driver of a car involved in the accident; and (3) there was sufficient evidence from which a jury could reasonably determine defendant's action in crossing the center line created a series of collisions which ultimately caused decedent's death.

2. Motor Vehicles— misdemeanor death by motor vehicle— jury instruction—sudden emergency doctrine

A defendant in a misdemeanor death by motor vehicle case is not entitled to a new trial even though the trial court failed to instruct the jury on the sudden emergency doctrine, because: (1) although various civil cases have addressed the issue of sudden emergencies in relation to the reasonableness of a defendant's actions, defendant has failed to cite a single criminal case establishing such an exception specific to N.C.G.S. § 20-146, which makes it illegal to drive left of the center of a highway; and (2) even if such an exception to the statute existed, defendant failed to establish the accident was not proximately caused, at least in part, by her failure to keep a proper lookout or the fact that she was traveling at an unsafe following distance given the wet conditions of the road.

3. Criminal Law— guilty plea—failure to timely notify DMV of change of address—court's failure to comply with statutory requirements

A defendant's plea of guilty of failure to timely notify the Department of Motor Vehicles (DMV) of a change of address must be vacated based on the trial court's failure to comply with N.C.G.S. §§ 15A-1022 and 15A-1026, because: (1) the record contains no transcript of the plea nor an indication, oral or written, that the trial court ever personally addressed defendant regarding the issues contained in N.C.G.S. § 15A-1022; and (2) there was more than technical non-compliance where there is no indication in the record of compliance nor does the record contain any factual basis for the plea from which the Court of Appeals may evaluate whether it was properly accepted.

Appeal by defendant from judgments entered 24 October 2001 by Judge Herbert O. Phillips, III, in New Hanover County Superior Court. Heard in the Court of Appeals 29 January 2003.

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Attorney General Roy A. Cooper, III, by Assistant Attorney General Tracy C. Curtner, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

MARTIN, Judge.

Idella Sarah Glover (“defendant”) appeals convictions of misdemeanor death by motor vehicle and failure to timely notify the Department of Motor Vehicles of a change in address. Defendant’s convictions arose out of a multiple-car collision that occurred at approximately 7:00 a.m. on 14 December 2000. Melanie Van Leuven died as a result of injuries sustained in the collision.

The State’s evidence tended to show that at that time, defendant was operating her gray Cadillac in the inner southbound lane of South College Road in Wilmington, North Carolina. Defendant was traveling approximately one car length behind the preceding car at about 35 to 40 miles per hour in damp conditions. According to defendant’s statement to investigators, the car in front of her stopped quickly, causing her to swerve to the left to avoid a rear-end collision. The State presented the testimony of Officer Thomas Donelson of the Wilmington Police Department, who was accepted by the court as an expert in accident reconstruction. Based on witness interviews and the physical evidence, including the nature and location of gouge marks and debris in the road, paint transfer between vehicles, and the state and location of the vehicles, Officer Donelson concluded that defendant had swerved from her southbound lane into oncoming traffic in the northbound lane of South College Road; that when she did so, her vehicle collided with the tail-end of a green truck driven by Gene Addison approximately four feet into the inner-most northbound lane; that the collision propelled Addison’s truck into oncoming traffic in the southbound lanes; that the truck then collided with the front driver’s side of a blue Saturn being driven by Van Leuven; that the collision caused the Saturn to spin and collide with a second truck driven by John Powell; and that the Saturn then came to rest facing north by a utility pole near the outer southbound lane. Officer Donelson’s testimony was corroborated by that of Addison, who testified that he observed a gray car in the southbound lane going too fast to avoid hitting the car in front of it; that it instead crossed the center lane and hit his truck while he was traveling in the inner northbound lane; and that this propelled the front of his truck into oncoming southbound traffic, where he collided with various vehicles.

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Officer Donelson also testified defendant confessed to having had to swerve to avoid hitting the car in front of her, but denied having crossed into the northbound lanes, maintaining instead that she never left the southbound turn lane. Officer Donelson testified defendant's version of the events was inconsistent with the physical evidence, including the location of debris and gouge marks attributable to the Cadillac located four feet into the inner northbound lane and the absence of any such physical evidence in the southbound turn lane.

Defendant did not present any evidence, but moved to dismiss the charge of misdemeanor death by motor vehicle at the close of the evidence. The trial court denied the motion, and on 24 October 2001, the jury returned a verdict of guilty on that charge. Defendant was sentenced thereon, in addition to the charge of failure to timely notify the DMV of an address change, to which defendant had previously pled guilty. Defendant appeals, bringing forth five assignments of error contained in three arguments, thereby abandoning the remaining seven assignments of error of record. *See* N.C.R. App. P. 28(a) (2002).

I.

[1] Defendant first argues the trial court erred in denying her motion to dismiss the charge of misdemeanor death by motor vehicle because the State failed to prove (1) defendant was driving the vehicle which crossed the center line and collided with Addison's truck; and (2) Van Leuven was driving the blue Saturn involved in the accident. We disagree.

The dispositive issue in reviewing a motion to dismiss on the ground of sufficiency of the evidence is whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense. *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002). "The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* The court must "consider the evidence in the light most favorable to the State, take it to be true, and give the State the benefit of every reasonable inference to be drawn therefrom." *State v. Martin*, 309 N.C. 465, 480, 308 S.E.2d 277, 286 (1983). The evidence may be direct, circumstantial, or both. *Barden*, 356 N.C. at 351, 572 S.E.2d at 131.

Defendant first asserts there was a complete absence of evidence tending to show she was the driver of the Cadillac which swerved into

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Addison's lane of travel. However, Officer Donelson read into evidence without objection from defendant a written statement by her acknowledging that she was traveling in the southbound lane of South College Road at the relevant location, that the car ahead of her stopped suddenly, and that to avoid hitting the car, she swerved into the southbound turn lane where the front left of her car collided with a northbound green truck. Despite defendant's statement that she did not actually swerve into the northbound lane, which statement Officer Donelson testified was incompatible with the physical evidence, defendant's statement is nonetheless sufficient to establish she was the driver of the gray car which collided with Addison's green truck. In addition, Addison testified he observed a gray car in the southbound lane going too fast to avoid hitting a car which had stopped in front of it, that the car had to swerve to avoid a rear-end collision, and that when doing so, it collided with his vehicle. Giving the State the benefit of all reasonable inferences, the evidence as to defendant's identity as the driver of the gray car which collided with Addison's truck was sufficient to submit the issue to the jury.

Defendant also argues the State failed in its burden to show the decedent, Van Leuven, was the person driving the blue Saturn involved in the accident. Officer Donelson identified the blue Saturn involved in the accident as Van Leuven's vehicle. Moreover, Dr. William Atkinson, the first doctor on the scene, stated he attended to Van Leuven while she was trapped in the driver's seat of her car, which was facing north at the side of the outer southbound lane by a utility pole. Defendant attempts to cast doubt on whether this car was the blue Saturn involved in the accident at issue by pointing out that Dr. Atkinson believed the damage to the front driver's side of Van Leuven's vehicle appeared to be caused by the utility pole by which the car came to a rest, whereas Officer Donelson testified the utility pole did not cause the damage to the blue Saturn. Thus, defendant argues, the only way to reconcile this testimony is to conclude the blue Saturn involved in the accident as described by Officer Donelson and the car in which Dr. Atkinson found Van Leuven were not the same vehicle.

Defendant's argument must fail, though, as it ignores the evidence that both Dr. Atkinson and Officer Donelson described Van Leuven's vehicle as being in the same location, i.e., facing north by a utility pole near the outer most southbound lane. Moreover, Officer Donelson testified that he too initially believed the damage to the front driver's side of the blue Saturn may have been caused by the

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utility pole; however, upon further analysis of the physical evidence, including the paint transfer between the Saturn and Addison's truck, and the fact there was "no paint transfer or any type of damage on the [utility] pole . . . consistent with a collision," as well as witness interviews, Officer Donelson concluded the damage was actually caused by the collision with Addison's truck. Thus, what defendant suggests is contradictory evidence is easily reconcilable given the fact Dr. Atkinson was not testifying as an expert in accident reconstruction. The State presented sufficient evidence on the issue of Van Leuven's identity as the driver of the blue Saturn involved in the accident. Taken in the light most favorable to the State, there was sufficient evidence from which a jury could reasonably determine defendant's action in crossing the center line created a series of collisions which ultimately caused Van Leuven's death. These assignments of error are therefore rejected.

II.

[2] In her second argument, defendant maintains she is entitled to a new trial because the trial court refused to instruct the jury on what defendant terms "the sudden emergency doctrine." Defendant requested that the trial court instruct the jury in accordance with North Carolina Pattern Jury Instruction 310.10, entitled Compulsion, Duress, or Coercion, inserting the term "sudden emergency" in the place of "compulsion," "duress," or "coercion." The pattern instruction provides:

There is evidence in this case tending to show that the defendant acted only because of [compulsion] [duress] [coercion]. The burden of proving [compulsion] [duress] [coercion] is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of [compulsion] [duress] [coercion] is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

N.C.P.I. Crim. 310.10.

Although various civil cases have addressed the issue of sudden emergencies in relation to the reasonableness of a defendant's actions, defendant has failed to cite a single criminal case establishing such an exception specifically to G.S. § 20-146 (making it illegal to

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drive left of the center of a highway). Even conceding the recognition of such an exception to the statute, it is well-established that in order to be entitled to an instruction on sudden emergency, a defendant is required to establish not only the existence of an emergency requiring immediate action to avoid injury, but also that the emergency was not created by negligence on the part of the defendant. *See McDevitt v. Stacy*, 148 N.C. App. 448, 559 S.E.2d 201 (2002). "In other words, a person may lose control of his vehicle responding to a sudden emergency, but a defendant may not assert the sudden emergency doctrine as a defense where the sudden emergency was caused, at least in part, by defendant's negligence in failing to maintain the proper lookout or speed in light of the roadway conditions at the time." *Allen v. Eford*, 123 N.C. App. 701, 703, 474 S.E.2d 141, 143 (1996), *disc. review denied*, 345 N.C. 639, 483 S.E.2d 702 (1997).

In the present case, defendant presented no evidence. The State's evidence tended to show defendant was traveling one car length behind the vehicle in front of her at approximately 35 to 40 miles per hour in damp conditions. Even if the accident was in part due to the negligence of the drivers in front of defendant who stopped suddenly, defendant failed to establish that the accident was not proximately caused, at least in part, by her failure to keep a proper lookout or the fact she was traveling at an unsafe following distance given the wet conditions of the road. Accordingly, she was not entitled to an instruction on sudden emergency.

III.

[3] In her third and final argument, defendant asserts her conviction for failure to timely notify the DMV of a change in address must be vacated because the trial court failed to comply with G.S. § 15A-1022 and 15A-1026. We must agree.

Under G.S. § 15A-1022, a trial court may not accept a guilty plea from a defendant without first addressing the defendant personally and, among other things, informing her of her right to remain silent and her right not to plead guilty; ascertaining whether she understands the nature of the charge to which she is pleading guilty, as well as her maximum possible sentence under the plea; determining whether she was satisfied with her counsel; and determining if the defendant was improperly pressured regarding the plea and that the plea is a product of informed choice. N.C. Gen. Stat. § 15A-1022(a); (b) (2002). Additionally, a trial court may not accept a guilty plea without first determining whether there exists a

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factual basis for the plea, which basis may be demonstrated by such things as a statement of facts by the prosecutor or defense counsel, a written statement by the defendant, or sworn testimony. N.C. Gen. Stat. § 15A-1022(c). A verbatim record of the defendant's plea must be preserved, including "the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses." N.C. Gen. Stat. § 15A-1026 (2002).

In the present case, the transcript reveals that prior to jury selection, the State and defense counsel engaged in an off-the-record bench conference, after which the trial court announced for the record that defendant wished to plead guilty to failure to timely notify the DMV of her address change, and that the plea would be addressed at a later time. Defendant's trial on misdemeanor death by motor vehicle proceeded. Afterwards, upon the jury's verdict, the trial court held discussions on sentencing. The prosecutor asked to be heard on the charge to which defendant "pled guilty right before the trial," and proceeded to discuss appropriate sentences for the charges. The record contains no transcript of the plea nor any indication, oral or written, that the trial court ever personally addressed defendant regarding the issues contained in G.S. § 15A-1022. Nor does the record indicate any evidence or statement of facts presented by the State with respect to the charge, written statement by defendant, testimony regarding the charge, or other factual basis for entry of defendant's plea.

We acknowledge the State's argument, based on this Court's decision in *State v. Hendricks*, 138 N.C. App. 668, 531 S.E.2d 896, (2000), that where a defendant simply alleges technical non-compliance with G.S. § 15A-1022, but fails to show resulting prejudice, vacation of the plea is not required. However, in *Hendricks*, although the record failed to establish that the trial court itself personally addressed defendant as to all statutory factors as required by the statute, the record indicated the trial court did make some of the required inquiries, and further, the transcript of plea between the State and the defendant "covered all the areas omitted by the trial judge." *Id.* at 669-70, 531 S.E.2d at 898. This Court determined any non-compliance with the statute must be viewed in the totality of the circumstances to determine whether it actually affected the defendant's decision to plead or undermined the plea's validity. *Id.* at 670, 531 S.E.2d at 898. In concluding the defendant had shown no prejudice as a result of the non-compliance, this Court relied on the facts that in the transcript of the plea signed by defendant, defendant was questioned as to whether he understood his right to remain silent as well as the nature

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of the charges against him, to which he answered affirmatively; that the defendant was also asked whether the plea was the result of any improper threats or promises, to which he answered no; and that the worksheet attached to the transcript of plea listed the maximum possible punishment for the offenses.

In contrast, in this case, there is no indication in the record of compliance, even in part, with G.S. § 15A-1022 or 15A-1026, nor does the record contain any transcript of plea or indicate any factual basis for the plea from which this Court may evaluate whether it was properly accepted. We believe such an absence constitutes more than mere “technical” non-compliance, and is sufficient to establish prejudice to defendant.

The judgment and sentence in 00-CRS-061749 for defendant’s failure to timely notify the DMV of an address change is hereby vacated and the matter remanded for further proceedings in accordance with G.S. § 15A-1022 and 15A-1026. Defendant’s conviction and sentence for misdemeanor death by motor vehicle in 00-CRS-061748 is undisturbed.

No error in part; vacated and remanded in part.

Judges HUDSON and STEELMAN concur.



REBECCA HARRISON, PLAINTIFF-APPELLANT v. LUCENT TECHNOLOGIES, EMPLOYER-
DEFENDANT, AND LUCENT TECHNOLOGIES DISABILITY BENEFITS, CARRIER-
DEFENDANT, APPELLEES

No. COA02-348

(Filed 18 February 2003)

Workers’ Compensation— not an injury by accident—right to direct medical treatment not acceptance of liability

The Industrial Commission did not err in a workers’ compensation case by denying plaintiff employee compensation for her shoulder injury and psychological problems allegedly stemming from her injury based on its findings and conclusion that plaintiff’s injuries were not caused by an accident, because: (1) the record shows that at the time of plaintiff’s injuries, she was engaged in normal and routine job activities; and (2) even though

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the employer directed medical treatment, it did not accept the claim as compensable and providing medical treatment does not mean acceptance of liability.

Appeal by plaintiff from order entered 29 November 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2003.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff.

Womble, Carlyle, Sandridge & Rice, by Clayton M. Custer and Stan B. Green, for defendants.

WYNN, Judge.

Under the North Carolina Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if caused by an "accident." N.C. Gen. Stat. § 97-2(6) (2001). In this appeal, Rebecca Harrison contends the North Carolina Industrial Commission erred in concluding that her injuries were not compensable under the Workers' Compensation Act because the injuries were not caused by an accident. We, however, find the full Commission's findings of fact support the conclusion that Ms. Harrison's injuries were not caused by a compensable accident; accordingly, we affirm the decision of the full Commission.

The underlying facts tend to show that Ms. Harrison had been an employee of Lucent Technologies, and its predecessor AT&T, since 1969. At the time of her alleged accident, Ms. Harrison worked as a secretary for Dale Posny in the Human Resources Department. Her duties included typing, faxing, making airline reservations, ordering and stocking supplies, and other similar activities.

According to Ms. Harrison, on 21 May 1999, she sat at her cubicle, reached over the side of her chair to pick up a heavy box of manila folders, got up and began carrying the box. After taking a few steps, she felt a twinge in her left shoulder and neck that almost caused her to pass out. One of her co-workers, Wendy Neely, helped Ms. Harrison to the company's medical department for assistance.

Five days later, Ms. Harrison went to her family physician and was examined by a physician assistant, Margie Trent. As a result of the examination, Ms. Trent ordered an MRI of her cervical spine (which revealed narrowing and degenerative changes at C5-6 but no

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evidence of disk herniation or spinal cord compression) and advised her to stay out of work from May 31 until June 7. Thereafter, Lucent Technologies' company doctor, Dr. Wilcockson, examined Ms. Harrison on 1 June 1999 and concluded that she could return to work the next day with restrictions of no lifting, pushing or pulling more than five pounds. Consequently, Ms. Harrison reported to work on 2 June 1999. During a return visit to Dr. Wilcockson, her weight restriction was raised to ten pounds.

Ms. Harrison continued working and did not seek further medical treatment until a 9 August 1999 visit with Dr. Wilcockson. At that time, she informed the doctor that although she had improved, she still had some left shoulder pain. As a result, Dr. Wilcockson continued her restrictions on a permanent basis.

On 11 August 1999, Ms. Harrison returned to her family physician with multiple complaints, including persistent pain in her left shoulder. Ms. Trent, concerned that Ms. Harrison might have rotator cuff syndrome, ordered an x-ray to help determine whether Ms. Harrison should be referred to an orthopedic surgeon.

On 19 August 1999, Ms. Harrison's supervisor, Ms. Posny, instructed Ms. Harrison to help clean out an office by emptying and removing several bound volumes. The binders varied in size with some several inches thick. Ms. Harrison began opening the binders, removing the papers and making several trips down the hall to take the papers to the appropriate containers. On each occasion she chose how much paper to carry and did not know the weights she lifted. By the time the job was complete, her left shoulder was bothering her more, but she did not complain of any problems to Ms. Posny. However, on 23 August 1999, she went to Dr. Wilcockson and complained she had developed soreness in her left shoulder while emptying the binders on 19 August. He referred her to Dr. Gramig, an orthopedic surgeon, who was under contract to render services to Lucent Technologies' employees.

On 26 August, Dr. Gramig examined Ms. Harrison who informed him that she could not lift her arm. According to Ms. Harrison, Dr. Gramig attempted a left shoulder manipulation without anesthesia (which Ms. Harrison claims traumatized her), diagnosed her with adhesive capsulitis of the left shoulder and ordered an MRI of the shoulder. However, because Lucent Technologies denied her claim and Dr. Gramig didn't accept her insurance, Ms. Harrison had to see a different doctor.

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Ms. Harrison returned to her family physician on 21 September 1999 and was referred to Dr. Riggan, another orthopedic surgeon. Dr. Riggan saw her on 27 September 1999 and agreed that she had adhesive capsulitis. He treated her with a procedure where her shoulder was manipulated under anesthesia to break the adhesions. She then underwent aggressive physical therapy.

Up until the spring of 1999, Ms. Harrison and Ms. Posny had a good working relationship. However, after her injury, Ms. Harrison felt that she was being harassed by her employer because of her medical problems. On 3 September 1999, Ms. Posny imposed a fifteen-minute time limit for errands and began to monitor Ms. Harrison closely. If Ms. Harrison was unable to complete her errands within fifteen minutes, she was to notify Ms. Posny of her location. Although Ms. Harrison believes this was harassment, Ms. Posny testified that the rule was imposed because she could not locate Ms. Harrison for three hours during a workday in April. In September 1999, Ms. Harrison received a verbal warning and an unsatisfactory conduct notation in her personnel file. Because of the imposition of the fifteen minute rule and the warning, Ms. Harrison filed two grievances with her union. Ms. Harrison's relationship with Ms. Posny became increasingly strained.

After Ms. Harrison remained out of work pursuant to Dr. Riggan's orders, Lucent Technologies began calling Ms. Harrison on a daily basis to ascertain how she was doing and to determine when she would return to work. Then in December 1999, Lucent Technologies informed Ms. Harrison they were removing her from the payroll although her surgeon had advised her not to work. Thereafter, Ms. Harrison was admitted to the Forsyth Medical psychiatric ward with symptoms of anxiety and depression with suicidal threats. Dr. Williams, a psychiatrist, determined that Ms. Harrison had experienced symptoms of rapid heart-beat, anxiety and panic which had been aggravated by her shoulder injury, associated hospitalization and conflict with her employer to the point that she had developed a post-traumatic stress disorder with associated depression and panic disorder. Ms. Harrison was hospitalized and treated with medication and therapy until 31 December 1999.

Ms. Harrison filed workers' compensation claims for the 21 May and 19 August 1999 incidents. Although Lucent Technologies initially provided medical treatment for each injury, liability was ultimately denied. The full Commission awarded Ms. Harrison compensation for her neck only, and ordered Lucent Technologies to pay all medical

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expenses rendered for the neck injury. Lucent Technologies was also ordered to pay all medical expenses arising from the treatment by Dr. Wilcockson and Dr. Gramig, which Lucent Technologies authorized. However the full Commission denied any compensation for Ms. Harrison's psychological problems and her shoulder injury. Ms. Harrison appeals.

“Under the North Carolina Workers’ Compensation Act, an injury arising out of and in the course of employment is compensable only if caused by an ‘accident’ and the claimant bears the burden of proving an accident has occurred.” N.C. Gen. Stat. § 97-2(6) (2001); *Calderwood v. The Charlotte-Mecklenburg Hospital Authority*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999). “An accident is an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.” *Id.* “The elements of an ‘accident’ are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.” *Adams v. Burlington Industries, Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983).

Ms. Harrison contends the full Commission erred when it concluded Ms. Harrison did not have a compensable injury by accident to her shoulder. “When considering an appeal from the Commission, its findings are binding if there is any competent evidence to support them, regardless of whether there is evidence which would support a contrary finding. Therefore, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission’s findings, and (2) whether those findings justify its conclusions of law.” *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116 (1998).

In this case, the Commission found

13. On 21 May 1999, plaintiff lifted a box of manila envelopes in a normal manner. There was nothing unusual about the weight of the box or the circumstances when she lifted it. She routinely lifted and carried boxes of envelopes as part of her regular job duties of placing office supplies in the supply cabinet.

...

15. On August 19, 1999 when plaintiff emptied the binders, she was performing one of her regular job duties. There was nothing

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unusual or out of the ordinary in the manner that she removed the papers from the binders or carried them to the bins on that occasion. She did not prove that she lifted an unusual or excessive amount of weight on that date. Consequently, she did not sustain a compensable injury to her shoulder on August 19, 1999.

These findings were supported by Ms. Harrison's testimony that her job duties included getting supplies out of the boxes on the floor and putting them in the supply closet, removing papers from binders and placing those papers in the appropriate bin. Ms. Harrison also testified that the other secretaries had similar duties. Ann Webster Whiddon, Lucent Technologies work force relations and staffing manager, testified the job description for a secretary position supporting a third-level manager, Ms. Harrison's position, included things such as organizing offices, cleaning out an office, taking proprietary materials to bins, stocking supply closets and transporting those supplies. Dale Posny testified the box of manila folders which allegedly caused the 21 May 1999 injury contained a hundred letter size manila envelopes and weighed five pounds. These facts constitute competent evidence to support the findings of fact.

Based upon these findings of fact, the Commission concluded:

4. However, a shoulder injury must meet the standards of an injury by accident in order to be compensable. An "accident" must involve more than merely carrying on the usual and customary duties in the usual way, but rather involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences.

5. On May 21, 1999, plaintiff did not sustain a compensable injury by accident to her shoulder arising out of and in the course of her employment with defendant-employer.

6. Plaintiff is not entitled to benefits under the Workers' Compensation Act for her shoulder injury, except for the medical treatment authorized by defendant-employer.

7. On August 19, 1999 plaintiff did not sustain an injury by accident to her left shoulder arising out of and in the course of her employment with defendant-employer. Consequently, plaintiff is not entitled to benefits under the Workers' Compensation Act for her shoulder injury or the subsequent psychiatric problems related to her shoulder injury.

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8. However, because defendant authorized the treatment by Dr. Wilcockson and Dr. Gramig, defendant is liable for payment to those providers.

We hold that the Commission's findings of fact justify its conclusions of law. Indeed, the record shows that at the time of Ms. Harrison's injuries, she was engaged in normal and routine job activities. Accordingly, the circumstances of Ms. Harrison's injury does not meet the criteria of injury by accident.

Nonetheless, Ms. Harrison argues that this Court's holding in *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 540 S.E.2d 785 (2000), mandates that if the employer directs the medical treatment of an employee allegedly injured at work, the employer is estopped from denying liability for a workers' compensation claim arising out of that alleged injury. We disagree.

In *Kanipe*, this Court held "an employer's right to direct medical treatment (including the right to select the treating physician) attaches once the employer accepts the claim as compensable." *Kanipe*, 141 N.C. App. at 624, 540 S.E.2d at 788. What Ms. Harrison would have us do in her case is to invert this holding to conclude that an employer accepts liability once the employer directs medical treatment. We decline to do so because neither the reasoning of *Kanipe* nor the facts of this case support the illogical conclusion that providing medical treatment means acceptance of liability. In this case, Lucent Technologies provided a medical department in its facilities for its employees which Ms. Harrison visited when she felt pain. Moreover, the Commission properly determined that since Lucent Technologies "authorized the treatment by Dr. Wilcockson and Dr. Gramig, [it] is liable for payment to those providers." These actions, however, do not estop Lucent Technologies from denying liability for injuries that the Commission determined were not caused by a compensable accident.

An employee's right to workers' compensation is determined by statute. In this case, the Commission's findings of fact support its conclusion that Ms. Harrison's shoulder injury did not meet the definition of injury as defined by N.C. Gen. Stat. § 97-2(6) (2001) and as interpreted by case law. Therefore, Ms. Harrison was not entitled to workers' compensation benefits. Finally, we have considered plaintiff's other assignments of error and find they are without merit. Accordingly, the award of the full Commission is,

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Affirmed.

Judges BRYANT and GEER concur.

ESTATE OF THOMAS GRAHAM, AND KAY FRANCES FOX TAYLOR, PLAINTIFFS V.
LUCILLE MORRISON, JOHN HALLMAN, AND LADD MORRISON, DEFENDANTS

No. COA02-610

(Filed 18 February 2003)

1. Appeal and Error— appealability—partial summary judgment—deeds voided—substantial right

A partial summary judgment voiding deeds was immediately appealable; denying appellate review would strip defendants of their property without any redress except another lawsuit.

2. Deeds— transfer under power of attorney—consideration—issue of material fact

The trial court erred by granting partial summary judgment for plaintiff and voiding deeds transferred under a power of attorney where the power of attorney did not expressly grant the right to make gifts of real property and the court apparently presumed the deeds to be gifts because no excise tax appeared. There was a genuine issue of material fact as to whether the services performed by defendants for the grantor and his wife before their deaths constitute valuable consideration bargained for by the grantor.

Appeal by defendants from judgment entered 21 February 2002 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 January 2003.

Samuel A. Wilson, III for plaintiffs-appellees.

Lawrence U. Davidson, III for defendants-appellants.

TYSON, Judge

Defendants appeal from a grant of partial summary judgment in favor of the plaintiff. We reverse and remand for trial.

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I. Background

In May 2000, Thomas Graham, a diabetic amputee, was in poor health. Mr. Graham's niece, Lucille Morrison ("Lucille"), helped care for Mr. Graham and often stayed with him during the night. Lucille also cared for Mr. Graham's wife, Melinda, prior to her death in 1991.

On 31 May 2000, Mr. Graham granted Lucille a durable and general power of attorney. Lucille signed Mr. Graham's name to the power of attorney at his request. The power of attorney grants Lucille broad powers and discretion in Mr. Graham's affairs but does not expressly contain the authority to make gifts of real property. The power of attorney was notarized and recorded in the Mecklenburg County Register of Deeds on 1 June 2000.

On 26 October 2000, Lucille, as attorney-in-fact for Mr. Graham, executed a general warranty deed of a portion of Mr. Graham's real property to herself as Grantee. This deed was recorded on 31 October 2000. After 26 October 2000, Lucille continued to provide care and assistance to Mr. Graham.

Around 1 June 2001, Plaintiff Kay Frances Taylor, ("Kay"), moved into Mr. Graham's house, known as "Coronet Way", in Charlotte. Kay was assumed to be the illegitimate daughter of Mr. Graham, but their relationship had not been close. Kay found Mr. Graham through the help of a relative.

After moving into the house, Kay limited Mr. Graham's visitors. Within the next week, Kay admitted Mr. Graham to the hospital under an assumed name.

On 5 June 2001, Lucille, as attorney-in-fact for Mr. Graham executed a general warranty deed on Coronet Way to her son, Ladd Morrison, ("Ladd"). On that date, Lucille, as attorney-in-fact, also conveyed other property of Mr. Graham to John Hallman for \$3,000.00. According to Lucille, this money was used to pay her attorney to defend this action. Lucille contends that Mr. Graham asked her to make the conveyances.

On 15 June 2001, an application and order extending time to file a complaint was filed in the name of "Thomas Graham versus Lucille Morrison, John Hallman, and Ladd Morrison" alleging fraud in creating a power of attorney and making gifts with such fraudulent power. The complaint in this action was filed and verified by Kay, based upon

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a power of attorney naming Kay as attorney in fact for Mr. Graham. A power of attorney executed on 20 June 2001 named Kay as attorney in fact. It was marked by a crudely formed "X" on the signature line. The power of attorney to Kay did not revoke the power of attorney previously granted to Lucille.

Defendants attempted but were unable to take the deposition of Mr. Graham on 18 July 2001 and 19 July 2001 due to Mr. Graham's illness and his attorney's schedule. Mr. Graham died on 7 August 2001. Kay entered his will into probate that day. Plaintiff amended its complaint on 10 August 2001 to substitute the estate of Thomas Graham and herself as party plaintiffs.

Plaintiff filed a motion for partial summary judgment on 9 November 2001. Defendants filed notice of intent to offer hearsay evidence on 30 November 2001, and filed a motion for summary judgment on 7 December 2001. Partial summary judgment was granted for plaintiff voiding the deeds on the basis that the power of attorney did not specifically authorize gifts. Plaintiff's motion to strike the hearsay evidence was granted. Defendants' summary judgment motion was denied, and plaintiff's motion for summary judgment on her claim of conversion was denied. Defendants appeal, and plaintiff asserts a cross-assignment of error.

II. Issues

The defendants' issues are (1) whether the deeds to Lucille Morrison and Ladd Morrison from Thomas Graham, executed by Lucille Morrison as attorney-in-fact, are void because the power of attorney contained no authority to gift, (2) whether Lucille's and Ladd's actions caring for Thomas and his wife constitute adequate consideration to support the transfers, and (3) whether the trial court properly excluded hearsay evidence offered by defendants. Plaintiff assigns error to the trial court's denial of summary judgment on the \$3,000 conversion claim.

III. Appellate Rule Violations

After defendants filed their original brief, plaintiff moved to dismiss "Plaintiff's Appeal" and impose sanctions pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure for failure to comply with the required format and contents of an appellate brief as required by N.C. R. App. P. 28(b) (2001). We perceive plaintiff moved to dismiss "Defendants' Appeal" for those reasons.

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Defendants filed a replacement brief which sufficiently complies with the Rules of Appellate Procedure. We decline to dismiss the appeal, but note the poor quality of defendants' brief with its multitude of mistakes that could have easily been corrected through a mere proofread prior to filing. N.C. R. App. P. appendix B, E (2001).

IV. Interlocutory Appeals

[1] Defendants appeal from a grant of partial summary judgment to plaintiff voiding their deeds. "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) (citations omitted). Interlocutory orders are appealable where (1) the denial of an appeal would affect a substantial right, N.C.G.S. § 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. R. Civ. P. 54(b) (2001).

The summary judgment order affects a substantial right because it declares defendants' deeds void. To deny appellate review would allow the judgment to strip defendants of their property without any possible redress except another lawsuit. "[T]he right to avoid the possibility of two trials on the same issues can be such a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982).

IV. Standard of Review

Summary judgment is appropriate where no genuine issues of material fact exist. N.C. R. Civ. P. 56(c) (2001). We view the evidence in the light most favorable to defendants, the nonmoving parties. *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986).

V. Voided Deeds

[2] Defendants argue that the trial court erred in voiding the deeds executed by Lucille, as attorney-in-fact, for Mr. Graham to Lucille and Ladd. The trial court based its decision on N.C.G.S. § 32A-14.1(b) which states "unless gifts are expressly authorized by the power of attorney, a power described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or

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the estate, creditors, or the creditors of the estate of the attorney-in-fact.” This Court previously reviewed this statute and affirmed summary judgment against an attorney-in-fact who transferred her principal’s property to herself. *See Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 487 S.E.2d 166 (1997).

In *Honeycutt*, a mother granted her daughter a durable and general power of attorney. *Id.* at 817, 487 S.E.2d at 166. The mother later opened a trust account in her name at the local bank, naming her son as the sole beneficiary with right of survivorship. *Id.* The daughter and attorney-in-fact for the mother executed a new signature card naming herself as the sole beneficiary of the account. *Id.*, 487 S.E.2d at 166-67. After the mother died, the son closed the account and received the balance. *Id.*, 487 S.E.2d at 167. The daughter filed suit against the bank for breach of contract, negligence, and unfair business practice. *Id.* at 817-18, 487 S.E.2d at 167. The bank joined the brother as a third-party defendant. *Id.* at 818, 487 S.E.2d at 167. The brother moved to dismiss his sister’s claim against the bank, and the trial court granted summary judgment in favor of the bank and the brother, holding that her power of attorney did not expressly allow her to make gifts. *Id.*

This Court relied upon the analysis in *Whitford v. Gaskill*, 345 N.C. 475, 480 S.E.2d 690 (1997). *Id.*

In *Whitford v. Gaskill*, 345 N.C. 475, [478], 480 S.E.2d 690, 692 (1997), our Supreme Court upheld this Court’s determination that “an attorney-in-fact acting pursuant to a broad general power of attorney lacks the authority to make a gift of the principal’s real property unless that power is expressly conferred” In its rationale, the Court noted that almost every jurisdiction which had considered the issue has held that “[a] general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it *without a present consideration inuring to the principal.*” *Id.* at [477], 480 S.E.2d at 691. The Court further noted that the underlying premise behind the majority rule is that “an attorney-in-fact is presumed to act in the best interests of the principal” and because the power to make a gift of the principal’s property is potentially adverse to the principal, “such power will not be lightly inferred from broad grants

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of power contained in a general power of attorney.” *Id.* at [478], 480 S.E.2d at 692.

Honeycutt, 126 N.C. App. at 818-19, 487 S.E.2d at 167 (emphasis supplied).

These deeds are void if the conveyances are determined to be gifts. Lucille’s broad power of attorney did not expressly grant her the right to make gifts of real property on behalf of Mr. Graham.

VI. Acts of Service As Consideration

Genuine issues of material fact exist whether the conveyances were gifts or were transferred for “valuable consideration” as recited in the deeds. We reverse the trial court’s grant of summary judgment. The trial court did not reach these issues during the summary judgment hearing. The court apparently presumed the deeds to be gifts because no excise tax appeared on either deed. Omission of excise tax does not *per se* transform a deed given for valuable consideration into a deed of gift. Recitation of valuable consideration within the deed and recording create a rebuttable presumption that the conveyance was valid. *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 463, 490 S.E.2d 593, 598 (1997), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998) (quoting *Pelaez v. Pelaez*, 16 N.C. App. 604, 606 192 S.E.2d 651, 652 (1972)) (stating “[o]rdinarily, the consideration recited in a deed is presumed to be correct.”); *Lance v. Cogdill*, 236 N.C. 134, 136, 71 S.E.2d 918, 920 (1952) (recording of a deed raises a presumption that the deed was duly executed). There is substantial evidence in the depositions of Lucille and Ladd Morrison of services performed for Mr. Graham. Testimony shows that Lucille and Ladd helped in the restoration of Mr. Graham’s home and cared for him and his wife before their deaths. The deeds do not purport to be deeds of gift but recite the property was conveyed in exchange for “valuable consideration.”

Past consideration or moral obligation is not adequate consideration to support a contract. *See Jones v. Winstead*, 186 N.C. 536, 540, 120 S.E. 89, 90-91 (1923). Services performed by one family member for another, within the unity of the family, are presumptively “rendered in obedience to a moral obligation and without expectation of compensation.” *Jones v. Saunders*, 254 N.C. 644, 649, 119 S.E.2d 789, 793 (citing *Allen v. Seay*, 248 N.C. 321, 323, 103 S.E.2d 332, 333). “[T]his principle of law does not prevent a parent from compensating a child for such services, and does not render consideration for a compensating conveyance inadequate.” *Id.*

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A genuine issue of material fact remains to determine whether Lucille's services rendered after the conveyance of real property to her on 26 October 2000 constitutes "valuable consideration" bargained for by Mr. Graham which supports a purchased conveyance and not a gift. A similar issue exists concerning Ladd's services to Mr. Graham. These questions of fact are not appropriate for determination upon a motion for summary judgment.

VII. Admissibility of Hearsay Evidence

Defendants contend that statements of the decedent made in the presence of Hattie Kennedy and W.B. Fuller are admissible as exceptions to the hearsay rule pursuant to either N.C. R. Evid. 804(b)(3) or 804(b)(5). In light of our reversal of the trial court's partial summary judgment order and remand for trial, we need not address the admissibility of the affidavits of alleged hearsay at the summary judgment hearing.

VIII. Plaintiff's Cross-Assignment of Error

Plaintiff argues that the trial judge erred in denying summary judgment on her conversion claim. We decline to address this issue as it is interlocutory.

IX. Conclusion

We reverse the trial court's order voiding the deeds as gifts and remand for a factual determination of whether the deeds were gifts or conveyances supported by "valuable consideration."

REVERSED AND REMANDED.

Judges TIMMONS-GOODSON and ELMORE concur.

STATE v. RADFORD

[156 N.C. App. 161 (2003)]

STATE OF NORTH CAROLINA v. SHAWN ANTHONY RADFORD, DEFENDANT

No. COA01-1579

(Filed 18 February 2003)

**Sentencing— aggravating factors—sufficiency of evidence—
more than assertion required**

A defendant was entitled to a new sentencing hearing for sexual activity by a substitute parent and indecent liberties where the court found the nonstatutory aggravating factor that the victim's psychological injuries were debilitating to an extent that she required counseling based on the prosecutor informing the court, after conferring with the victim's mother, that the victim was currently receiving counseling. The courts cannot find an aggravating factor based only upon an assertion by the prosecutor.

Appeal by defendant from judgment entered 13 August 2001 by Judge J. Gentry Caudill in Burke County Superior Court. Heard in the Court of Appeals 19 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Adrian M. Lapas, for defendant-appellant.

HUDSON, Judge.

Defendant Shawn Anthony Radford pled guilty to two counts of sexual activity by a substitute parent and two counts of taking indecent liberties with a child. At the sentencing hearing, the trial court found that the aggravating circumstances outweighed those in mitigation and sentenced defendant in the aggravated range for his class and level of offenses. Defendant appeals his sentence. For the reasons set forth below, we reverse the decision of the trial court and remand for resentencing.

On August 13, 2001, defendant entered into a plea agreement, pursuant to which he tendered pleas of guilty to two counts of sexual activity by a substitute parent, in violation of N.C. Gen. Stat. § 14-27.7, and two counts of taking indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1. Sentencing was left to the discretion of the court.

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At the sentencing hearing, the prosecutor summarized the factual basis for defendant's guilty plea as follows: In the fall of 1999, the victim was sexually abused by her natural father in South Carolina. The father was charged with and later pled guilty to sexual contact with a minor in violation of South Carolina law. Because of the resulting disruption to the family and the psychological and emotional stress caused by the abuse, the victim's mother and stepfather decided that the victim should live with relatives in North Carolina. The victim then moved in with her aunt, Grace King, and King's long-time companion, the defendant, in Morganton, North Carolina. The victim's mother and stepfather planned to remain in South Carolina until they could wind up their affairs and join their daughter in North Carolina, which they ultimately did.

Defendant began a pattern of perpetrating sexual acts on the victim, who was then thirteen years old. On the first such occasion, defendant and the girl were listening to music and drinking alcohol that defendant had provided. Defendant picked up the victim, carried her into the bedroom, and had vaginal intercourse. The victim repeatedly told defendant to stop, that she did not think she was ready for this, and that she did not want to participate in that kind of activity. Defendant ignored her protests and continued to have intercourse with her for 15 to 20 minutes. When defendant was finished, the victim left the bedroom and went into the living room, while defendant stayed in the bedroom.

This type of encounter occurred repeatedly. As a result of increasing seduction by defendant, the victim became convinced that she felt affection for him. She began sneaking out of the house to be with him, and they engaged in additional acts of intercourse, continuing until November 23, 2000, when the victim was discovered missing from her bedroom. The victim's stepfather, who by this time had moved to North Carolina with the mother, found the victim hiding in a bathroom at defendant's house. Defendant had denied that she was there. The victim then told her mother and stepfather about the first incident with defendant and the subsequent events.

Although defendant initially denied that any inappropriate behavior had occurred, he later admitted to the victim's mother and stepfather that he had engaged in intercourse with the victim. A medical examination was conducted, which revealed scarring consistent with healing tears that corroborated the victim's story.

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Also at the sentencing hearing, the State argued that the seriousness of the offenses was aggravated because defendant was aware of what the victim's father had done to her and knew about the resulting emotional and psychological trauma. According to the prosecutor, defendant and Grace King had held themselves out as able to provide a safe haven to which the victim could escape what had occurred in South Carolina, but, instead of providing such a place, defendant targeted her as a sexual victim again. The victim acknowledged at the hearing that the incidents with her biological father had not involved intercourse and that the first time she had had intercourse was with defendant. She did not add anything further, nor did her mother or stepfather.

The State then argued that defendant's conduct—holding himself out as providing a safe haven but instead further victimizing a child who was already traumatized—should constitute a nonstatutory aggravating factor. The court asked whether the victim had undergone any psychological testing. The prosecutor conferred with the victim's mother and then informed the court that the victim was in counseling but that he had not seen any testing or reports. The prosecutor also informed the court, per the wishes of the victim's mother, that defendant's conduct had virtually destroyed the relationship between Grace King, her sister, and her.

Defendant's attorney informed the court that defendant had a long history of alcohol problems, that he had been in treatment for them, and that he had worked for 17 years as a carpet installer. The attorney presented the court with a letter from defendant's employer and a letter from defendant's landlord attesting to defendant's character. He then submitted as statutory mitigating factors defendant's longtime problems with alcohol, his acknowledgment of wrongdoing and acceptance of responsibility, and his positive employment history. The court found these as mitigating factors.

As nonstatutory aggravating factors, the court found that although there was "not evidence before the Court as to whether or not the condition is permanent, the Court does find that psychological injury suffered by the victim as a result of the Defendant's conduct is debilitating and has required psychological counseling." The court also found that defendant's conduct devastated the support group that the victim should have been able to turn to and that his conduct would affect her ability to recover successfully.

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The court then concluded that the aggravating factors outweighed the mitigating factors. Accordingly, the court sentenced defendant in the aggravated range on each count: 36 to 53 months on both counts of sexual activity by a substitute parent and 24 to 29 months on both counts of indecent liberties with a child, to run consecutively. Defendant appeals his sentence.

By his first and only assignment of error, defendant contends that the State presented insufficient evidence to support the trial court's finding that the victim suffered debilitating psychological injuries. In defendant's view, the prosecutor's statement, standing alone, is not sufficient to support the court's finding of this aggravating factor. We agree.

Under the Structured Sentencing Act, the trial court must impose a sentence within the statutorily set presumptive range unless it determines that aggravating or mitigating factors warrant a greater or lesser sentence. N.C. Gen. Stat. § 15A-1340.16(a) (2001). The trial court is required to consider evidence of these aggravating or mitigating factors, but whether to depart from the presumptive range is within the trial court's discretion. *Id.* The State bears the burden of proving aggravating factors by a preponderance of the evidence. *State v. Kemp*, 152 N.C. App. 231, 240, 569 S.E.2d 717, 722, *disc. review denied*, 356 N.C. 441, 573 S.E.2d 158 (2002). Where the State presents insufficient evidence to support an aggravating factor, the defendant is entitled to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983).

It is well established that trial courts cannot find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists. In *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984),¹ for example, the trial court found as an aggravating factor that the defendant's conduct caused severe mental injury to the victim. The only evidence offered by the State in support was a statement by the district attorney that he had been told by the victim's husband that the victim had entered the hospital after testifying at trial, that she had been heavily sedated, and that she was resting at home. *Id.* at 250, 321 S.E.2d at 863. The husband did not testify, nor

1. Although *Brown*, and other cases cited in this opinion, were decided under the predecessor to the Structured Sentencing Act, our analysis is not affected. Under both the Structured Sentencing Act and the Fair Sentencing Act, the State is required to prove aggravating factors by a preponderance of the evidence. See N.C. Gen. Stat. § 15A-1340.16(a) (2001) (Structured Sentencing Act); N.C. Gen. Stat. § 15A-1340.4(a) (repealed 1995) (Fair Sentencing Act).

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did the State offer any medical testimony or reports. *Id.* “Since there was no evidence to support a finding that defendant caused [the victim’s] hospitalization during the trial other than the prosecutor’s reiteration of [the husband’s] statement that she was confined to bed and heavily sedated,” the court held that the trial judge erred in finding the aggravating factor. *Id.*

Similarly in *State v. Jones*, 104 N.C. App. 251, 409 S.E.2d 322 (1991), the trial court found as an aggravating factor that the defendant inflicted physical injury on the victim that caused great monetary damage. Again, however, the evidence concerning the victim’s medical bills and lack of insurance was placed before the court “solely by the oral representation of the prosecuting attorney.” *Id.* at 256, 409 S.E.2d at 325. No bills or records were submitted. The victim did not testify nor did the defendant stipulate to the amounts or existence of the medical bills. Accordingly, the court held that the State presented insufficient evidence to support the aggravating factor and awarded the defendant a new sentencing hearing. *Id.*; see also *State v. Canady*, 330 N.C. 398, 399-400, 410 S.E.2d 875, 876-77 (1991) (new sentencing hearing where only evidence of defendant’s prior convictions, an aggravating factor, was prosecutor’s statement to that effect); *State v. Thompson*, 309 N.C. 421, 424-25, 307 S.E.2d 156, 159 (1983) (“We also agree . . . that the prosecuting attorney’s statement concerning a prior conviction . . . constituted insufficient evidence to support a finding of that prior conviction”). Cf. *State v. Shea*, 80 N.C. App. 705, 707, 343 S.E.2d 437, 439 (where defendant made the opposite argument—i.e., that statements made by the prosecutor established mitigating factors, the court held that “[t]hese statements . . . were not competent evidence, and the trial court, therefore, did not err in failing to find these mitigating factors”), *cert. denied*, 317 N.C. 713, 347 S.E.2d 452 (1986); *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986) (“absent a stipulation by the prosecution, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence [that] would support a finding of nonstatutory mitigating factors”).

Here, the trial court concluded, in essence, that the victim was psychologically injured by defendant, that the injury was debilitating, and that, as a result of defendant’s conduct, the victim was in ongoing psychological counseling. These findings were based on the court asking the prosecutor whether the State had “any evidence of any psychological testing that has been done as to the young woman involved.” After conferring with the victim’s mother, the prosecutor

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informed the court that the victim was “currently engaged with counseling with Burke Family Resources, your Honor. But I have not seen any of the testing or summary reports on that.” There was no other evidence of the victim’s symptoms or of the nature or time frame of the counseling.

As in *Brown* and *Jones*, the prosecutor here tendered no evidence about the victim’s psychological injuries other than his own statement. He offered no reports, no bills, no forms. The victim did not testify, nor did her mother; their only participation came when the prosecutor conferred with the victim’s mother before informing the court about the counseling. Defendant did not stipulate to the statement. See *Swimm*, 316 N.C. at 32, 340 S.E.2d at 71 (“Such statements may, of course, constitute adequate evidence of the existence of aggravating or mitigating factors if the opposing party so stipulates.”). Further, even though defendant did not contest the information, “[w]e do not feel that a defendant’s silence while the prosecuting attorney makes a statement should support an inference that the defendant consented to the statement.” *Canady*, 330 N.C. at 400, 410 S.E.2d at 877.

And, even if we were to consider the prosecutor’s declaration as evidence that the victim’s psychological injuries were debilitating to an extent that required counseling, the prosecutor made no statement and presented no evidence to the effect that defendant’s conduct resulted in the need for the ongoing psychological counseling. Certainly such a correlation is logical, but the record provides no basis for such a finding. As the cases cited above reflect, the evidentiary link must consist of more than a bald assertion by the prosecutor. Because we hold that the record does not adequately support the nonstatutory aggravating circumstance found by the trial court here, defendant is entitled to a new sentencing hearing. *Ahearn*, 307 N.C. at 602, 300 S.E.2d at 701.

Remanded for resentencing.

Judges TIMMONS-GOODSON and CAMPBELL concur.

Judge Campbell concurred prior to 1/1/03.

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[156 N.C. App. 167 (2003)]

STATE OF NORTH CAROLINA v. SEDRIC BETHEA

No. COA02-248

(Filed 18 February 2003)

1. Appeal and Error— preservation of issues—motion in limine—failure to object at trial

Although defendant contends the trial court erred in a first-degree kidnapping, first-degree rape, robbery with a dangerous weapon, and second-degree kidnapping case by overruling defendant's pretrial motion in limine to exclude a witness's testimony regarding an October 1999 incident involving defendant and the witness's then-boyfriend, this assignment of error is dismissed because: (1) defendant failed to preserve the question for appellate review by failing to object when the testimony was offered at trial; and (2) a motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if defendant fails to further object to that evidence at the time it is offered at trial.

2. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon even though defendant joined with others in the commission of the crime and the theory of acting in concert was not submitted to the jury, because there was substantial evidence to show that one victim's money was taken by defendant with the use or threatened use of a firearm whereby the victim's life was endangered or threatened and that defendant personally committed each element of the offense.

Appeal by defendant from judgments entered 6 April 2001 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 8 January 2003.

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

John T. Hall for defendant-appellant.

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MARTIN, Judge.

Defendant was charged with the first degree kidnapping and first degree rape of Ashley H., and robbery with a dangerous weapon and second degree kidnapping of Joslyn B. A jury found defendant guilty as charged. Defendant appeals from judgments entered upon these convictions.

The evidence presented at trial tended to show that defendant and his brother, Lamont Bethea, and Ellis Stokes went to Brad Lane's mobile home on 6 May 2000. They were armed with a rifle and handgun. A group of people, including Ashley H. and Joslyn B., were sitting in the living room of the mobile home drinking beer and smoking marijuana. The men told everyone to get on the floor, and demanded to talk to Lane, saying they wanted some cocaine. Upon finding that Lane was not there and that no one else there had cocaine, defendant and his brother told everyone to empty their pockets onto the table in the middle of the room. The group complied, including Joslyn B., who removed about \$110 from her pocket and placed it on the table. Defendant and his brother took the money from the table. One of the group said he knew where the cocaine was kept and he and defendant's brother went to the bedroom to look for it. Their search turned up no cocaine and they returned to the living room. Defendant, Lamont Bethea, and Stokes continued to demand information about where they could get cocaine and began physically abusing some of the males present.

Ashley H. testified that she heard defendant whispering to Stokes about her, then defendant began to touch her breasts and genital area with his hands or the gun. Defendant took Ashley H. to the bathroom, kissed and touched her, and asked her to perform fellatio, which she refused. His brother then entered the bathroom, defendant left, and the brother asked her to perform fellatio, which she also refused. Defendant re-entered the bathroom and his brother returned to the living room. Defendant told Ashley H. to get on the floor, she refused, and he pushed her down. At that point, there was commotion in the living room and defendant ran back into the living room and Ashley H. followed. Defendant then took Ashley H. into the backyard, where defendant's brother, then defendant, had sexual intercourse with her. Ashley H. testified that she did not consent to intercourse with either one and that each one was holding the gun as he raped her, thus she did not struggle other than to say "no." At some point, after they had re-entered the mobile home, Stokes took Ashley H. back outside to

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ask her where the cocaine was. A car pulled up and Stokes, defendant, and his brother fled.

Ashley H. soon left the scene in her car and stopped a police officer to tell him about the robbery. She then went to her grandmother's house, told her she had been raped, and they went to Wake Medical Center. Ashley H.'s grandmother testified that although Ashley did not cry, she looked like she was "in shock." The State offered evidence tending to show that the DNA of sperm found in vaginal swabs taken from Ashley H. after the incident matched that of defendant.

Ashley H. testified that she had seen both defendant and his brother before 6 May 2000 when she had been present at the mobile home and they had visited Lane. She stated that she heard their names at that point, but did not know which was Sedric and which Lamont. After the events of 6 May 2000, she learned the name of defendant and was able to identify him at trial.

Ellis Stokes testified for the State that he, Lamont Bethea, and defendant had planned to rob drugs from a person named Gillis, who also lived at the mobile home occupied by Brad Lane, and that he had provided the guns used in the robbery. Stokes testified that defendant had told him Ashley H. had performed oral sex on him, but denied having intercourse with her. After learning of the results of the DNA testing, Stokes agreed to cooperate with law enforcement. Wake County Sheriff's Detective E. W. Woodlief testified that after having been warned of his rights, defendant gave a statement in which he admitted that he had sexual intercourse with Ashley H. but asserted it was consensual and in exchange for cocaine.

Joslyn B. testified that she had seen defendant around Knightdale before 6 May 2000. Joslyn B. testified that in October 1999, she and her boyfriend were in his car when her boyfriend stopped to sell drugs to defendant, who was with some others on bicycles. While her boyfriend was showing the drugs to defendant, she heard defendant say, "bounce," which means "to leave." She looked up and defendant was pointing a gun at her boyfriend's head. Her boyfriend tried to get out of the car, but she held him back, saying she wanted to leave. Her boyfriend then drove around trying to find and chase defendant and his friends. When she asked who defendant was, her boyfriend told her, "Sedric Bethea." She was thus able to identify defendant as one of the three who entered the mobile home and robbed her on 6 May 2000.

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Defendant offered evidence through the testimony of his mother tending to show that he and Ashley H. had a brief dating relationship prior to 6 May 2000. Defendant's mother testified that Ashley H. had paged Sedric, talked with him on the phone, and that she had seen Ashley H. in her yard when she came to pick up defendant in her car. Another witness, Owen Ryles, testified that he had observed defendant and his brother in the company of Ashley H. and Joslyn B. on two or three occasions prior to the events giving rise to these charges.

On appeal, defendant assigns error to (1) the trial court's ruling overruling his motion to exclude evidence regarding the October 1999 incident involving defendant and Joslyn B.'s then-boyfriend and (2) the trial court's denial of his motion to dismiss the charge of robbery with a dangerous weapon on the grounds that the evidence was insufficient to support the charge. We find no error in defendant's trial.

[1] By his first two assignments of error, defendant argues the trial court erred by overruling his pre-trial motion *in limine* to exclude Joslyn B.'s testimony concerning the October 1999 incident involving defendant and her then-boyfriend. Defendant contended in the pre-trial motion and on appeal that the testimony should have been excluded as violative of G.S. § 8C-1, Rules 403 and 404(b). However, defendant has failed to preserve the question for appellate review by failing to object when the testimony was offered at trial. Our courts have "consistently held that '[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial.'" *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (quoting *State v. Bonnett*, 348 N.C. 417, 437, 502 S.E.2d 563, 576 (1998)). These assignments of error are overruled.

[2] By his remaining assignment of error, defendant contends the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon at the close of all the evidence. He argues that the theory of acting in concert was not submitted to the jury and that the State failed to show that it was defendant who took Joslyn B.'s money from the table. Therefore, defendant contends, the evidence was insufficient to show a taking, an essential element of the offense of robbery with a dangerous weapon.

In ruling on a motion to dismiss, the trial court must determine whether the State has presented substantial evidence on each ele-

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ment of the offense with which the defendant is charged and that defendant is the perpetrator. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). Substantial evidence is “relevant evidence which a reasonable mind could accept as adequate to support a conclusion.” *Id.* The evidence must be evaluated in the light most favorable to the State, but evidence which raises only a conjecture or suspicion of guilt is insufficient to survive a motion to dismiss. *Id.*

It is true, as argued by defendant, that this Court has held that where a defendant joins with others in the commission of a crime, and the trial court fails to submit an instruction to the jury that the defendant may be guilty if found to have been acting in concert with others, the defendant’s conviction of the crime may be upheld only if there is substantial evidence that the defendant personally committed each element of the offense. *State v. Cunningham*, 140 N.C. App. 315, 536 S.E.2d 341 (2000), *review dismissed*, 353 N.C. 385, 547 S.E.2d 24 (2001); *State v. McCoy*, 79 N.C. App. 273, 339 S.E.2d 419 (1986); *State v. Helton*, 79 N.C. App. 566, 339 S.E.2d 814 (1986).

G.S. § 14-87(a) makes it a Class D felony for:

Any person . . . , having in possession or with the use or threatened use of any firearms . . . , whereby the life of a person is endangered or threatened, [to] unlawfully take[] . . . personal property from another.

N.C. Gen. Stat. § 14-87(a) (2002). For the purposes of robbery, a “taking” occurs when the thief removes property from the victim’s possession. *State v. Barnes*, 345 N.C. 146, 149-50, 478 S.E.2d 188, 191 (1996) (citing *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986)).

In the present case, Joslyn B. testified that defendant and his brother burst into the house brandishing firearms, that they both demanded that the occupants give up their money and property and place it onto a table, and that she put her money onto the table in compliance with their demands. At that point, there was substantial evidence that defendant had personally removed, or “taken” the money from her possession with the use or threatened use of a firearm. Moreover, when Ashley H. was questioned with respect to who had taken the money and property from the table, she answered: “Both of them . . . Lamont and Sedric.” Thus, we hold there was substantial evidence to show that Joslyn B.’s money was taken by defendant with the use or threatened use of a firearm whereby Joslyn B.’s

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life was endangered or threatened, and that defendant personally committed each element of the offense. The motion to dismiss the charge of robbery with a dangerous weapon was properly denied.

No error.

Judges HUDSON and STEELMAN concur.



STATE OF NORTH CAROLINA v. CHRISTOPHER CORNELIUS TAYLOR, DEFENDANT

No. COA02-440

(Filed 18 February 2003)

1. Sentencing— habitual felon—multiple instances—only one indictment required

The State may choose to use multiple habitual felon indictments, but only a single indictment is required and presenting multiple indictments (twenty in this case) may lead to handling those indictments as though they represent a separate crime.

2. Sentencing— habitual felon—separate sentencing on status—error

Sentences based only on attaining habitual felon status were vacated; one who acquires habitual felon status subjects himself only to having the sentences of his current convictions enhanced. The court has subject matter jurisdiction to sentence a defendant only upon his convictions and not upon his acquired status.

3. Sentencing— habitual felon—judgment on status alone—not clerical error

The entry of judgments for being an habitual felon could not be construed as clerical error where the error appeared on the judgment and the court's statements explicitly indicate the intent to enter judgments and sentences on the status of being an habitual felon.

Appeal by defendant from judgment entered 22 October 2001 by Judge J.B. Allen, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 28 January 2003.

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Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Richard E. Jester for the defendant-appellant.

WYNN, Judge.

In this appeal, we are constrained to hold under North Carolina law, the trial court erred by entering three judgments on habitual felony status, and sentencing defendant consecutively upon that status alone. *See State v. Patton*, 342 N.C. 633, 466 S.E.2d 708 (1996). Accordingly, we vacate the judgments entered by the trial court purporting to sentence defendant on obtaining the status of habitual felon.

The underlying facts on appeal show that on 23 March 2001, defendant pled guilty to ten counts of obtaining property by false pretenses, six counts of felonious breaking and entering, six counts of larceny after breaking and entering, three counts of felonious possession of stolen goods and six counts of misdemeanor possession of stolen goods (hereinafter referred to as defendant's "substantive convictions"). Additionally, the State *indicted defendant on twenty counts of being an habitual felon* to which he also pled guilty.

Following his pleas, the trial judge conducted a sentencing hearing on 22 October 2001 and entered the following judgments:

First Judgment: 01CRS2723, Judgment and Commitment on "Habitual Felon" described as a Class C felony. Sentence of 151 months to a maximum term of 191.

Second Judgment: 01CRS2724, Judgment and Commitment on "Habitual Felon" described as a Class C felony. Sentence of 151 months to a maximum term of 191, to begin at the expiration of the sentence imposed in 01CRS2723.

Third Judgment: 01CRS2725, Judgment and Commitment on "Habitual Felon" described as a Class C felony. Sentence of 151 months to a maximum term of 191, to begin at the expiration of the sentence imposed in 01CRS2724.

Fourth Judgment: 01CRS002726, Judgment and Commitment consolidating the ten counts of false pretense, six counts of felonious breaking and entering, six counts of larceny, three counts of felonious possession of stolen goods, six counts of misdemeanor possession of stolen goods, *and eighteen counts of*

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habitual felony including 01CRS0025. As to each of the felonies listed under this judgment, the trial judge indicated that the punishment class was enhanced to Class C as provided for under our habitual felony statute. Sentence of 151 months to a maximum term of 191, to begin at the expiration of the sentence imposed in 01CRS2725.

Prior to being sentenced, defendant informed the court that he was not on probation when these current crimes occurred. The trial court disregarded defendant's statement and accepted the State's contention that defendant was on probation at the time of these crimes. However, on 24 October 2001, the State reported to the trial court that it had "mistakenly asserted that defendant was on probation at the time he committed the instant offenses." Accordingly, the trial judge reconsidered defendant's sentence and apparently amended the judgment with case number 01CRS2726 to be re-designated as 01CRS2725 with the sentence in the amended judgment to begin at the expiration of the sentence imposed in 01CRS2524. The intent as stated by the trial judge was to amend defendant's judgments from four to three consecutive sentences. Defendant appeals.

[1] Initially, we point out the imprudence of indicting a defendant upon separate habitual felon indictments. In this case, the State indicted defendant in twenty separate habitual felony indictments, each setting forth the same three prior offenses. In 1996, our Supreme Court held that "a separate habitual felon indictment is not required for each substantive felony indictment." *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709 (1996) (rejecting the reasoning of the Court of Appeals that a one to one correspondence between substantive felony indictments and habitual felon indictments was required). One of the purposes of the habitual felon indictment is "to provide notice to a defendant that he is being prosecuted for his substantive felony as a recidivist." 342 N.C. at 636, 466 S.E.2d at 710. "A single habitual felon indictment in compliance with § 14-7.3 provides adequate notice of the State's intention to prosecute a defendant as a recidivist, regardless of the number of substantive felonies for which the defendant is being tried at that time. The statute and our case law require nothing further." *Id.* Thus, while the State may choose to use multiple habitual felon indictments, our Supreme Court only requires the use of a single indictment for all substantive felonies.

Indeed, the apparent wisdom of the Supreme Court's reasoning in *Patton* is borne out by the error committed in this case. Here, by

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presenting twenty indictments to the trial court, the resulting error of entering judgment only on the habitual felon status ostensibly arose out of the mistaken handling of the individual indictments as though each represented a separate crime. However, it is well-recognized that,

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence.

State v. Thomas, 82 N.C. App. 682, 683, 347 S.E.2d 494, 495 (1986).

[2] On appeal, defendant correctly contends the judgments based only on attaining the status of habitual felon should be vacated because the trial judge did not use the habitual felon status finding to enhance the sentence on the substantive offense, but rather, sentenced defendant for being a habitual felon only. Unquestionably, the judgments of 01CRS002723, 01CRS002724 and 01CRS002725 (habitual felon judgment part) only refer to the habitual felon status and do not contain substantive offenses that could have been enhanced by that status. Accordingly, in light of our case law holding this to be impermissible, we must vacate judgments against defendant purporting to sentence him for having attained the status of habitual felon.

The State in recognizing this fatal error responds in its brief that because each habitual felon *indictment* specifically references one of the twenty-five underlying felonies, “the trial court’s intention presumably was that judgments reflect both the habitual felon charge and the underlying charge.” Candidly the State concedes, “This, however, was not effected in the judgment, three of which indicates only the habitual felon charge and not the accompanying underlying charge.” Thus, the State acknowledges that “Defendant correctly asserts that being an habitual felon is a status and not a crime, and that the habitual felon status standing alone will not support a criminal sentence . . . Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon.” In sum, a trial court has subject matter jurisdiction to sentence a defendant only upon his criminal convictions, not upon his acquired status of being an habitual felon which is not a crime. Rather, one who acquires the status of being an habitual felon subjects himself only to having the sentences of his current criminal convictions enhanced as a Class C felon.

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[3] Nonetheless, the State suggests that we should construe this error as clerical error and remand for correction. This we cannot do. Indeed, “[a] court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein.” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000). However, “it cannot under the guise of an amendment of its records, correct a judicial error.” *Id.* Most assuredly, a trial court’s entry of judgment and sentence on a “non crime” is not a clerical error. *See State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (2000) (determining there was an obvious clerical error where the felony judgment findings of aggravating and mitigating factors form was inconsistent with the trial court’s actual findings); *State v. Westbrook*, 345 N.C. 43, 54-55, 478 S.E.2d 483, 490 (1996) (reviewing the record and transcript to determine whether a clerical error existed); *State v. Thomas*, — N.C. App. —, 570 S.E.2d 142, 151 (2002) (finding a clerical error existed where the trial court’s actual findings were inconsistent with the AOC form). Rather, the error in this case was judicial in nature, not clerical.

The record indicates that in sentencing defendant to four consecutive terms of 151 to 191 months, the trial court stated:

And the Court takes four of the habitual felons. He has a sentence of 151 months minimum, 191 months maximum to begin at the expiration. That totals to about 604 months minimum, 764 months maximum. And all the other charges are consolidated with the last one.

Two days later when the prosecutor reported that he had incorrectly informed the trial court that defendant was on probation when he committed the offenses, the trial court amended the judgment in 01 CRS 002725 and sentenced defendant to three consecutive terms of 151 to 191 months stating:

So he was not on probation and for the record the Court did take that into consideration in the sentence. I’ll ask that the record reflect the numerous charges on the calendar involving Christopher Taylor, but more important 20 counts of habitual felon. 01 CRS 2723 through 2742. As I recall the Court gave him— I gave him four consecutive sentences on four habitual felons 151 to 191.

Thus, not only does the error of entering judgment on being an habitual felon appear on the face of each judgment; the trial court’s

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statements explicitly indicate the intent to enter judgments and sentences on the status of being an habitual felon. Accordingly, the record does not support the State's contention that the judgments contained clerical errors. "Clerical error has been defined . . . as 'an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination' ". *State v. Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878; see e.g., *State v. Linemann*, 135 N.C. App. 734, 522 S.E.2d 781 (1999) (lower court corrected clerical errors in the judgment by correcting the defendant's race and correcting the class of the misdemeanor); *State v. Hammond*, 307 N.C. 662, 300 S.E.2d 361 (1983) (clerical error existed where the felony judgment and commitment form listed the crime of robbery with a deadly weapon as a Class C felony, whereas in fact it was a Class D felony).

In the case *sub judice*, neither the transcript nor the record reveal clerical errors; rather, the judgment reflects the trial court's actual judgment and sentence upon the purported offenses of "habitual felon" as stated in the transcript. Accordingly, the record shows convincingly that the entry of judgments upon the purported convictions of "habitual felon", was not a result of a clerical error.

In sum, we vacate the judgments and sentences in cases numbers 01CRS002723, 01CRS002724, and that part of 01CRS002725 which purports to be a judgment alone on attaining the status of habitual felon. However, we find no error in the amended case number 01CRS002725. Thus, the defendant's sentence of 151 months to 191 months of maximum imprisonment under amended case number 01CRS002725 is affirmed. Defendant's remaining contentions on appeal are without merit.

Vacated in part, no error in part.

Judges BRYANT and GEER concur.

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STATE OF NORTH CAROLINA v. ORLANDO TREMAINE LEA, DEFENDANT

No. COA02-344

(Filed 18 February 2003)

Sentencing— attempted second-degree murder convictions vacated—motion to pray judgment on assault convictions

The trial court did not err by allowing the State's motion to pray judgment on multiple assault convictions five years after defendant's convictions for multiple attempted second-degree murders were vacated based on the fact that the crime of attempted second-degree murder was no longer recognized in North Carolina, because: (1) the delay is not unreasonable since for five years judgment was in effect which had been properly entered on defendant's convictions for attempted second-degree murder; (2) the record does not show that defendant objected to the continuation of the prayer for judgment or that he ever requested that the trial court enter judgment on the assault convictions which is tantamount to his consent to a continuation of judgment during that time period; and (3) there is no evidence that defendant suffered any actual prejudice due to the delay in sentencing, and defendant only argued about the length of the sentence he was about to receive.

On Writ of Certiorari to review judgments entered 18 May 2000 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 30 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Walter T. Johnson, Jr., for defendant-appellant.

HUDSON, Judge.

Defendant Orlando T. Lea ("defendant") was convicted of three counts of attempted second-degree murder and three counts of assault. The superior court entered a prayer for judgment continued on the assault convictions. When the North Carolina Supreme Court later held that the crime of attempted second-degree murder did not exist in North Carolina, the superior court vacated those convictions and entered judgment on the assault convictions. Defendant appealed, contending that the five years that had passed in the

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interim was unreasonable and had prejudiced him. For the reason set forth below, we affirm the decision of the superior court.

Defendant was convicted in 1995 of three counts of attempted second-degree murder, one count of assault with a deadly weapon inflicting serious injury, two counts of assault with a deadly weapon, and one count of discharging a firearm into occupied property. The trial court sentenced defendant for the three counts of attempted second-degree murder and for discharging a firearm into occupied property. The court entered a prayer for judgment continued on the conviction for assault with a deadly weapon inflicting serious injury and the two convictions for assault with a deadly weapon.

Defendant appealed to this Court. In *State v. Lea*, 126 N.C. App. 440, 485 S.E.2d 874 (1997), we found no error in defendant's convictions and sentence. Then, in April 2000, our Supreme Court held that the crime of attempted second-degree murder did not exist under North Carolina law. *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000). In May 2000, defendant filed a motion for appropriate relief requesting that the superior court vacate his three convictions for attempted second-degree murder. The State filed a motion to pray judgment on defendant's assault convictions.

The superior court held a hearing on both motions on 18 May 2000. The court granted defendant's motion and vacated defendant's convictions for attempted second-degree murder. The court also granted the State's motion to pray judgment and sentenced defendant to consecutive terms of 120 days on the two convictions for assault with a deadly weapon. As the court explained:

[T]here was a reasonable cause for the delay in the entry of final judgment in those convictions of Defendant Lea upon which Prayer for Judgment was originally continued in these matters, because for five years, there was an affirmed judgment of the defendant in the attempted second-degree murder convictions. Thus, the conviction remained intact until the rulings in . . . *State v. Coble* in April of this year.

The court also sentenced defendant to a consecutive term of 42 to 60 months on the conviction for assault with a deadly weapon inflicting serious injury.

On 1 August 2001, defendant filed a petition for certiorari with this Court, which we allowed.

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Defendant argues that the trial court erred when it allowed the State's prayer for judgment. Specifically, defendant contends that the prayer for judgment had been continued for an unreasonable period of time and that he has been prejudiced thereby.

A trial court has the inherent power to designate the manner by which its judgments shall be executed. *State v. Griffin*, 246 N.C. 680, 682, 100 S.E.2d 49, 51 (1957). For example, a court is authorized to continue a case to a subsequent date for sentencing. *State v. Degree*, 110 N.C. App. 638, 640, 430 S.E.2d 491, 493 (1993). This continuance is frequently referred to as a "prayer for judgment continued" and vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated. *Id.* at 640-41, 430 S.E.2d at 493; see also N.C. Gen. Stat. § 15A-1334(a) (allowing continuance of a sentencing hearing); N.C. Gen. Stat. § 15A-1416(b)(1) (allowing the State to move for imposition of a sentence when prayer for judgment has been continued).

The continuance may be for a definite or indefinite period of time, but, in any event, the sentence must be entered within a reasonable time after the conviction or plea of guilty. *State v. Absher*, 335 N.C. 155, 156, 436 S.E.2d 365, 366 (1993); *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493. If not so entered, the trial court loses jurisdiction. *Absher*, 335 N.C. at 156, 436 S.E.2d at 366. In *Degree*, this Court explained that determining whether a sentence has been entered within a reasonable time period requires "consideration of the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493.

Here, the sentence was entered a little more than five years after defendant was convicted. In light of the circumstances of this case, we conclude that the sentence was entered within a reasonable time.

First, the delay is not unreasonable because for five years judgment was in effect, which had been properly entered on defendant's convictions for attempted second-degree murder. The jury returned its verdict on the original convictions on 9 May 1995. At that time, the court continued the prayer for judgment on defendant's assault convictions because, as explained in the order entered 16 June 2000, of the long consecutive active sentences imposed in the judgments on the three counts of attempted second-degree murder. Defendant's

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judgments and sentences were upheld by this Court on 17 June 1997. It was not until 7 April 2000, that the Supreme Court issued its opinion in *Coble* in which it held that the crime of attempted second-degree murder did not exist in North Carolina. On 8 May 2000, based on *Coble*, defendant filed his motion for appropriate relief seeking to set aside his convictions for attempted second-degree murder. Within a week of defendant's motion and less than a month after *Coble* was handed down, the State filed its motion to pray judgment on the assault convictions. The superior court entered judgment on 18 May 2000, about a month after *Coble* was decided and then filed an order with findings and conclusions to explain its rulings on 16 June 2000.

When the Supreme Court decided that the crime of attempted second-degree murder did not exist, defendant's active sentences on those counts had to be set aside. Yet, by praying judgment, the State sought to ensure that defendant suffered some consequences for his criminal conduct. This procedure has precedent. In *State v. Pakulski*, for example, the superior court arrested judgment on the defendant's breaking or entering and larceny convictions and sentenced the defendant for felony murder. *Pakulski*, 326 N.C. 434, 390 S.E.2d 129 (1990). This Court on appeal reversed the felony murder conviction, and the State prayed for judgment on the breaking or entering and larceny convictions. The trial court entered judgment on those convictions, three years and four months after the jury had convicted the defendant. Our Supreme Court concluded that there was "no legal impediment to entry of judgment and imposition of sentence on the valid verdicts of guilty of breaking or entering and larceny." *Id.* at 436, 390 S.E.2d at 130; see also *State v. Mahaley*, 122 N.C. App. 490, 470 S.E.2d 549 (1996) (judgment that was entered on conspiracy and robbery convictions four years and six months after judgment was arrested was upheld where the defendant's death sentence on a murder charge was vacated on appeal); *State v. Pakulski*, 106 N.C. App. 444, 417 S.E.2d 515 (judgment entered on robbery convictions five years and eight months after judgment that was arrested was held to be proper where the defendant's murder conviction had been set aside on appeal and State decided not to prosecute murder charge but to pray judgment on robbery convictions), *disc. review denied*, 332 N.C. 670, 424 S.E.2d 415 (1992).

We also consider whether defendant consented to the delay in this case. Although a prayer for judgment "may not be continued over the defendant's objection," *State v. Jaynes*, 198 N.C. 728, 730, 153 S.E.

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410, 411 (1930), the record does not show that defendant here objected to the continuation of the prayer for judgment or that he ever requested that the trial court enter judgment on the assault convictions. His failure to do either is “tantamount to his consent to a continuation of” judgment during that time period. *Degree*, 110 N.C. App. at 641-42, 430 S.E.2d at 493.

Moreover, there is no evidence that defendant suffered any actual prejudice due to the delay in sentencing. He has not, for example, demonstrated any impediment to his ability to properly present evidence or argument to the trial court resulting from the five-year delay. In fact, at the motion hearing, defendant made no argument as to why the delay prejudiced him but argued only about the length of the sentence he was about to receive.

Accordingly, we hold that the judgments were entered here within a reasonable period of time and that defendant suffered no actual prejudice thereby.

We conclude that the trial court did not err in allowing the State’s motion to pray judgment.

Affirmed.

Judges McGEE and BIGGS concur.

Judge Biggs concurred prior to 1/1/03.

STATE OF NORTH CAROLINA v. CHRISTINE MARIE LIBERATO

No. COA02-426

(Filed 18 February 2003)

Child Abuse and Neglect— felony child abuse—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant’s motion to dismiss the charge of felony child abuse inflicting serious injury under N.C.G.S. § 14-318.4(a), because: (1) when an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental,

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there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries; (2) two doctors testified in their expert opinion that the child's injuries were intentionally inflicted and the amount of force required to cause such injuries was greater than that resulting from the child falling off either a mattress or chair which was the explanation given by defendant; and (3) defendant testified that the child was in defendant's sole custody the entire time during which the child's injuries were sustained.

Appeal by defendant from judgment entered 10 October 2001 by Judge Loto G. Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 9 January 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General R. Kirk Randleman, for the State.

Leslie C. Rawls for defendant-appellant.

HUNTER, Judge.

Christine Marie Liberato ("defendant") appeals her conviction for felony child abuse of her minor daughter, Ruth Liberato ("Ruth"), born 4 November 1997. We conclude the trial court committed no error.

On 2 October 2000, defendant was indicted by a Buncombe County Grand Jury for felony child abuse inflicting serious injury, a violation of Section 14-318.4(a) of the North Carolina General Statutes. Beginning on 8 October 2001, defendant was tried before a jury in Buncombe County Superior Court. The following evidence was introduced at trial.

The State's evidence tended to show that on 27 August 1999, Detective Connie Robinson ("Detective Robinson") was called to Mission Saint Joseph's Hospital in Asheville, North Carolina, to investigate injuries sustained by Ruth. During questioning, defendant told Detective Robinson that at approximately noon on 26 August 1999, defendant had laid Ruth and her younger brother, Thomas, down on a mattress in the living room for a nap while she went to work on some bills. Defendant eventually fell asleep herself, but was awakened when her boyfriend, Jorge, knocked on the door. Following a short conversation with Jorge, defendant went to the bathroom. In a matter of seconds, Jorge ran into the bathroom carrying Ruth's limp body

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and yelling that the child was not breathing. An ambulance was called, and Ruth was taken to the hospital.

Defendant told the detective that she and Jorge had never been abusive to the child. Defendant believed Ruth was injured as a result of accidentally falling off the mattress that was lying on the floor. Finally, defendant told Detective Robinson about additional incidents involving Ruth that may have had some relevance to Ruth's current condition, such as: (1) approximately two weeks before the current incident, Ruth and Thomas were treated by a hospital emergency room for ear infections; (2) approximately a week before the current incident, the children had gotten sick again and defendant had quit her job so that she could take care of them; (3) four or five days before the current incident, Ruth had fallen, but appeared to be unharmed despite vomiting, dizziness, and excessive sleeping; and (4) two or three days before the current incident, Ruth had fallen out of a chair before defendant could catch her, hitting her head, face, and ear on a hardwood floor.

At the hospital, Ruth was seen by Dr. Leon DeJournette, M.D. ("Dr. DeJournette"), who was accepted by the court as an expert witness in the field of pediatrics and pediatric critical care. Dr. DeJournette testified that Ruth had been admitted with a brain injury from a subdural hematoma, a blood clot near her brain. He further stated that Ruth had two such blood clots, as well as a small bruise on her right eyelid and bruises under her chin. In his opinion, Ruth's injuries were intentionally inflicted just before Ruth was admitted to the hospital and were not consistent with falling off either a mattress six to eight inches high or a chair three to four feet high. He believed that it would have taken a vertical fall of close to ten feet high to produce the type of injuries sustained by Ruth. Moreover, Dr. DeJournette testified that the bruises under Ruth's chin were consistent with someone putting their hand under the child's jaw and trying to push Ruth's jaw up.

Dr. Cynthia Brown, M.D. ("Dr. Brown") also attended to Ruth at the hospital and testified during the trial. She was accepted by the court as an expert witness in the fields of pediatrics and child abuse. Dr. Brown's diagnosis of Ruth's injuries was the same as that given by Dr. DeJournette. Dr. Brown testified that the effects of injuries to a child's brain cause that child to become less conscious close to the time of the injury. In her opinion, Dr. Brown did not believe defendant's assessment of how Ruth was injured explained the severity of the child's brain injuries.

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At the close of the State's evidence, defendant made a motion to dismiss, which was denied. Thereafter, defendant's mother and one of Ruth's teachers testified that Ruth acted and behaved as a normal, healthy child and not one that was being abused. Also, defendant testified on her own behalf and gave essentially the same testimony given by Detective Robinson. Defendant testified that *Jorge* told her Ruth had rolled off the mattress. Defendant further testified that *Jorge* did not have time to hurt Ruth that day because he was only alone with the child for a few seconds while defendant was in the bathroom. Finally, defendant testified that she had sole custody of Ruth during the entire time in which Ruth could have sustained the injuries.

Defendant renewed her motion to dismiss at the close of all the evidence. The motion was denied. Thus, following deliberations, the jury returned a verdict finding defendant guilty of felony child abuse. Defendant appeals.

By defendant's sole assignment of error she argues the trial court erred by denying her motions to dismiss due to insufficiency of the evidence.

In order to survive a motion to dismiss in a criminal action, 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, 65-66, 296 S.E.2d 649, 651 (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). "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981) (citations omitted).

In the present case, defendant was indicted and convicted of child abuse inflicting serious injury in violation of Section 14-318.4(a). This section provides:

A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally

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commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony

N.C. Gen. Stat. § 14-318.4(a) (2001). It is undisputed that defendant is Ruth's mother and that Ruth is under sixteen years of age. Thus, the State was only required to tender substantial evidence that defendant intentionally inflicted serious physical injury upon Ruth. Defendant contends that the State failed to meet this burden due to insufficiency of the evidence. We disagree.

This Court has previously held that:

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. In determining the presence or absence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.

State v. Riggsbee, 72 N.C. App. 167, 171, 323 S.E.2d 502, 505 (1984) (citations omitted). See also *State v. Noffsinger*, 137 N.C. App. 418, 424, 528 S.E.2d 605, 609 (2000). With respect to Section 14-318.4, this Court also held in *Riggsbee* that when an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries. *Riggsbee*, 72 N.C. App. at 171, 323 S.E.2d at 505. See also *State v. Perdue*, 320 N.C. 51, 357 S.E.2d 345 (1987).

The evidence before this Court in the case *sub judice* is sufficient to infer defendant's guilt. Doctors DeJournette and Brown both testified that in their expert opinion, Ruth's injuries were intentionally inflicted. They opined that the amount of force required to cause such injuries was greater than that resulting from Ruth falling off either a mattress or a chair, which was the explanation given by defendant. Moreover, defendant testified that (1) Jorge was not alone with Ruth long enough to inflict any injuries on the child, and (2) Ruth was in defendant's sole custody the entire time during which the child's injuries were sustained. This testimony provided sufficient circumstantial evidence by which a jury could infer that defendant intentionally inflicted the injuries upon Ruth, especially when considering the court's holding in *Riggsbee*.

When viewed in the light most favorable to the State, the evidence is sufficient to withstand defendant's motions to dismiss. Thus, we

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conclude that the trial court did not err in denying defendant's motions to dismiss due to insufficiency of the evidence.

No error.

Judges McGEE and CALABRIA concur.



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No. COA02-429

(Filed 18 February 2003)

1. Trials—pretrial order—erroneous statement of no pending issues

The trial court acted within its discretion when it addressed the issue of plaintiff's failure to obtain a North Carolina certificate of authority to transact business even though a pretrial order had indicated that there were no pending motions needing resolution prior to trial. The record indicates that the issue of whether plaintiff could avail itself of the courts of the state was pending despite the erroneous statement in the pretrial order. Moreover, the issue was first presented in defendant's answer and plaintiff can hardly claim surprise.

2. Corporations—foreign—transacting business in North Carolina

The trial court's conclusion that plaintiff was transacting business in North Carolina (without a certificate of authority) was supported by the findings and the evidence where plaintiff's business in North Carolina was regular, systematic, and extensive; plaintiff had been coming to North Carolina since about 1970 to sell and consign merchandise to jewelry stores; plaintiff routinely came to North Carolina as frequently as twice every four weeks during some parts of the year, each time bringing merchandise to deliver; and the sales were finalized in North Carolina. N.C.G.S. §§ 55-15-01(b), 55-15-02.

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3. Corporations— foreign—failure to obtain certificate to transact business—action dismissed

The trial court acted within its discretion by dismissing rather than continuing an action for monies owed where plaintiff did not have a certificate to transact business in North Carolina. The applicable statute, N.C.G.S. § 55-15-02, simply indicates that an action cannot be maintained unless a certificate is obtained prior to trial and does not specify the procedure in the event of failure to obtain a certificate of authority. Moreover, defendant was aware that the motion was pending and could have obtained the certificate in the year and a half between the filing of the motion and the dismissal of its action.

Appeal by plaintiff from judgment entered 9 January 2002 by Judge Richlyn Holt in Macon County District Court. Heard in the Court of Appeals 13 November 2002.

Creighton W. Sossomon, for plaintiff-appellant.

Coward, Hicks & Siler, P.A., by Richard K. Walker, for defendants-appellees.

HUDSON, Judge.

Appellant Harold Lang Jewelers, Inc. (“Lang”), a Florida corporation, filed suit against the appellees (“Johnson”). As one of its affirmative defenses, Johnson argued that Lang could not sue in a North Carolina court because Lang was transacting business in the state without a certificate of authority to do so. The trial court agreed and dismissed the suit prior to trial. Lang appealed. For the reasons set forth below, we affirm the decision of the trial court.

Lang filed suit in April 1999, alleging that Johnson owed it \$160,322.90 plus interest for jewelry sold or consigned. Johnson answered in May 1999, asserting as one of its eight affirmative defenses that Lang could not sue in a North Carolina court because Lang had failed to obtain a certificate of authority to transact business in the state. On January 7, 2002, the case was called for trial. At that time, Johnson orally raised the defense of Lang’s failure to obtain a certificate of authority and requested a hearing on that issue. After hearing evidence and argument, the district court granted the motion and dismissed Lang’s action. Lang now appeals.

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[1] Lang first argues that the trial court erred when it considered Johnson's motion because the parties' pretrial order precluded further motions prior to trial. We disagree.

The pretrial order dated January 14, 2000, indicates that "there are no pending Motions before the Court which need resolution prior to Trial of this matter." However, the record reflects that in fact there was a motion pending—whether Lang could avail itself of the courts of this state. Pursuant to N.C. Gen. Stat. § 55-15-02, a foreign corporation that transacts business in North Carolina is barred from maintaining an action in any state court unless it has obtained a certificate of authority to transact business prior to trial. An "issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial." N.C. Gen. Stat. § 55-15-02(a); see also *State of North Carolina ex rel. Glamorgan Pipe & Foundry Co.*, 266 N.C. 342, 344, 145 S.E.2d 912, 913 (1966) (holding that motions under the predecessor to § 55-15-02 "challenge the authority of the Court to proceed with a trial of the cause on its merits"). Rule 16 of our rules of civil procedure specifically permits pretrial orders to be modified at trial to prevent manifest injustice. We are persuaded that the trial court acted within its discretion when it addressed this dispositive issue as it did—prior to commencing trial, despite the erroneous statement in the pretrial order.

We also note that Lang can hardly claim surprise. The motion to dismiss based on failure to obtain a certificate of authority was first presented in Johnson's answer, filed on May 21, 1999, more than a year and a half before the matter was to be tried. Lang had sufficient time to address the issue. Thus, we see no error here.

[2] Second, Lang argues that the trial court did not find sufficient facts to support its conclusion that Lang was, in fact, transacting business in the state of North Carolina. Again, we disagree.

To "transact business" is defined by statute and common law. Specifically, N.C. Gen. Stat. § 55-15-01 sets forth examples of when a foreign corporation is NOT transacting business:

- (1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;
- (2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

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- (3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;
- (4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities;
- (5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts;
- (6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;
- (7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;
- (8) Transacting business in interstate commerce;
- (9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;
- (10) Selling through independent contractors;
- (11) Owning, without more, real or personal property.

N.C. Gen. Stat. § 55-15-01(b). Our courts have interpreted transacting business in the state to “require the engaging in, carrying on or exercising, in North Carolina, some of the functions for which the corporation was created.” *Canterbury v. Monroe Lange Hardware Imports Divis. of Macrose Indus. Corp.*, 48 N.C. App. 90, 96, 268 S.E.2d 868, 872 (1980), citing *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965). The business done by the corporation must be of such nature and character “as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State.” *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 556, 140 S.E.2d 3, 9 (1965) (citation and quotation marks omitted). In other words, the activities carried on by the corporation in

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North Carolina must be substantial, continuous, systematic, and regular. *Canterbury*, 48 N.C. App. at 96, 268 S.E.2d at 872.

Here, the trial court concluded that Lang's business activity in North Carolina was regular, continuous, and substantial such that it was transacting business in the state. We uphold this conclusion only if it is supported by the findings of fact, and, contrary to Lang's assertion, we hold that it is. *Royal v. Hartle*, 145 N.C. App. 181, 182, 551 S.E.2d 168, 170, *disc. review denied*, 354 N.C. 365, 555 S.E.2d 922 (2001).

Specifically, the court found that Lang, through its single employee, had sold and consigned merchandise to jewelry stores in Franklin, Asheville, and Highlands, North Carolina, since 1970. The court also found that Lang's employee came to North Carolina at least twice every six weeks during the year and at least twice every four weeks during the summer months for the purpose of transacting business. Sometimes he came to North Carolina to transact business as often as three times a month. The court found that when the employee came to North Carolina, he always brought jewelry with him for delivery. When he visited jewelry stores in the state, he would either (1) make a direct sale on the spot without any confirmation from any other person or entity in any other place or (2) consign the jewelry, also without any further confirmation or approval from any other person or entity anywhere. When the employee took orders, he either shipped the ordered items to the business in North Carolina or personally delivered the merchandise. He also took returns of merchandise from customers in the state. The court further found that the business that Lang conducted in North Carolina did not require it to communicate with any other person or seek any authority from any other person.

In sum, we conclude that the trial court's conclusions of law are adequately supported by the facts found in this case. There is ample evidence that Lang's business in this state has been regular, systematic, and extensive. Lang has been coming to North Carolina since about 1970 to sell and consign merchandise to several jewelry stores. In fact, Lang routinely came to North Carolina as frequently as twice every four weeks during some parts of the year, and each time he brought with him merchandise to deliver. Moreover, the orders did not require "acceptance without this State before becoming binding contracts" (N.C. Gen. Stat. § 55-15-01(b)(5)); instead, Lang's employee finalized the sales in North Carolina. Accordingly, Lang's assignments of error on this ground are overruled.

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[3] Finally, Lang contends that the trial court erred when it dismissed the action, arguing that the court should have continued the case to permit Lang to obtain the requisite certificate of authority. The applicable statute, N.C. Gen. Stat. § 55-15-02, does not specify the procedure in the event of failure to obtain a certificate of authority. The statute simply indicates that an action cannot be maintained unless the certificate is obtained prior to trial. N.C. Gen. Stat. § 55-15-02(a). Lang has not cited, nor have we found, a case where a continuance has been granted by a court in these circumstances. Moreover, Lang was aware that Johnson's motion was pending and could have obtained the certificate in the year and a half that passed between the filing of the motion and the court's dismissal of the case. In the absence of statutory or other authority dictating a continuance, we hold that the trial court acted within its discretion in dismissing the action.

For the reasons set forth above, we affirm the decision of the trial court.

Affirmed.

CHIEF JUDGE EAGLES and JUDGE MCGEE concur.

LAKISHA ANN ARTIS ELLIS, PLAINTIFF V. LANNIE THOMAS WHITAKER AND
GARANCO, INC., DEFENDANTS

No. COA02-604

(Filed 18 February 2003)

Motor Vehicles— stop sign—defendant's failure to stop—plaintiff's contributory negligence—insufficient evidence

Plaintiff's motion for a judgment notwithstanding the verdict should have been granted in an automobile accident case in which defendant ran a stop sign and the jury found plaintiff contributorily negligent. Evidence that the intersection itself was unobstructed did not negate evidence that the direction from which defendant approached was obstructed by trees and houses, and the evidence failed to establish a proximate connection between plaintiff's speed and the accident. Plaintiff was not required to anticipate that defendant would be negligent.

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Appeal by plaintiff from judgment entered 10 January 2002 and an order entered 24 January 2002 by Judge Cy A. Grant, Sr. in Wilson County Superior Court. Heard in the Court of Appeals 9 January 2003.

Narron & Holdford, P.A., by Ben L. Eagles, for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler and W. Dudley Whitley, for defendant-appellees.

HUNTER, Judge.

LaKisha Ann Artis Ellis (“plaintiff”) appeals a judgment finding her contributorily negligent with respect to a motor vehicle accident between her and Lannie Thomas Whitaker (“defendant Whitaker”), an employee of Garanco, Inc. (“defendant Garanco”). Plaintiff also appeals an order denying her Rule 50 motion for judgment notwithstanding the verdict (“JNOV”) or, in the alternative, Rule 59 motion for a new trial. We reverse the trial court’s judgment and remand on the issue of damages for the reasons stated herein.

This case arises from a motor vehicle accident that occurred on 10 August 1999 at the intersection of Walnut Street and Warren Street in Wilson, North Carolina. Plaintiff was driving a Honda Civic westward on Warren Street. Defendant Whitaker was driving a work truck owned by defendant Garanco, his employer, northbound on Walnut Street. The intersection was controlled by a stop sign located on Walnut Street. Defendant Whitaker drove through the stop sign and collided with plaintiff. Both parties sustained injuries.

Thereafter, plaintiff filed a complaint on 30 December 1999 alleging the accident and her resulting injuries were caused due to the negligence of defendant Whitaker while he was acting as an agent or employee of defendant Garanco. In defendants’ answer, they admitted defendant Whitaker was negligent for running the stop sign. However, as a defense, defendants alleged the contributory negligence of plaintiff barred any recovery she sought from them.

A trial by jury was held on 7 January 2002 in the Wilson County Superior Court. Officer Aubrey Pearson (“Officer Pearson”) testified that he was dispatched to the accident scene and filled out an accident report. Using the report to refresh his memory, the officer testified that the front of plaintiff’s vehicle struck the passenger’s side of defendants’ truck, turning the truck upside down. Officer Pearson

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was unable to ascertain the speed at which each vehicle was traveling because neither vehicle left tire impressions prior to the point of impact. However, the officer also testified that an eyewitness who saw the accident told him that both vehicles were traveling at an estimated speed of thirty-five miles per hour.

Plaintiff testified that she was traveling thirty to thirty-five miles per hour on Warren Street just prior to the accident. Although there was nothing blocking her vision as she approached the intersection, plaintiff's view of defendant Whitaker's street of travel was obscured by houses and trees. Plaintiff further testified that she "was looking straight ahead and off to the side," but she did not see defendants' truck until it was right in front of her.

Defendant Whitaker also testified during the trial. He testified that he was traveling thirty-five miles per hour on Walnut Street. Defendant Whitaker admitted to not seeing the stop sign or plaintiff's vehicle. Nevertheless, he further testified that he thought plaintiff may have been speeding, estimating her speed at approximately forty-five to fifty-five miles per hour. Defendant Whitaker "arrived at this estimate based upon the severity of the impact of [plaintiff's] car into [defendants'] car and what [plaintiff's] car did to [defendants'] car as a result of the impact." This testimony was admitted into evidence over plaintiff's objection.¹

At the conclusion of the trial, the jury returned a verdict finding plaintiff contributorily negligent. On 10 January 2002, a judgment was entered reflecting the jury verdict and taxing costs against plaintiff in the amount of \$447.50. Plaintiff subsequently filed a motion for JNOV or, in the alternative, a motion for a new trial. Both were denied in an order filed 24 January 2002. Plaintiff appeals.

By plaintiff's first assignment of error, she argues the trial court erred in denying her motion for JNOV. We agree.

A motion for JNOV "is simply a renewal of a party's earlier motion for directed verdict[.]" *Kearns v. Horsley*, 144 N.C. App. 200, 207, 552 S.E.2d 1, 6, *disc. review denied*, 354 N.C. 573, 559 S.E.2d 179 (2001). Thus, when ruling on this motion, the trial court must consider the evidence in the light most favorable to the non-movant, taking the evidence supporting the non-movant's claims as true with all contradic-

1. Plaintiff's failure to assign error to defendant Whitaker's estimation of her vehicle's speed without actually seeing the vehicle prior to impact prevents this Court from addressing the admissibility of that testimony further on appeal. *See* N.C.R. App. P. 10 (2002).

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tions, conflicts, and inconsistencies resolved in the non-movant's favor so as to give the non-movant the benefit of every reasonable inference. *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 563, 467 S.E.2d 58, 65 (1996). Likewise, "[o]n appeal the standard of review for a JNOV . . . is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Kearns*, 144 N.C. App. at 207, 552 S.E.2d at 6 (citation omitted). This is a high standard for the moving party, requiring a denial of the motion if there is more than a scintilla of evidence to support the non-movant's *prima facie* case. *Id.*

Here, Plaintiff sought a motion for judgment notwithstanding the jury's verdict finding her liable for contributory negligence. Contributory negligence "is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967).

Two elements, at least, are necessary to constitute contributory negligence: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury. . . . There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action.

Construction Co. v. R. R., 184 N.C. 179, 180, 113 S.E. 672, 673 (1922) (emphasis in original). See also *Cobo v. Raba*, 347 N.C. 541, 495 S.E.2d 362 (1998). Since contributory negligence is an affirmative defense, the burden is on the defendant to prove more than a scintilla of evidence supporting each element of this defense to survive a motion for JNOV. See *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). Nevertheless, "JNOVs are rarely appropriate for issues of contributory negligence" (*Smith v. Wal-Mart Stores*, 128 N.C. App. 282, 286, 495 S.E.2d 149, 151 (1998)) because " 'application of the prudent man test, or any other applicable standard of care, is generally for the jury.' " *Id.* at 285-86, 495 S.E.2d at 151 (quoting *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987)).

When considered in the light most favorable to defendants, the evidence in the case *sub judice* established the following: (1) Plaintiff was driving at a speed of approximately fifty miles per hour; (2) plaintiff's view of the intersection was unobstructed; (3) plaintiff did not

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apply the brakes prior to impact because no skid marks were found; and (4) the force of the impact resulted in defendants' truck being overturned. However, this evidence "merely raise[d] conjecture on the issue of contributory negligence [and was] insufficient to go to the jury." *Snead*, 101 N.C. App. at 466, 400 S.E.2d at 93.

Our Supreme Court has held that a person

"has a right to assume that any motorist approaching from his left on the intersecting street will stop in obedience to the red light [or a stop sign] facing him unless and until something occurs that is reasonably calculated to put him on notice that such motorist will unlawfully enter the intersection."

Cicogna v. Holder, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997) (quoting *Jones v. Schaffer*, 252 N.C. 368, 375, 114 S.E.2d 105, 111 (1960)). In the present case, defendant Whitaker approached from plaintiff's left and entered her lane of travel after running a stop sign. Although there was evidence indicating that the intersection itself was unobstructed, this evidence did not negate other evidence that established the direction from which defendant Whitaker approached was *obstructed* by trees and houses.

Also, the evidence failed to establish a proximate connection between plaintiff's speed and the accident. Defendants' evidence regarding plaintiff's speed suggested negligence on her part; but whether or not she was speeding, "plaintiff was not required to anticipate that the defendant would be negligent." *Id.* at 489, 480 S.E.2d at 637. Without more, defendants failed to establish the "real causal connection" between plaintiff's negligence and the accident necessary to prove plaintiff was contributorily negligent.

Accordingly, when all of the evidence is viewed in the light most favorable to defendants, it fails to provide more than a scintilla of evidence needed to establish plaintiff had sufficient notice to avoid the accident or that her negligence was the proximate cause of the accident. Therefore, plaintiff's motion for JNOV should have been granted.

Finally, having determined that the trial court erred in denying plaintiff's motion for JNOV, it is unnecessary for this Court to address plaintiff's remaining assignments of error. Therefore, since defendants' negligence is uncontroverted, we reverse the trial court's judgment finding plaintiff contributorily negligent and remand this case for a new trial on the issue of damages.

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[156 N.C. App. 197 (2003)]

Reversed and remanded.

Judges McGEE and CALABRIA concur.

THE SHADOW GROUP, LLC, PLAINTIFF v. HEATHER HILLS HOME OWNERS
ASSOCIATION, DEFENDANT

No. COA02-493

(Filed 18 February 2003)

1. Appeal and Error— denial of 12(b)(6) motion—appeal after final judgment

The denial of a motion to dismiss for failure to state a claim is not reviewable upon appeal from a final judgment on the merits.

2. Nuisance— water flow—from common areas to townhouse

The trial court did not err in a trespass and nuisance action by finding that defendant substantially interfered with plaintiff's use and enjoyment of its property by failing to stop the flow of water from common areas into plaintiff's townhouse. The parties stipulated that defendant owned and was responsible for the common areas within the subdivision, that water flowed from those areas onto plaintiff's property, that defendant exacerbated the water flow through attempted repairs, and that this flow damaged plaintiff's property.

3. Trespass— water flow—repairs—problem exacerbated

The trial court's conclusions that defendant caused the entry of water from common areas onto plaintiff's townhouse property were supported by the court's findings that defendant undertook to repair the water flow problem and that those repairs exacerbated the problem.

4. Trespass— water flow—findings—sufficient

The trial court's conclusion that there was a trespass in defendant's causing water to flow from common areas into plaintiff's townhouse was supported by sufficient findings where the court found that defendant's attempted remedy exacerbated the flow, that this continued after plaintiff's purchase of the property, that defendant did not stop the flow, that plaintiff did not autho-

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alize the flow, and that plaintiff spent \$2,480 to remedy the problem. Moreover, every subsequent incidence of water flowing onto the property after plaintiff's possession could constitute a trespass in and of itself.

Appeal by defendant from order and judgment entered 18 January 2002 by Judge Laurie L. Hutchins in Forsyth County District Court. Heard in the Court of Appeals 29 January 2003.

Hunter, Elam, Benjamin & Tomlin, by Jason A. Knight, for plaintiff-appellee.

Hatfield, Mountcastle, Deal, Van Zandt & Mann, LLP, by Marc Hunter Eppley, for defendant-appellant.

MARTIN, Judge.

Plaintiff filed a complaint in this action alleging that it purchased a townhouse on a parcel of real property located in the Heather Hills subdivision in September 1999. At that time, and since 1974, defendant was the owner of all common areas in the subdivision. Plaintiff alleged that as early as July 1997, defendant was aware that water from the common areas flowed into the basements of various townhouses in the subdivision, including the townhouse eventually purchased by plaintiff. Following plaintiff's purchase of the property, an inspection revealed standing water and flood damage inside the townhouse allegedly caused by the flow of water from the subdivision's common areas. An attorney for plaintiff notified defendant of the flood problems in October 1999. Following a meeting of defendant's members, defendant informed plaintiff it would not pay for any repairs or prevention related to the flood problems. As a result, plaintiff paid \$2,480 for waterproofing to remedy the problem.

Plaintiff asserted claims for trespass to real property and for private nuisance. The complaint alleged plaintiff was the owner of the property, that defendant voluntarily caused water from the common areas of the subdivision to flow onto plaintiff's property, and that plaintiff sustained damages as a result. The complaint also alleged that defendant "substantially interfered with [plaintiff's] use and enjoyment of its property by causing water to flow into the property which resulted in flooding or caused a significant annoyance, material physical discomfort and injury to the property" and that defendant's interference was unreasonable and resulted in damage to plaintiff.

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Defendant answered and moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Following arbitration resulting in an award in favor of defendant, plaintiff appealed to the district court for a trial *de novo*. The trial court heard the matter sitting without a jury. The trial court entered judgment in which it found that defendant owned and was responsible for maintenance and upkeep of the subdivision common areas; that water flowed downhill from the common areas and damaged plaintiff's property; that in 1996, defendant employed a contractor in an attempt to remedy the water flow problem by installing a new drainage system adjacent to plaintiff's property; that the new system in fact exacerbated the water flow problem and actually caused water to flow onto plaintiff's property and through the sliding glass doors; that plaintiff did not authorize defendant to cause the water to flow onto its property; and that defendant substantially interfered with plaintiff's enjoyment of the property by failing to stop the water from flowing from the common areas onto plaintiff's property. The trial court awarded plaintiff damages in the amount of \$2,480.00. Defendant appeals.

[1] Defendant's first assignment of error is to the denial of its G.S. § 1A-1, Rule 12(b)(6) motion to dismiss the complaint for its failure to state a claim upon which relief can be granted. However, it is well established that the denial of a Rule 12(b)(6) motion to dismiss is not reviewable upon an appeal from a final judgment on the merits. *Berrier v. Thrift*, 107 N.C. App. 356, 359, 420 S.E.2d 206, 208 (1992) (citing *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E.2d 755, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986)), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993). Thus, the assignment of error is dismissed.

[2] Defendant's second assignment of error is to the trial court's finding of fact that defendant "substantially interfered with Plaintiff's use and enjoyment of the property by failing to stop the water to flow into the property from the common areas into Plaintiff's townhouse." Defendant asserts this finding is unfounded, as "nothing in the pleadings or the facts before the trial court showed that Defendant interfered with Plaintiff at all."

When a trial court sits as the finder of fact, its findings of fact are conclusive on appeal where supported by competent evidence, even where the evidence would support a finding to the contrary.

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Creekside Apartments v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994).

In order to establish a claim for nuisance, a plaintiff must show the existence of a substantial and unreasonable interference with the use and enjoyment of its property. *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). In this context, our Supreme Court has interpreted substantial interference to mean a “substantial annoyance, some material physical discomfort . . . or injury to [the plaintiff’s] health or property.” *Duffy v. Meadows*, 131 N.C. 31, 34, 42 S.E. 460, — (1902). The pattern jury instruction for private nuisance instructs that “[i]nterference is substantial when it results in significant annoyance, material physical discomfort or injury to a person’s health or property. A slight inconvenience or a petty annoyance is not a substantial interference.” N.C.P.I. Civil 805.25. Moreover, one’s action in interfering with the flow of water resulting in damage to another’s property can constitute a private nuisance. See *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977).

In the present case, the parties stipulated that defendant owned and was responsible for the common areas within the subdivision, that water flowed from those areas onto plaintiff’s property, that defendant exacerbated the water flow onto plaintiff’s property beginning in 1996 when it undertook to repair the problem, and that this flow of water damaged plaintiff’s property. These stipulations are sufficient to support the trial court’s finding that the circumstances gave rise to more than a slight inconvenience or petty annoyance to plaintiff and that defendant substantially interfered with plaintiff’s use and enjoyment of its property.

[3] Defendant next argues the trial court’s findings were insufficient to support its conclusion of law that defendant “caused the entry of water from the common areas and the drainage system into the property.” However, as noted previously, defendant stipulated, and the trial court found, that defendant undertook to repair the water flow problem, but that its repairs, which included the installation of a drainage system adjacent to plaintiff’s property, only exacerbated the problem. These findings support the trial court’s conclusion of law that defendant’s actions not only failed to address the water flow problem, but actually contributed to the flow of water onto plaintiff’s property. This assignment of error is overruled.

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[4] In support of its fourth assignment of error, defendant argues there were insufficient findings of fact to support the trial court's conclusion of law that defendant's actions amounted to a trespass. In order to establish a trespass to real property, a plaintiff must show: (1) his possession of the property at the time the trespass was committed; (2) an unauthorized entry by the defendant; and (3) resulting damage to the plaintiff. *Ammons v. Wysong & Miles Co.*, 110 N.C. App. 739, 745, 431 S.E.2d 524, 528, *disc. review denied*, 334 N.C. 619, 435 S.E.2d 332 (1993). One's action of causing water to flow onto another's property can constitute such a trespass. *See, e.g., Wilson v. McLeod Oil Co. Inc.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991).

The trial court found that defendant's action in attempting to remedy the water flow problem in 1996 actually exacerbated the flow of water onto plaintiff's property from the common areas, that this problem continued after plaintiff's purchase of the property, that defendant did not stop the flow of water onto plaintiff's property, that plaintiff did not authorize defendant to cause water to flow onto its property, and that plaintiff spent \$2,480 to remedy the problem. These findings are supported by competent evidence and are sufficient to establish each necessary element of a claim for trespass.

Moreover, even though defendant's initial exacerbation of the water flow onto plaintiff's property was alleged to have occurred prior to plaintiff's ownership of the property, because the nature of the water flow was recurrent, every subsequent incidence of water flowing onto the property after plaintiff's possession could constitute a trespass in and of itself. *See Ivester v. Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88 (1939) (causes of action exist for all consequential and successive damages for a recurring injury resulting from a condition wrongfully created and maintained, such as a recurrent nuisance or trespass); *Roberts v. Baldwin*, 151 N.C. 407, 66 S.E. 346 (1909) (water flowing from defendant's land onto plaintiff's land constitutes recurring trespass, as opposed to continuing trespass, because although the condition which allows for the water to flow onto plaintiff's property exists continuously, the actual flow of water is irregular and variable in frequency of occurrence depending upon rainfall and other factors). Accordingly, this assignment of error is overruled.

Finally, defendant contends there were insufficient findings of fact to support the trial court's conclusions that defendant substantially interfered with plaintiff's use and enjoyment of the property, and that defendant's actions constituted a private nuisance. In so

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arguing, defendant simply summarizes its argument in support of its second assignment of error, that the evidence failed to support any finding of interference on defendant's part. We have addressed and rejected this argument. The trial court's findings of fact on this matter were supported by competent evidence, are therefore conclusive on appeal, and these findings in turn support the conclusions of law.

The judgment of the trial court is affirmed.

Affirmed.

Judges HUDSON and STEELMAN concur.



STATE OF NORTH CAROLINA v. HEBREW HAIRSTON

No. COA02-414

(Filed 18 February 2003)

Evidence— prior offenses—no underlying facts

There was prejudicial error in a cocaine possession and habitual felon prosecution where the court admitted testimony about defendant's prior cocaine convictions without underlying facts showing similarities between those convictions and the present offense and instructed the jury that it could consider the convictions under N.C.G.S. § 8C-1, Rule 404(b). The evidence was conflicting and not so overwhelming as to make the error nonprejudicial.

Appeal by defendant from judgment entered 7 November 2001 by Judge Michael E. Helms in Rockingham County Superior Court. Heard in the Court of Appeals 22 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Marvin R. Waters, for the State.

Geoffrey W. Hosford, for defendant-appellant.

STEELMAN, Judge.

Defendant was indicted for felony possession of cocaine and for being an habitual felon. He was found guilty of felony possession of

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cocaine by a jury and pled guilty to being an habitual felon. The trial court entered a judgment sentencing defendant to an active term of a minimum of 133 months and a maximum of 169 months. Defendant appeals his conviction for felony possession of cocaine.

The State's evidence at trial tended to show that at approximately 2:00 a.m. on 21 August 2000, Detective Scott Carter of the Eden Police Department stopped a vehicle in which defendant was a front-seat passenger for a traffic violation. After noticing a strong odor of marijuana emanating from the vehicle, Detective Carter searched the driver and found marijuana on his person. Detective Carter then searched the vehicle and found a clear pill bottle containing white residue under the front passenger seat, another pill bottle containing white residue on the side of the driver's seat and a milk container in the console between the driver's seat and the front passenger seat. The contents of the milk container were bubbling, and Detective Carter determined it contained 20 pieces of crack cocaine. Detective Carter testified that he had observed defendant drinking from the milk container during the traffic stop.

During the State's evidence, the Deputy Clerk of Superior Court of Rockingham County testified from court records concerning defendant's prior convictions for possession with intent to sell and deliver cocaine and sale of cocaine in 1995 and 1996. The trial court gave a limiting jury instruction at the time of the testimony that this evidence could not be used to prove defendant acted in conformity with the prior convictions but could be considered only to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001).

Following the close of the State's evidence, defendant offered evidence and testified before the jury. He was cross-examined about his prior drug convictions which the State had introduced through the Deputy Clerk's testimony. He also was questioned about other prior drug convictions and denied drinking from the milk container found to contain crack cocaine.

The driver of the vehicle, Clarence Broadnax ("Broadnax") testified for defendant that the crack cocaine rocks found in the milk container belonged to Broadnax and that he had poured them into the milk container when he noticed Detective Carter pull behind the vehicle for the traffic stop. Broadnax also stated that no one else knew the cocaine was in the vehicle.

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In the charge to the jury, the trial court instructed the jury pursuant to the North Carolina Pattern Jury Instructions, Criminal 105.40, Impeachment of the Defendant as a Witness by Proof of Unrelated Crimes, which provides that the jury may consider evidence of a defendant's prior convictions only as it bears on his truthfulness. Immediately thereafter, the trial court charged the jury that

[w]hen evidence has been received that at an earlier time the defendant was convicted of charges dealing with cocaine, this evidence is not to be used by you as proof that the defendant is guilty of the present charge. It may be used, however, for the purpose of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, entrapment or accident.

The trial court also instructed the jury on constructive possession pursuant to North Carolina Pattern Jury Instructions, Criminal, 104.41, requiring both the knowledge that the substance is present and the power and intent to control it. Although he was afforded the opportunity to object, defendant did not object to any portion of the trial court's charge prior to the jury's commencing deliberations.

In his first assignment of error, defendant contends that it was reversible error to allow the Deputy Clerk to testify about his prior convictions as part of the State's evidence.

Under Rule 404(b), evidence of a defendant's other crimes, wrongs or acts is not admissible to show action in conformity therewith but may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2001) allows for admission of prior convictions for the limited purpose of assessing a defendant's credibility as a witness if the evidence of the convictions is "elicited from the witness or established by public record *during cross-examination or thereafter.*" (emphasis added)

Our Supreme Court recently held that the bare fact of a defendant's prior convictions is not admissible under Rule 404(b) absent some offer of evidence regarding the facts and circumstances underlying the prior convictions. *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583 (2002) (reversing this Court's decision and adopting Judge Wynn's dissent in *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (2002)).

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Here, as in *Wilkerson*, the Deputy Clerk testified regarding the bare facts of defendant's prior convictions for cocaine offenses but offered no testimony about the facts underlying these convictions. Under the holding in *Wilkerson*, the trial court erred in admitting this testimony for substantive purposes under Rule 404(b) without evidence of the underlying facts to show similarities between the prior convictions and present offense charged. However, unlike *Wilkerson*, defendant here testified and was cross-examined about his prior convictions. Thus, we must determine whether the error was sufficiently prejudicial to defendant so as to require a new trial under N.C. Gen. Stat. § 15A-1447(a) (2001).

"In order to show prejudice necessary for a new trial, a defendant alleging error must show 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" *State v. Goodman*, 149 N.C. App. 57, 64, 560 S.E.2d 196, 201 (quoting N.C. Gen. Stat. § 15A-1443(a) (1999)), *disc. review allowed on additional issues*, 356 N.C. 170, 568 S.E.2d 852 (2002). An instructional error is not prejudicial where other evidence against the defendant is overwhelming. *State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

The evidence in this case as to defendant's guilt was conflicting and was not so overwhelming as to make the trial court's error in admitting prior convictions evidence non-prejudicial. Rule 609 permits the jury to consider evidence of defendant's prior convictions for the limited purpose of assessing his credibility. The trial court improperly instructed the jury on two occasions that they could consider defendant's two prior drug convictions for Rule 404(b) purposes. The jury was allowed to infer from defendant's prior convictions that he was involved in the sale of drugs, that he had knowledge of the cocaine in the vehicle and that he had the intent to control the cocaine. Based on the evidence in this case, there is a reasonable possibility that a different result would have been reached at trial had this evidence not been received under Rule 404(b). This case is reversed and remanded for a new trial.

We decline to address defendant's remaining assignments of error because they are not likely to recur at a new trial.

NICHOLSON v. F. HOFFMANN-LAROCHE, LTD.

[156 N.C. App. 206 (2003)]

NEW TRIAL

Judges MARTIN and HUDSON concur.

TINA L. NICHOLSON, MICHAEL ARMSTRONG, AND MERRILL J. FOWLER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED IN NORTH CAROLINA, PLAINTIFFS V. F. HOFFMANN-LAROCHE, LTD., ET AL. DEFENDANTS AND STATE OF NORTH CAROLINA, EX REL. ROY COOPER, ATTORNEY GENERAL, PLAINTIFF V. F. HOFFMANN-LAROCHE, INC., ET AL., DEFENDANTS

No. COA02-247

(Filed 18 February 2003)

Appeal and Error— appealability—interlocutory order—denial of motion to intervene

Appellant's appeal from the denial of his motion to intervene in a class action against major manufacturers of various vitamin products based upon alleged price fixing and market allocation conspiracy is dismissed as an appeal from an interlocutory order, because: (1) the trial court's order denying defendant's motion to intervene does not determine the entire controversy among all parties; and (2) no substantial right is affected when appellant, upon objecting in a timely manner at the fairness hearing to the approval of the settlement, would have the right to appeal without intervening in this action.

Appeal by Bill Beaver from order entered 10 September 2001 by Judge Shirley L. Fulton, Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 January 2003.

Stubbs & Perdue, P.A., by Jason Hendren and Michael Malone and Law Offices of George A. Barton, P.C., by George A. Barton, for appellant.

Helms, Mullis & Wicker, PLLC, by William C. Mayberry, Peter J. Covington, and Jason Evans and Mayer, Brown, Rowe & Maw, by Mary K. Mandeville, for defendant-appellees.

NICHOLSON v. F. HOFFMANN-LAROCHE, LTD.

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James F. Wyatt, III and Straus & Boies, LLP, by David Boies, Timothy Battin, Ian Otto, and Michael Straus, for plaintiffs-appellees.

Attorney General Roy Cooper, by Assistant Attorney General K. D. Sturgis, for the State of North Carolina-appellees.

WYNN, Judge.

Bill Beaver, appellant, contends the trial court erred in denying his motion to intervene. Because appellant's appeal is interlocutory, we hereby dismiss his appeal.

On 5 March 1999, Tina Nicholson, a North Carolina resident and a consumer of various vitamin products, filed a class action case against the major manufacturers of those vitamin products, based upon an alleged price fixing and market allocation conspiracy that occurred during the 1990s.¹ The complaint requested treble damages based on the defendants' alleged violations of the North Carolina antitrust laws, N.C. Gen. Stat. § 75-1 *et seq.*, on behalf of herself and all similarly situated consumers in North Carolina.² Shortly afterwards, the parties agreed to a stay of the trial court proceedings pending the outcome of settlement discussions.

On 10 October 2000, Class Counsel, along with the State Attorneys General, entered into a Master Settlement Agreement with seven Defendants. The Master Settlement Agreement provided for a recovery of more than \$187 million for the benefit of indirect purchasers of vitamins. Under the terms of the settlement, class members were divided into two separate subclasses, consisting of a commercial settlement class and a consumer settlement class. The members of the North Carolina Commercial Class would be eligible to file claims against a multistate claim fund, while members of the North Carolina consumer class would benefit from two *cy pres* distributions. The first, a \$7,584,000 payment, would be distributed to nonprofit corporations, charitable organizations and/or political subdivisions of North Carolina for the express purpose of improving the health and nutrition of North Carolina citizens or the advancement of nutritional and dietary science in the State. The second, a \$705,000

1. The lawsuit was filed in coordination with more than twenty-two class actions filed in other states and the District of Columbia on behalf of indirect purchasers of vitamins.

2. On 14 June 2001 the State of North Carolina was allowed to intervene as a plaintiff on behalf of governmental purchasers and as *parens patriae*.

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payment, would be distributed by the North Carolina Attorney General's Office for the benefit of injured consumers and/or injured commercial purchasers (the State Economic Impact Fund).

On 30 May 2001, plaintiffs requested the trial court grant preliminary approval of the proposed settlement. The trial court granted preliminary approval on 14 June 2001. Appellant moved to intervene on 17 July 2001 for the purposes of (1) objecting to the proposed consumer class settlement; and (2) acting as the named representative of the North Carolina Consumer Class with his counsel. The trial court denied appellant's motion on 10 September 2001; he appealed.

The trial court's order denying appellant's motion to intervene is interlocutory because it has not determined the entire controversy among all parties. *See Alford v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998). "Although interlocutory orders are generally not immediately appealable, immediate appellate review may be granted where the order adversely affects a substantial right which appellant may lose if an appeal is not granted." *Id.*, N.C. Gen. Stat. § 1-277; 7A-27(d) (2001). Appellant argues a substantial right is affected because he contends "an objecting class member does not have standing to appeal from a trial court order granting final approval to a class settlement unless that class member has been permitted to intervene in the class action proceeding."

Whether an objecting class member has standing to appeal from a trial court order granting final approval to a class settlement without having first intervened into the class action has not been decided in North Carolina. "As this specific issue has not been decided by our State's appellate courts, we consider decisions from other jurisdictions. In that Rule 24 of the North Carolina Rules of Civil Procedure is virtually identical to Rule 24 of the Federal Rules of Civil Procedure, we appropriately look to the federal court decisions for guidance." *Harvey Fertilizer and Gas Co. v. Pitt Cty.*, — N.C. App. —, 568 S.E.2d 923, 927 (2002). The United States Supreme Court, in its interpretation of Fed. R. Civ. P. 23(b) & 24, recently held "nonnamed class members who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *Devlin v. Scardelletti*, 122 S.Ct. 2005, 2013 (2002). We are guided by *Scardelletti* in holding that likewise, appellant, upon objecting in a timely manner at the fairness hearing to the approval of the settlement, would have the right to appeal without intervening in this

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[156 N.C. App. 209 (2003)]

action. Accordingly, since there is no substantial right affected, we dismiss appellant's appeal as interlocutory.

Dismissed.

Judges BRYANT and GEER concur.

SHIRLEY PARKER, EMPLOYEE, PLAINTIFF v. WAL-MART STORES, INC., EMPLOYER,
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER, DEFENDANTS

No. COA02-204

(Filed 18 February 2003)

Workers' Compensation— disability—pre-injury wages

The Industrial Commission erred in a workers' compensation case by finding that plaintiff employee is temporarily totally disabled because: (1) the full Commission merely found that plaintiff's doctor had not released plaintiff to return to work after her surgery even though she retained the ability to perform a range of activities that may or may not have allowed her to earn her pre-injury wages as a fitting-room attendant or in some other employment; and (2) the full Commission failed to make the proper findings with respect to plaintiff's incapacity to earn pre-injury wages.

Appeal by defendants from opinion and award filed 24 October 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2003.

Whitley, Jenkins & Riddle, by J. Christopher Brantley, for plaintiff appellee.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr. and Zachary C. Bolen, for defendant appellants.

BRYANT, Judge.

Wal-Mart Stores, Inc. and Insurance Company of the State of Pennsylvania (collectively defendants) appeal an opinion and award by the Full Commission of the North Carolina Industrial Commission

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[156 N.C. App. 209 (2003)]

filed 24 October 2001 awarding Shirley Parker (plaintiff) temporary total disability compensation.

In its opinion and award, the Full Commission found in pertinent part:

1. On 12 October 1996, plaintiff was working as a stocker in the Wal-Mart Store in Jacksonville, North Carolina when she strained her low[er] back while lifting furniture. Thereafter, plaintiff was out of work until August 1997, during which time she received compensation for total disability. When plaintiff did return to work, she was assigned to be a fitting[-]room attendant, where her primary responsibility was to answer telephones.

2. Plaintiff was initially evaluated at Onslow Doctors Care on 14 and 16 October 1996. She was then referred to Dr. Noel Rogers [(Dr. Rogers)] Dr. Rogers treated plaintiff for her back through 22 November 1996, at which time he referred plaintiff for evaluation by Dr. Robert Abraham [(Dr. Abraham)], a neurosurgeon in Jacksonville.

. . . .

5. . . . [D]efendant-carrier and plaintiff agreed for Dr. [Mark] Roger [(Dr. Roger)] to become the treating physician. . . .

6. Plaintiff returned to work for defendant-employer as a fitting-room attendant in August of 1997. . . .

7. The fitting-room attendant job plaintiff performed for defendant-employer was not created for her but represented a job defendant-employer had available for plaintiff which was suitable to her capacity. In her position as a fitting-room attendant, plaintiff had the capacity to earn wages of at least \$314.75 per week[, Plaintiff's stipulated pre-injury average weekly wage].

8. . . . [Plaintiff] consulted Dr. Abraham without referral or authorization on 20 July 1998 for complaints of increased back pain. Four days later . . . Dr. Abraham performed a percutaneous discectomy . . . in an effort to repair a bulging disc

9. . . . [Plaintiff was] diagnosed . . . with chronic pain disorder. According to plaintiff, water therapy was most beneficial in improving pain symptoms. Plaintiff also used a TENS unit which helped alleviate some of her chronic low[er] back pain.

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10. . . . [P]laintiff only had a temporary improvement in her symptoms following surgery.

11. Plaintiff last worked at Wal-Mart on or about 28 August 1998. Since that time, plaintiff has retained the capacity to perform activities including standing for a period of up to 15 minutes, walking of a quarter mile and lifting 20 pounds, provided that she avoids bending, twisting, climbing and reaching above her shoulders.

12. Dr. Abraham has not released plaintiff to return to work.

. . . .

14. Following his evaluation of plaintiff [on 17 July 2000], Dr. Roger indicated that plaintiff is not currently a surgical candidate but did state that he is willing to manage plaintiff's ongoing treatment. Currently, Dr. Roger's only recommendation is that plaintiff continue her pain management treatment This is the same course of treatment into which Dr. Abraham referred plaintiff in 1997 before her surgery.

Based on these findings, the Full Commission then concluded:

1. Plaintiff sustained an injury by accident

. . . .

5. Plaintiff has been disabled since she last worked for defendant-employer[,] and plaintiff has not yet reached maximum medical improvement.

6. As a result of the compensable injury, plaintiff is entitled to temporary total disability compensation . . . continuing until plaintiff returns to work at the same or greater wages or until further order of the Commission.

The issue is whether the Full Commission's findings support its conclusion that plaintiff is disabled.

In a workers' compensation case, the plaintiff has the burden of proving she suffers from a disability as a result of a work-related injury. *Coppley v. PPG Indus., Inc.*, 133 N.C. App. 631, 634, 516 S.E.2d 184, 186 (1999). "Disability" is defined by statute as "incapacity because of injury to earn the wages which the employee was receiv-

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ing at the time of injury in the same or any other employment.” N.C.G.S. § 97-2(9) (2001). The determination of whether a disability exists is a conclusion of law that must be based upon findings of fact supported by competent evidence. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 594-95, 290 S.E.2d 682, 683 (1982). To support a conclusion of disability, the Industrial Commission must thus find facts indicating: “(1) [the plaintiff] was incapable of earning pre-injury wages in the same employment, (2) she was incapable of earning pre-injury wages in any other employment, and (3) the incapacity to earn pre-injury wages in either the same or other employment was caused by [the] plaintiff’s injury.” *Coppley*, 133 N.C. App. at 634, 516 S.E.2d at 186 (citing *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683). Furthermore, as the Industrial Commission must make specific findings of fact as to each material fact upon which the rights of the parties depend, “the Commission’s findings must sufficiently reflect that [the] plaintiff produced evidence to prove all three *Hilliard* factors.” *Id.* at 635, 516 S.E.2d at 187. If the Industrial Commission’s findings are insufficient to determine the rights of the parties, the appellate court may remand the case for additional findings. *See Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684.

In this case, the Full Commission merely found that Dr. Abraham had not released plaintiff to return to work after her surgery even though she retained the ability to perform a range of activities that may or may not have allowed her to earn her pre-injury wages as a fitting-room attendant or in some other employment. *Cf. Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994) (“[a]n employee’s release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury”). Because the Full Commission made no finding with respect to plaintiff’s incapacity to earn pre-injury wages, this case must be reversed and remanded for entry of findings on plaintiff’s evidence pertaining to the *Hilliard* factors. We do not address defendants’ remaining assignments of error as they turn on the issue of disability to be decided on remand.

Reversed and remanded.

Judges WYNN and GEER concur.

SARDA v. CITY/CTY. OF DURHAM BD. OF ADJUST.

[156 N.C. App. 213 (2003)]

PETER J. SARDA AND WIFE, PATRICIA T. SARDA, PETITIONERS V. CITY/COUNTY OF
DURHAM BOARD OF ADJUSTMENT AND JOE MITCHELL, RESPONDENTS

No. COA02-284

(Filed 18 February 2003)

Zoning— appeal of board of adjustment decision—standing

Petitioners lacked standing to appeal to superior court a board of adjustment decision to grant a special use permit where petitioners alleged that they were the owners of a residential tract about 400 yards from the proposed paintball playing field, but did not allege that they would suffer special damages distinct from the rest of the community.

Appeal by Respondents from order entered 22 October 2001 by Judge Narley L. Cashwell in Durham County Superior Court. Heard in the Court of Appeals 27 January 2003.

Wallace, Creech & Sarda, L.L.P., by Peter J. Sarda and Richard P. Nordan, for petitioner-appellees.

Office of the Durham County Attorney, by Lowell S. Siler, for respondent-appellant City/County of Durham Board of Adjustment.

Law Office of Brenda M. Foreman, by Brenda M. Foreman, for respondent-appellant Joe Mitchell.

ELMORE, Judge.

Joe Mitchell (“respondent Mitchell” or “Mitchell”) moves this Court pursuant to N.C.R. App. P. 37(a) to determine: (1) that Peter J. Sarda and Patricia T. Sarda (collectively, “petitioners”) lacked standing to appeal to the superior court from the City/County of Durham Board of Adjustment’s (“respondent Board” or “Board”) decision granting a special use permit in this matter; (2) that petitioners lack standing to be a party to the subsequent appeal to this Court from the superior court’s order; and (3) that petitioners’ appeal should be dismissed. We agree, and pursuant to N.C.R. App. P. 37(b), hereby allow respondent Mitchell’s motion to dismiss the instant appeal.

On 24 October 2000, respondent Board granted a Minor Special Use Permit to respondent Mitchell, allowing Mitchell to operate a

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“Paintball Playing Field” on a tract of land he owns in rural Durham County. Petitioners, owners of a residential tract located across North Carolina Highway 98 approximately four hundred (400) yards from Mitchell’s tract, appeared at the hearing before the Board and unsuccessfully argued against issuance of the special use permit. Pursuant to N.C. Gen. Stat. § 153A-345(e) (2001), petitioners filed a Petition for Writ of Certiorari (“Petition”) on 23 November 2000, seeking review by the Superior Court, Durham County, of the Board’s decision to grant the special use permit. The Honorable Narley L. Cashwell heard this matter on 9 October 2001, and by his order filed 22 October 2001, the superior court reversed the Board’s decision, finding specifically that the special use permit should not have been issued in the absence of “evidence which is competent, material and substantial in support of the Board’s finding that the proposed use is not injurious to the value of the properties in the general vicinity.”

Respondents thereafter filed separate Notice of Appeal from the superior court’s judgment to this Court on 13 November 2001 (respondent Board) and 29 November 2001 (respondent Mitchell). On 28 May 2002, pursuant to N.C.R. App. P. 37(a), respondent Mitchell filed a “Motion to Dismiss Appeal (Contest Standing).” Respondent Mitchell’s motion to dismiss the instant appeal was referred to this panel for determination.

In moving to dismiss the instant appeal, respondent Mitchell asserts that petitioners lacked standing to appeal to the superior court from the respondent Board’s decision to issue the special use permit to respondent Mitchell. Respondent Mitchell further asserts that as a consequence of petitioners’ lack of standing, (1) the superior court lacks subject matter jurisdiction over the controversy, such that its 22 October 2001 order reversing the Board’s decision is a nullity; and (2) petitioners are not proper parties to the instant appeal before this Court.

In a case where, as in the case at bar, nearby landowners appealed to the superior court from a municipal board of adjustment’s decision to grant a special use permit, this Court held that the nearby landowners lacked standing where

the petitioners failed to allege, and the Superior Court failed to find, that petitioners would be subject to ‘special damages’ distinct from the rest of the community. Without a claim of special damages, the petitioners are not ‘aggrieved’ persons under N.C. Gen. Stat. § 160A-388(e), and they have no standing.

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Heery v. Zoning Board of Adjustment, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983). “[S]pecial damage[s]” are defined as “a reduction in the value of his [petitioner’s] own property.” *Id.* at 613, 300 S.E.2d at 870. N.C. Gen. Stat. § 160A-388(e) (2001) is a substantially parallel statute to N.C. Gen. Stat. § 153A-345(e), the subject statute in the case at bar.

In the instant case, as in *Heery*, petitioners have failed to allege, and the superior court has failed to find, that they would suffer “special damages distinct from the rest of the community” should respondent Mitchell receive the requested special use permit. Regarding petitioners’ purported interest in the instant controversy, the Petition alleges only that they are “the record land owners of a tract of land located across the highway from Respondent’s property, and are citizens and residents of Durham County, North Carolina.” This is clearly insufficient to qualify as an allegation that petitioners would suffer “special damages distinct from the rest of the community” should the Board issue the requested permit. Petitioners’ mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of “special damages distinct from the rest of the community” in their Petition, is insufficient to confer standing upon them. *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997).

In any case or controversy before the North Carolina courts, “subject matter jurisdiction exists only if a plaintiff has standing.” *Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845, *rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). “If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction.” *State v. Linemann*, 135 N.C. App. 734, 739, 522 S.E.2d 781, 785 (1999) (citing *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)). “A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

For the reasons discussed above, we hold that (1) petitioners lacked standing to appeal to the superior court from the respondent Board’s decision to issue the special use permit to respondent Mitchell; and (2) that petitioners lack standing to be proper parties to an appeal before this Court.

Because of petitioners’ lack of standing, the order appealed from is vacated, and the matter is remanded to the superior court for the

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entry of an order (1) dismissing the Petition for Writ of Certiorari filed 23 November 2000; and (2) reinstating the ruling of the Board of Adjustment dated 24 October 2000.

Vacated and remanded.

Chief Judge EAGLES and Judge McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 FEBRUARY 2003

CAMPBELL v. N.C. WILDLIFE RES. COMM'N No. 02-189	Wake (01CVS4005)	Affirmed
DAVIS v. DAVIS No. 02-290	Montgomery (99CVD415)	Affirmed
HOLLIFIELD v. CITY OF HICKORY No. 02-483	Catawba (01CVS2304)	Affirmed
STATE v. BROWN No. 02-127	New Hanover (99CRS8202) (00CRS9929)	No error in trial; remanded for new sentencing hearing
STATE v. GOODMAN No. 02-282	Cumberland (00CRS57262) (00CRS57440)	No error in part; vacated in part
STATE v. McCOY No. 02-260	Guilford (00CRS111393) (01CRS23733)	No error
STATE v. MORRISON No. 02-57	Cumberland (00CRS949) (00CRS950)	No error
STATE v. PENN No. 02-488	Forsyth (99CRS21947) (99CRS37258) (99CRS37259) (99CRS37260) (99CRS37261) (99CRS37262) (99CRS37263) (99CRS37264) (99CRS37265) (99CRS37266) (99CRS37267) (99CRS37268) (99CRS37269) (99CRS37274) (99CRS37275) (99CRS37276) (99CRS37277) (01CRS15275) (01CRS15276) (01CRS15278) (01CRS15279)	No error

STATE v. ROBINSON No. 02-327	Union (00CRS54105)	No error
STATE v. WOODS No. 02-391	Clay (00CRS696) (00CRS697) (00CRS698) (00CRS700) (01CRS189)	Reversed and remanded in part; no error in part
TAYLOR'S NURSERY, INC. v. BAYLOR BOYS, INC. No. 02-134	Wake (98CVS7856)	Affirmed
FILED 18 FEBRUARY 2003		
BOYD v. BOYD No. 02-514	Catawba (00CVD3412)	Affirmed
BRAGG v. AMERISTEEL No. 02-457	Ind. Comm. (I.C. 955375)	Affirmed
BREWER v. SOUTHERN DEVICES No. 02-605	Ind. Comm. (I.C. 92743)	Affirmed
GILLENWATER v. N.C. DEP'T OF TRANSP. No. 02-350	Guilford (01CVS4400)	Affirmed
N.C. DEP'T OF ENV'T & NATURAL RES. v. SWAIN No. 02-754	Wake (98CVS5611)	Dismissed
ROBINSON v. RAPSCALLION MARINE, INC. No. 01-1513	Dare (00CVS248) (00CVS730)	Reversed and remanded
ROE v. CHILDREN'S SCHOOL No. 02-376	Burke (01CVS1444) (01CVS1482)	Dismissed
STATE v. ANDERSON No. 02-490	Halifax (99CRS807)	No error
STATE v. BALDWIN No. 02-857	Forsyth (94CRS30503)	Vacated and remanded
STATE v. CARTER No. 02-713	Durham (97CRS12044) (97CRS12045)	Vacated

STATE v. CURRY No. 02-678	Forsyth (01CRS32149) (01CRS32182) (01CRS32230) (01CRS54536) (01CRS55138)	No error
STATE v. DAWSON No. 02-451	Lenoir (00CRS51840)	No prejudicial error
STATE v. GEDDIE No. 02-18	Moore (00CRS10789)	No error
STATE v. GILLESPIE No. 02-1018	Lincoln (01CRS1913)	No error
STATE v. KING No. 02-658	Pitt (00CRS58959)	No error Order entered 26 November 2001 denying defendant's motion for appropri- ate relief is vacated
STATE v. McMANUS No. 02-822	Mecklenburg (99CRS42251) (99CRS42252)	Affirmed
STATE v. PIERCE No. 02-242	Beaufort (01CRS705) (01CRS709)	Reversed in part and remanded
STATE v. ROBERTSON No. 02-445	Surry (01CRS4449) (01CRS4450) (01CRS4451) (01CRS51991) (01CRS51993)	No error
STATE v. WALTERS No. 02-528	Robeson (01CRS6462)	No error

IN RE WILL OF McDONALD

[156 N.C. App. 220 (2003)]

IN THE MATTER OF THE WILL OF MARY O. McDONALD, DECEASED

No. COA02-472

(Filed 4 March 2003)

1. Wills— caveat—duress and undue influence—directed verdict—judgment notwithstanding the verdict—motion for new trial

The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by denying propounder's motions for directed verdict, judgment notwithstanding the verdict, and for a new trial even though propounder was not present during the negotiation and execution of the will, because there was more than a scintilla of evidence from which the jury could reasonably find the existence of the four elements of undue influence including that: (1) decedent, in the weeks following her daughter's death and leading up to the execution of the will, was a person who was subject to influence; (2) propounder, who suddenly became wholly involved in decedent's affairs, had an opportunity to exert influence over decedent; (3) propounder, who among other things directly solicited decedent's financial consultant for assistance in persuading decedent not to involve her nephew with the will, had a disposition to exert influence; and (4) the result indicates the presence of undue influence.

2. Evidence— will caveat—sale of trucking business—motive—untruthfulness

The trial court did not abuse its discretion in a will caveat action alleging the will was obtained through duress and undue influence by denying propounder's motion in limine and by admitting evidence regarding propounder's sale of her trucking business even though propounder contends the evidence was impermissibly admitted to show her character for untruthfulness, because: (1) the trial court specifically found information regarding the sale of propounder's trucking business was relevant and that its probative value would not be outweighed by the danger of unfair prejudice; (2) propounder told other witnesses and testified in her deposition that the sale of her trucking business was the reason she announced her retirement days prior to execution of the will, and caveator sought to prove this reason as untruthful to establish a pattern of deceit surrounding the will and to

IN RE WILL OF McDONALD

[156 N.C. App. 220 (2003)]

show propounder knew she was to be named the primary beneficiary and was motivated to conceal this fact from others who might raise questions about her retirement and the will; and (3) even if admitted in error, this evidence was not prejudicial in light of other evidence of instances of propounder's untruthfulness and the testimony of several witnesses as to her general reputation in the community as untrustworthy.

3. Wills— caveat—undue influence—jury instructions

The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by instructing the jury that it could consider on the issue of undue influence whether decedent was subjected to misrepresentations regarding the wishes of her natural children, whether propounder obtained other transfers of property from decedent, and whether propounder was disposed to exert undue influence, because: (1) a trial court may instruct the jury as to claims or defenses that are supported by the evidence when viewed in the light most favorable to the proponent of the instruction; and (2) each instruction in the present case was amply supported by the evidence and was relevant to the issue of undue influence.

4. Evidence— opinion—will caveat—susceptibility to influence

The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by permitting decedent's financial advisor to testify as to his opinion that he could have swayed decedent in making decisions had he so desired, because: (1) the testimony was rationally based on the financial advisor's perception of decedent over the course of many dealings with her and was also helpful to a determination of a fact in issue of whether decedent was susceptible to influence in the time leading to the execution of her will; and (2) not only was there ample testimony from other witnesses about decedent's susceptibility to undue influence, but propounder's counsel later yielded essentially the same statement from the financial advisor on cross-examination thereby precluding objection from propounder and rendering any error harmless.

5. Costs— will caveat—attorney fees

The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by denying propounder's motion for attorney fees and costs, because: (1) although N.C.G.S. § 6-21 requires the trial court to make a finding

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of fact that the proceeding had substantial merit prior to awarding attorney fees to the caveator, the statutes does not require any such findings in the case of a propounder; and (2) a trial court's decision whether to award attorney fees and costs to a propounder under N.C.G.S. § 6-21 is within its sound discretion, and there was no abuse of discretion given the jury's verdict that the will was procured through propounder's exertion of undue influence.

Appeal by propounder from judgment entered 1 June 2001 and order entered 28 June 2001 by Judge Melzer A. Morgan, Jr., in Moore County Superior Court. Heard in the Court of Appeals 29 January 2003.

Katherine E. Jean for propounder-appellant.

West & Smith, LLP, by Stanley W. West, for caveator-appellee.

MARTIN, Judge.

Mary O. "Quill" McDonald died 23 February 1999. On 17 March 1999, Vickie S. Calcutt presented for probate a paper writing purporting to be McDonald's Last Will and Testament. The paper writing named Calcutt as primary beneficiary. On 9 August 2000, McDonald's son, James C. McDonald, filed a caveat to the will, alleging the execution of the will was obtained through duress and undue influence.

The evidence tended to show that McDonald had two children, Mary Louise McDonald and James McDonald, the caveator in this action. McDonald's husband and father of her children died in 1989. At the time, and at all relevant times, caveator lived in Asheville and had limited contact with his mother, who resided in Southern Pines. In 1995, after living away from her mother for several years, Mary Louise moved back to Southern Pines to live with McDonald, who was then approximately 84 years old. Various relatives and friends testified McDonald became "totally reliant" and dependent upon Mary Louise, and that McDonald would do as Mary Louise directed. In July of 1997, Mary Louise became ill and died suddenly. Lilla Williams, McDonald's niece, testified McDonald was "devastated" by Mary Louise's death. Jean Cameron, a relative and close friend of McDonald's who had been around her on a weekly basis for some 40 years, testified Mary Louise's death came as a shock to McDonald, who was then 86 years old. McDonald moved into Cameron's home for a short time after the death.

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Cameron testified that despite having known McDonald virtually all her life, she had never heard propounder's name until just prior to Mary Louise's death. McDonald's next door neighbor, who was generally aware of any visitors to McDonald's house, testified he had never seen propounder until Mary Louise's funeral. Lilla Williams testified that prior to Mary Louise moving back to Southern Pines, propounder was not at all significant in McDonald's life, and in fact, McDonald "didn't care for [propounder] or her family." Linda Laverdure and Agnes Davis, nieces of McDonald, both testified they were around McDonald often for many years, and that McDonald did not associate with propounder until Mary Louise returned to Southern Pines. Davis testified propounder only became very involved in McDonald's life following Mary Louise's death.

Cameron testified that in the weeks following Mary Louise's death, and about the time she first noticed propounder's involvement with McDonald, she observed "a definite change" in McDonald's personality. Whereas McDonald had typically been "feisty" and formed her own opinions, she was now "very submissive to any suggestions or planning." Cameron noticed propounder was constantly "directing [McDonald] what to do," was "very much in charge," and that McDonald was "very submissive" to everything propounder instructed. Cameron also observed that in order to direct McDonald what to do, propounder "repeatedly" and continually told McDonald "this is what Mary Louise would have done" or "this is what Mary Louise would have liked for you to do." Cameron testified these statements always had a significant impact on McDonald, who would then completely and uncharacteristically submit to whatever propounder had suggested as being Mary Louise's desire.

Cameron's testimony was corroborated by several other witnesses close to McDonald. Laverdure testified that after Mary Louise's death, propounder "stepped into" Mary Louise's role of directing McDonald and making decisions for her. Williams also observed propounder "several times" directing McDonald what to do by stating it was what Mary Louise would have wanted, and that propounder told McDonald that Mary Louise had given her specific instructions to look after McDonald should Mary Louise die, but that she "could only look after her if [McDonald] gave her the means to do it."

In addition, Cameron testified that during the weeks after Mary Louise's death, McDonald was taking several medications and was easily confused by what she needed to take and when, such that

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Cameron was required to monitor her. Cameron further testified she tried to explain to McDonald how to use household items such as the microwave, but McDonald was incapable of understanding. Cameron had to assist McDonald with such things as bathing. Also during this time, Cameron routinely drove McDonald to her own home to pick up her mail, and propounder would accompany them. Cameron testified that while in McDonald's house, she observed propounder going through papers which Cameron believed to be Mary Louise's financial documents.

Caveator also presented the testimony of Mike Haney, a financial consultant who performed services for McDonald. Haney testified McDonald contacted him shortly after Mary Louise's death in July 1997. McDonald requested that Haney take her to see Robert Page, an attorney. Haney did so, and the three briefly discussed the drafting of a will for McDonald. Haney testified that in discussing potential beneficiaries, the only name McDonald mentioned was Norman Paschal, a blood nephew who resided in Atlanta and had assisted in caring for McDonald's older sister. According to Cameron, Paschal was the first person McDonald wished to contact after Mary Louise's death. Propounder's name was never mentioned in that meeting.

After that meeting, Haney testified McDonald requested that he come to her house on a weekly basis to assist her. Throughout this time, Haney observed about McDonald a "dependency on someone to point the direction specifically" and stated he believed he could have persuaded her or pushed her in making decisions had he so desired. On one such meeting at McDonald's house, Haney met propounder. Haney testified that when he was leaving that day, propounder followed him out to his car and told him it was obvious McDonald trusted him, and that "[w]e really don't need this nephew in Atlanta involved in this. We're a family up here; we can take care of it." Haney was taken aback by propounder's statements, and did not respond.

McDonald also sought financial services from Blanchard Granville following Mary Louise's death. Granville met with McDonald several times regarding her financial investments. Granville testified propounder was present for all his meetings with McDonald, including those at which the beneficiary designations on McDonald's investments were changed from Mary Louise to propounder. Granville testified propounder did most of the talking during these meetings, and that McDonald was "very, very quiet" and obviously "depressed."

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In mid-September 1997, roughly two months after Mary Louise's death and one month prior to execution of the will, McDonald moved from Cameron's home to a retirement home. Cameron testified she visited McDonald in her room one evening shortly after the move. When Cameron returned home that evening, she received a telephone call from propounder, who told her McDonald had complained about Cameron's visit. Cameron was surprised, because McDonald never gave any indication she was not welcome to visit and McDonald was pleasant for the duration of the visit. As a result, Cameron did not visit McDonald in the retirement home until some time later upon receiving a telephone call from a relative of McDonald's asking her why she had not been visiting McDonald. Cameron relayed what propounder had told her, but the relative dismissed it as untrue. When Cameron visited McDonald shortly thereafter, McDonald was equally perplexed as to why Cameron had not been visiting.

Williams testified that shortly after McDonald's move into the retirement home, McDonald complained to her that she was not able to place long-distance telephone calls from the telephone in her room. Propounder suggested it was likely a problem with the telephone itself, but when Williams tested another telephone in McDonald's room, she could not make a long-distance call. Larry Furr, a telephone company representative, testified McDonald's telephone number was registered to McDonald, care of propounder, and that when the telephone service was established in September 1997, a block was placed on the telephone that would prohibit any long-distance calls from being made from that telephone. Furr testified such a block would have had to have been specifically requested, because there was an additional monthly charge for the block. Furr also testified the monthly bills for McDonald's telephone were mailed to propounder.

Sometime in September 1997, just prior to execution of McDonald's will, propounder announced she was ceasing her child care business effective the end of October 1997. Williams testified propounder told her she had sold some trucks from a trucking business she owned and had enough money that she would no longer need to work. Propounder also testified in her deposition that the sale of some trucks was the reason she no longer needed to work. Propounder later retracted that statement and subsequently testified the real reason she no longer needed to work was because of a "secret agreement" she had to provide trucking services to the United States government, and that the government paid her \$160,000 in

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cash at the end of 1997. Propounder testified she had no documentation to prove the existence of any such agreement.

In October 1997, propounder brought McDonald to Haney's office because they believed McDonald's will had been drafted. Haney, in propounder's presence, offered to go over the will with McDonald. After that offer, Haney did not hear from McDonald again, which he considered unusual, since she had always contacted him on a weekly basis. When Haney contacted McDonald, her "tone" was completely different and she stated she would not be needing his help. McDonald never contacted Haney again, and when he saw her in public, McDonald, who was always with propounder, was "very cold." Williams testified propounder told her Haney had tried to embezzle money from McDonald, that he should no longer have any contact whatsoever with McDonald, and that she was going to make certain Haney would not be permitted entry into McDonald's retirement home. Haney denied any wrongdoing.

On 20 October 1997 McDonald executed a will purporting to leave the bulk of her substantial estate to propounder, with the exception of three \$5,000 charitable bequests and \$5,000 for McDonald's neighbor. Propounder presented the testimony of Robert Page, the attorney who drafted McDonald's will. Page testified that during his meetings with McDonald regarding the will, her emotional state appeared to be "very good," and that she was "in control of herself mentally." Page testified McDonald already had a holographic will. That will was executed in 1973, and directed that her estate be given to her husband, or if he was not living, to Mary Louise, with the exception of \$1,000 to be given to caveator. Page further testified that throughout the process of drafting McDonald's will, he did not know who propounder was, and that the person who brought McDonald to his office generally stayed in the reception area and was not a part of his discussions with McDonald. Page also testified that during the actual execution of the will, he believed the only people present in the room were himself, McDonald, and two of his staff people who functioned as witnesses. Page testified it was his opinion McDonald was of sound mind when executing the will and that she did so without constraint or undue influence.

In December 1997, shortly after propounder stopped working, she began writing checks for \$10,000 on McDonald's account to herself and each of her family members; she had McDonald sign the checks. Again in January 1998, propounder wrote out \$30,000 in checks signed by McDonald transferring McDonald's money to pro-

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pounder's family, in addition to a check for \$21,800 for the purchase of a vehicle in propounder's name. Propounder again wrote out checks to her family members totaling \$30,000 in January 1999 and had McDonald sign them. Propounder testified McDonald did this at the direction of attorney Page to reduce her estate for tax purposes. Additionally, propounder began writing checks to "cash" from McDonald's account in October 1997 and every month thereafter in the amount of \$1,600. Propounder testified the money was going to Williams to put in a trust fund for her grandchildren. Williams testified she had never heard of any such trust and received no checks from McDonald or propounder.

McDonald died on 23 February 1999. Williams testified that when she saw a copy of McDonald's will following her death, she called propounder because she "wanted to know the truth" about the will. Williams testified propounder and her husband thereafter came to Williams' house and confronted her. When Williams asked about caveator, propounder "threaten[ed]" her and stated that if she caused any problems with the will, propounder would create problems for Williams. Williams testified propounder stood in front of her in a threatening manner with her hands on her hips, stating she "knew the ropes," and Williams had "better stay out of it."

Additionally, several witnesses testified propounder had a general reputation for untruthfulness. Davis testified propounder told her after Mary Louise's death that she had contacted caveator, and he had expressed that he did not want "any part of anything." Williams also testified that after Mary Louise's death, propounder told her she had traveled to Asheville to visit caveator, and that he stated he "didn't want any part of [McDonald]." After McDonald's death, propounder again told Williams she had spoken to caveator and he had expressed wanting nothing to do with his mother and that "there was no need in trying to get in touch with him." Caveator testified in his deposition that he had not even heard of propounder until he visited Moore County in July 2000 and was informed by Cameron, Davis, Williams and Laverdure that propounder had received the bulk of his mother's estate. Caveator testified all four women were surprised to discover he had never been informed of the deaths of his sister and mother because they had all been led to believe propounder had contacted him.

Propounder's motion for a directed verdict at the close of caveator's evidence was denied. The jury returned a verdict, finding McDonald's will was procured through undue influence and was not

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her true will. The trial court entered judgment on the verdict, ordering that the will have no legal effect. Propounder's motions for judgment notwithstanding the verdict and a new trial were denied. Propounder appeals.

[1] Propounder brings forth sixteen assignments of error contained within six arguments. Propounder first argues the trial court erred in denying her motions for directed verdict, judgment notwithstanding the verdict and a new trial because the evidence was insufficient to sustain the verdict. Our standard of review for the denial of a motion for directed verdict and judgment notwithstanding the verdict is the same, that is, whether the evidence was sufficient to submit the issue to the jury. *Alexander v. Alexander*, 152 N.C. App. 169, 170-71, 567 S.E.2d 211, 213 (2002). "The standard is high for the moving party as the motion should be denied if there is more than a scintilla of evidence to support the [non-movant's] prima facie case." *Id.* Further, the non-movant's evidence must be taken as true, with all contradictions, conflicts, and inconsistencies resolved in the non-movant's favor, giving him the benefit of every reasonable inference. *Id.* The standard of review for the denial of a new trial motion based on insufficiency of the evidence is "simply whether the record affirmatively demonstrates an abuse of discretion by the trial court in doing so." *In re Will of Buck*, 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999).

Undue influence is the " ' 'fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.' " *In re Estate of Whitaker v. Holyfield*, 144 N.C. App. 295, 300, 547 S.E.2d 853, 857-58 (citations omitted), *disc. review denied*, 354 N.C. 218, 555 S.E.2d 278 (2001). In order to state a *prima facie* case on the issue of undue influence, a caveator must prove the existence of four factors: " '(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 Campbell*, 155 N.C. App. 441, 454, 573 S.E.2d 550, 560 (2002) (citation omitted).

Our Supreme Court has identified seven factors probative on the issue of undue influence: (1) old age and physical and mental weakness of the person executing the will; (2) the person executing the will is in the home of the beneficiary and subject to the beneficiary's constant association and supervision; (3) others have little or no opportunity to see her; (4) the will is different from and revokes a prior will; (5) the beneficiary is not a blood relative; (6) the will dis-

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inherits the natural objects of her bounty; and (7) the beneficiary procured the will's execution. *Id.* at 455-56, 573 S.E.2d at 561. However, the list is not exhaustive, and the Supreme Court has recognized "the impossibility of setting forth all the various combinations of factors which make out a case of undue influence." *In re Will of Fields*, 75 N.C. App. 649, 651, 331 S.E.2d 193, 194 (1985).

Moreover, due to the difficulty in proving the existence of undue influence, our courts have recognized "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." *Campbell*, 155 N.C. App. at 454, 573 S.E.2d at 560. "Direct proof of undue influence is not necessary and is rarely available; circumstantial evidence may be considered In fact, '[t]he more adroit and cunning the person exercising the influence, the more difficult it is to detect the badges of undue influence and to prove that it existed.'" *In re Will of Everhart*, 88 N.C. App. 572, 574, 364 S.E.2d 173, 174 (citations omitted), *disc. review denied*, 322 N.C. 112, 367 S.E.2d 910 (1988). Accordingly, each surrounding fact and circumstance, though standing alone may have little import, when taken together may permit an inference that the testatrix's wishes and free will had been overcome by another. *In re Will of Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000), *disc. review denied*, 353 N.C. 375, 547 S.E.2d 16 (2001).

In the present case, propounder relies heavily on the seven relevant factors set forth by our Supreme Court, arguing there was no evidence McDonald suffered from any mental weakness; that McDonald did not live with propounder and interacted with other family and friends; that the primary beneficiaries of McDonald's prior will were deceased; that caveator was not the natural object of McDonald's bounty because of their estranged relationship; and that there was no evidence propounder procured the will's execution, and indeed, Page's testimony established McDonald was of sound mind during execution of her will, and that propounder was not present or otherwise involved with Page.

However, as to the seven factors, caveator's evidence, taken as true, established McDonald was a few days shy of being 87 years old at the time she executed the will; that McDonald had experienced some mental weakness, as established by Cameron's testimony that she became easily confused by her medications and was incapable of

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understanding basic tasks such as operating a microwave; that McDonald was physically weak, as established by Cameron's testimony that she had to assist McDonald with activities such as bathing, that McDonald could no longer drive, and that she moved to an assisted living home where she could receive constant care; that propounder was wholly involved in McDonald's affairs and attempted to limit McDonald's contact with others, and particularly, caveator; that the will was different from McDonald's 1973 will inasmuch as that will purported to leave McDonald's estate to her immediate family, including a certain amount to caveator, whereas her 1997 will was made in favor of propounder, who was of no blood relation to McDonald and had only been involved in McDonald's life for 2 of her 87 years at most; and that the 1997 will disinherited McDonald's only living child, as well as various other blood relatives, including Norman Paschal, whom McDonald had originally considered as an appropriate beneficiary.

Moreover, as to the factor of propounder having procured the will's execution in her favor, caveator presented evidence which although circumstantial, when taken together and as true, established a pattern of manipulation and deceit by propounder in an effort to isolate McDonald from others and influence her to name propounder beneficiary of her estate. The evidence established that propounder, who was theretofore insignificant in McDonald's life, became exceedingly involved in her affairs following Mary Louise's death, an event which devastated McDonald and caused a dramatic change in her personality; that McDonald was uncharacteristically submissive to propounder because she told McDonald Mary Louise had asked her to take care of McDonald, and McDonald always wanted to please Mary Louise; that propounder told McDonald she could only look after her if McDonald gave her the money to do so; that propounder repeatedly directed McDonald what to do by stating it was what Mary Louise wanted, which statements had a significant impact on McDonald; that it was apparent in meetings with Haney regarding McDonald's will and finances that McDonald was easily swayed and depended on someone else to direct her; that when propounder discovered McDonald had suggested her blood nephew as a beneficiary of her estate, propounder solicited Haney's assistance in changing McDonald's mind and ensuring Paschal would not be involved with the will; that propounder became exceedingly involved in McDonald's life, constantly driving McDonald places and assisting her in all areas, including moving her into the retirement home and handling her bills; that propounder also became involved in

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McDonald's financial affairs, going through Mary Louise's financial documents and actively leading all meetings with McDonald's investment planner while McDonald simply sat quietly; that these meetings resulted in propounder being named beneficiary of McDonald's investments; that just prior to execution of the will, propounder announced her retirement, and thereafter gave conflicting reasons as to why she was able to retire; that a few weeks after her retirement and execution of the will, propounder wrote several substantial checks to herself and her family from McDonald's account which she had McDonald sign; and that propounder lied about monthly checks she wrote to "cash" out of McDonald's account within days of being named beneficiary of the will.

The evidence further permitted reasonable inferences that propounder sought to and did prevent McDonald from contacting Norman Paschal or caveator by blocking McDonald from making long-distance telephone calls; that propounder sought to and did limit McDonald's contact with others, as evidenced through her lies to Cameron that McDonald did not want her to visit, and regarding Haney's embezzlement of McDonald's money after he offered to explain the will to McDonald and refused to assist propounder in ensuring Paschal would not be involved with the will; that propounder lied to several of McDonald's family and close friends, and inferentially, to McDonald herself about having contacted caveator after both Mary Louise's and McDonald's deaths, relaying that caveator did not want anything to do with his family and did not wish to be contacted; and that propounder threatened Williams, McDonald's niece, and ordered her to "stay out of it" when Williams asked about caveator after seeing a copy of the will.

We hold such evidence, when viewed under the appropriate standard, constituted more than a scintilla of evidence from which the jury could reasonably find the existence of the four elements of undue influence: (1) that McDonald, in the weeks following Mary Louise's death and leading up to the execution of the will, was a person who was subject to influence; (2) that propounder, who suddenly became wholly involved in McDonald's affairs, had an opportunity to exert influence over McDonald; (3) that propounder, who, among other things, directly solicited Haney's assistance in persuading McDonald not to involve Paschal with the will, had a disposition to exert influence; and (4) the result indicates the presence of undue influence.

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Although propounder presented some evidence which conflicts with caveator's, such as Page's testimony that McDonald appeared to be of a strong and independent mental state, any such inconsistencies must be resolved in favor of the non-movant in ruling upon the motions. Though the fact propounder was not, according to Page, present during the negotiation and execution of the will is a factor favorable to propounder, we disagree that this factor was sufficient grounds on which to take the issue from the jury, in light of caveator's substantial evidence of the circumstances leading up to the execution of the will.

Finally, in light of all of the evidence, we discern no abuse of discretion in the trial court's denial of propounder's motion for a new trial. Accordingly, these assignments of error are overruled.

[2] Propounder next argues the trial court erred in denying her motion *in limine* and admitting evidence regarding the sale of her trucking business, asserting such evidence was wholly irrelevant and impermissibly admitted to establish her character for untruthfulness. The trial court specifically found information regarding the sale of propounder's trucking business was relevant and that its probative value would not be outweighed by the danger of unfair prejudice. A trial court's determination of admissibility and whether the probative value of evidence outweighs its potential prejudice is within its sound discretion. *Allen v. Roberts Constr. Co.*, 138 N.C. App. 557, 532 S.E.2d 534, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). Likewise, the denial of a motion *in limine* will not be reversed absent an abuse of discretion. *Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999).

We discern no abuse of discretion in the trial court's determination of relevancy and admissibility given that propounder told other witnesses and testified in her deposition that the sale of her trucking business was the reason she announced her retirement days prior to execution of the will. Caveator sought to prove this reason as untruthful to establish a pattern of deceit surrounding the will, and to show propounder knew she was to be named the primary beneficiary and was motivated to conceal this fact from others who might raise questions about her retirement and the will. Although, by itself, evidence of the sale of the trucking business may not have been wholly significant, given the wide range of evidence to be considered in cases of undue influence, the evidence was probative when viewed in conjunction with the totality of the circumstances. *See, e.g., In*

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re Will of Thompson, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958) (regarding undue influence, “[w]e cannot judge of the importance of the bit of mosaic being laid at the time or the part of the pattern being woven except in connection with the whole design.” (citation omitted)).

Propounder argues that the evidence admitted went beyond evidence of the sale of the trucking business, and addressed issues regarding the way in which propounder conducted that business solely to prove her character for untruthfulness. However, we reject her argument. Even if admitted in error, this evidence was not prejudicial in light of other evidence of instances of propounder’s untruthfulness, and the testimony of several witnesses as to her general reputation in the community as untrustworthy.

[3] Next, propounder argues the trial court erred in instructing the jury that it could consider, in determining the existence of undue influence, whether: (1) McDonald was subjected to misrepresentations regarding the wishes of her natural children; (2) propounder obtained other transfers of property from McDonald; and (3) propounder was disposed to exert undue influence. Propounder argues none of these instructions was supported by the evidence.

A trial court may instruct the jury as to claims or defenses that are supported by the evidence when viewed in the light most favorable to the proponent of the instruction. *Hill v. McCall*, 148 N.C. App. 698, 559 S.E.2d 265 (2002). We hold each instruction in the present case was amply supported by the evidence and was relevant to the issue of undue influence.

As to the court’s instruction that the jury could consider whether McDonald was subjected to misrepresentations about the wishes of her children, caveator presented substantial evidence showing propounder consistently controlled McDonald by representing that she knew what Mary Louise would like for McDonald to be doing and that Mary Louise specifically requested that propounder care for McDonald. Moreover, caveator presented evidence from several witnesses that propounder lied about having contacted caveator after the death of Mary Louise and represented to others that caveator wanted nothing to do with his family and did not wish to be contacted.

As to the instruction regarding propounder having obtained other transfers of property from McDonald, the evidence established pro-

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pounder wrote herself checks from McDonald's account and had McDonald sign the checks, including a check for \$21,800 for the purchase of a vehicle in propounder's name. Moreover, the evidence also established propounder regularly wrote checks to "cash" from McDonald's account, stating the money was being used for a trust fund for Williams' grandchildren, of which Williams denied any knowledge. Propounder argues this evidence simply indicates McDonald was following Page's advice to make *inter vivos* gifts to propounder; however it was for the jury to determine what the evidence indicated. The fact remains there existed evidence that propounder obtained transfers of property from McDonald, and the instruction was therefore warranted.

Finally, there existed ample evidence, as detailed in Part I of this opinion, of propounder's disposition to exert undue influence over McDonald. Accordingly, the trial court did not err in instructing the jury as to these issues, and these assignments of error are therefore overruled.

[4] Propounder next maintains the trial court erred in permitting Haney to testify as to his opinion that he could have swayed McDonald in making decisions had he so desired. Propounder argues caveator failed to present a sufficient foundation by showing the statement was rationally based on Haney's perceptions. We disagree. Under G.S. § 8C-1, Rule 701, a lay witness may testify regarding an opinion or inference which is both "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2002).

In this case, the testimony at issue was rationally based on Haney's perception of McDonald over the course of many dealings with her, and was also helpful to a determination of a fact in issue, whether McDonald was susceptible to influence in the time leading up to the execution of her will. In any event, not only was there ample testimony from other witnesses about McDonald's susceptibility to influence, but propounder's counsel later yielded essentially the same statement from Haney on cross-examination, thereby precluding objection from propounder and rendering any error harmless. *See, e.g., Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 535 S.E.2d 55 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001).

[5] Finally, propounder argues the trial court committed reversible error in denying her motion for attorney's fees and costs because the

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court was first required to enter findings of fact on whether propounder's position, although unsuccessful, was supported by substantial merit. G.S. § 6-21 provides the requisite statutory authority for a court to award fees and costs to either party in a will caveat proceeding. N.C. Gen. Stat. § 6-21(2) (2002). The statute requires that prior to awarding attorney's fees to the *caveator*, the trial court must make a finding of fact that the proceeding had substantial merit. N.C. Gen. Stat. § 6-21(2). The statute does not, however, require the trial court make any such findings in the case of a propounder. Propounder has not cited any authority for her proposition that the trial court must make such a finding before denying a propounder's motion, and we decline to read this requirement into the plain language of G.S. § 6-21. A trial court's decision whether to award attorney's fees and costs to a propounder under G.S. § 6-21 is within its sound discretion. *In re Will of Ridge*, 302 N.C. 375, 275 S.E.2d 424 (1981). No abuse of discretion is present here, given the jury's verdict that the will was procured through propounder's exertion of undue influence.

No error.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. MARCUS LAMONT CARMON

No. COA02-571

(Filed 4 March 2003)

1. Search and Seizure— articulable suspicion for stop—classic drug transaction

Officers' observations were sufficient for an articulable suspicion that defendant was engaged in criminal activity, and defendant's motion to suppress cocaine seized during the subsequent stop was properly denied, where an officer saw defendant receive a softball-size package from a man in a conspicuous car at night, defendant then appeared to be nervous, and an officer with extensive narcotics training and experience in observing drug transactions testified that the incident looked like a classic drug transaction.

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2. Confessions and Incriminating Statements— statement not coerced—confession and cooperation distinguished— threat to girlfriend insufficient

A cocaine defendant's statement to officers was not coerced where defendant contended that the statement was made from fear that his girlfriend would be charged, but defendant was told that his girlfriend could be arrested, not that she would be, and defendant was offered the opportunity to assist police in their investigation of defendant's supplier to avoid his immediate arrest. Defendant was not induced to confess but to cooperate, and officers kept their promise and did not immediately arrest defendant even though he did not fully cooperate with them.

3. Drugs— trafficking in cocaine—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of trafficking in cocaine where there was testimony that more than the requisite amount was seized from defendant and that he carried the drugs around a parking lot, entered his girlfriend's car with the drugs, and drove away with her before being stopped.

4. Criminal Law— entrapment—delaying stop

Officers did not entrap defendant into trafficking in cocaine by transportation by delaying the stop until defendant's girlfriend began to drive him away from the scene. Defendant carried the cocaine around a parking lot, entered his girlfriend's car, and began to leave; there is no evidence that officers induced defendant to commit an offense he was in the process of committing.

5. Evidence— lay reference to paranoia—witness's meaning explained—not prejudicial

There was no prejudice in a cocaine trafficking prosecution in the admission of an officer's characterization of defendant's behavior as paranoia. The officer was not qualified as an expert in psychology, but upon further questioning explained his meaning.

6. Evidence— duplicative—harmless error

Testimony about the amount of crack cocaine that could be produced from powder seized from defendant was duplicative but harmless because the State had already proven the amount needed to constitute cocaine trafficking through the testimony of an arresting officer.

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7. Evidence— expert testimony—reliance on tests performed by another

There was no error in a cocaine trafficking prosecution in the allowance of testimony from an SBI agent concerning tests performed by another agent. The first agent (Wagoner) was accepted as an expert, and experts may base their opinions on tests performed by others if those tests are the type reasonably relied upon by experts in the field.

8. Criminal Law— jury poll—request required

It is a defendant's responsibility to request a jury poll, even if at an inopportune time, and there was no plain error in the trial court dismissing the jury without asking defendant if he wished to poll the jury.

9. Sentencing— jury address by defendant—request required

There was no error, plain or otherwise, in a cocaine trafficking prosecution where defendant did not individually address the jury prior to sentencing, but his attorney spoke on his behalf and defendant did not ask to speak himself and did not object after his attorney spoke. The court is not required to specifically address defendant nor to ask whether defendant wishes to make a statement after his attorney addresses the court. N.C.G.S. § 15A-1334(b).

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgments entered 12 December 2001 by Judge William C. Griffin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 22 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General William R. Miller, for the State.

Geoffrey W. Hosford for defendant-appellant.

TYSON, Judge.

I. Background

Greenville Police Officer Jay Madigan, ("Madigan"), drove his personal vehicle into the Food Lion parking lot on 6 April 2001, around 10:00 p.m. Madigan spotted a large, dark sport sedan with chrome rims parked in the parking lot. Madigan observed Marcus Lamont Carmon ("defendant") standing partially inside the sedan

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with the passenger door opened, and saw the driver passing an object about the size of a softball to the defendant. Defendant held the package close to his chest, put the package in his jacket, and stepped away from the sedan. The sedan drove away as defendant walked toward the pay telephones located near the Food Lion entrance. Defendant appeared to survey the area, "looking all around and all around and all around." Defendant never searched for change or a calling card, or attempted to make a phone call.

Defendant walked towards the entrance of the Food Lion and continued to survey the area. Defendant walked to another vehicle in the parking lot and entered the passenger side. While observing defendant, Madigan used his cell phone to call the police communications center. He relayed his observations concerning defendant to E.L. Phipps ("Phipps") of the Greenville Police Department. Phipps relayed this to Officer William Holland ("Holland") of the Greenville Police Department. Madigan had received extensive narcotics training from the state and federal government.

Defendant's girlfriend purchased a bag of groceries, left the Food Lion store, and entered the driver's side of the vehicle in which defendant was seated. The girlfriend drove out of the parking lot and was stopped by Phipps and Holland. Holland approached the girlfriend, and Phipps moved toward defendant. Phipps explained to defendant what Madigan had observed. Defendant denied the allegations and consented to be searched. Phipps immediately reached to where Madigan had seen defendant place the package. Phipps felt the package and alerted Holland who reached through the car and retrieved two plastic bags wrapped around approximately 55.4 grams of powder containing cocaine.

Defendant was transported to the police station where he received his *Miranda* rights. Defendant provided a written statement to police. Defendant stated that he called "Flash" about 9:30 p.m., explained that he had a money problem, and that Flash told defendant to meet him at Food Lion. Flash arrived around 10:00 p.m. and gave defendant the cocaine. Defendant owed Flash two thousand dollars. Defendant also stated that his girlfriend went into the store to purchase beer and that she knew nothing about the drug exchange.

Defendant was not immediately arrested but was encouraged to cooperate in an investigation against Flash. Officer A.P. White requested that defendant be released to work for the investigation.

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Defendant never assisted in apprehending Flash. Defendant was arrested on 22 June 2001 and charged with trafficking cocaine by possession, trafficking cocaine by transportation, and possession with intent to sell and deliver cocaine.

Defendant moved to suppress his statement on the grounds that the officers coerced him to cooperate by threatening to charge his girlfriend. The trial court found that this suggestion originated from defendant's own motives, and that defendant's statement was voluntarily and understandingly given.

Defendant also moved to suppress all evidence obtained from the stop of the vehicle. The trial court found that defendant consented to the search of his person and that Madigan's observations were sufficient to raise a reasonable suspicion and to warrant an investigatory stop.

A jury found defendant guilty of trafficking cocaine by possession, trafficking cocaine by transportation, and possession with intent to sell and deliver cocaine. Defendant was sentenced to consecutive terms of 35-42 months each for the trafficking offenses and 8-10 months for the possession, the possession sentence to run concurrently with the trafficking offenses. Defendant appeals.

II. Issues

Defendant assigns eight errors. (1) The trial court erred in denying the motion to suppress evidence because Madigan only had an "inarticulable hunch" and not articulable suspicion that defendant was engaged in criminal activity and, (2) denying the motion to suppress defendant's statement because of police coercion. (3) The trial court erred when it denied defendant's motion to dismiss because of insufficient evidence that defendant committed the offense of trafficking by transportation. (4) The trial court erred when it allowed improper lay opinion testimony about defendant's behavior and (5) when it allowed the prosecutor to cross-examine SBI Agent Wagoner ("Wagoner") about the amount of crack cocaine that a person could generate from the evidence seized. (6) The trial court erred and violated defendant's confrontation rights by allowing Wagoner to testify about the results of tests performed by SBI Agent Suggs ("Suggs"). (7) The trial court committed plain error in denying defendant the opportunity to poll the jury after return of the verdicts and (8) in denying defendant the opportunity to address the court prior to imposing judgment.

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III. Denial of the Motion to SuppressA. Evidence Seized

[1] Defendant contends that the trial court should have suppressed the evidence seized during the stop and search and argues that the officers did not have an articulable suspicion that defendant was involved in criminal activity. The test for articulable suspicion is based upon the “totality of the circumstances” and is very fact-specific. *See In re Whitley*, 122 N.C. App. 290, 468 S.E.2d 610, *disc. rev. denied*, 344 N.C. 437, 476 S.E.2d 132 (1996).

The trial court’s findings of fact “are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). The conclusions of law “must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

Officer Madigan observed defendant receive a softball-size package from a man in a conspicuous car at night. Madigan noticed what appeared to be nervous behavior by the defendant after the transaction.

Officer Madigan’s observations of defendant’s behavior and apparent nervousness, are appropriate considerations to determine whether reasonable suspicion existed. *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999), *State v. Butler*, 147 N.C. App. 1, 8, 556 S.E.2d 304, 309 (2001), *aff’d*, 356 N.C. 141, 567 S.E.2d 137 (2002), *State v. Hendrickson*, 124 N.C. App. 150, 155, 476 S.E.2d 389, 392-93 (1996), *appeal dismissed, disc. rev. improvidently allowed*, 346 N.C. 273, 488 S.E.2d 45 (1997). *See also State v. Grimmitt*, 54 N.C. App. 494, 502, 284 S.E.2d 144, 150 (1981), *disc. rev. denied*, 305 N.C. 304, 290 S.E.2d 706 (1982) (holding nervousness alone does not provide reasonable suspicion). The nighttime exchange as well as Madigan’s past experience in observing drug transactions as a police officer and extensive narcotic training are factors to determine whether the officer had a reasonable suspicion justifying the stop. *See State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 505 (1973) (holding time of day or night to be a relevant consideration in determining whether reasonable suspicion exists); *Butler*, 147 N.C. App. at 7, 556 S.E.2d at 308-09 (“[a] trained narcotics agent forms a reasonable, articulable suspicion that an individual is a drug courier on the

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basis of identifiable behaviors that are usually associated with drug couriers as opposed to law abiding citizens.” (internal quotations omitted)). Madigan testified that the incident looked like a “classic” drug transaction, the sort of hypothetical given in narcotics school. We find these observations to be sufficient for an “articulable suspicion.” Defendant’s assignment of error is overruled.

B. Statement Given

[2] Defendant contends that the trial court erred in denying his motion to suppress the statement he gave to the officers. Defendant argues that his statement was coerced and out of fear that his girlfriend would be charged if he declined to talk.

Officer Holland admitted at trial that he told defendant that his girlfriend *could* be charged and her vehicle seized if defendant did not cooperate. Defendant was not specifically induced to confess but rather to “cooperate” with police. Defendant Carmon chose to make a statement as part of his cooperation, not in exchange for his freedom or leniency, but to avoid possible prosecution of his girlfriend. The alleged “threat” towards defendant’s girlfriend’s arrest was insufficient to render defendant’s statement involuntary as the officers never stated that defendant’s girlfriend *would* be charged but only indicated that it *could* happen.

Defendant was offered the opportunity to assist the police investigation of Flash to avoid immediate arrest. Defendant gave a statement but later refused to help in the investigation of Flash.

“[P]romises not to prosecute a defendant made during a police interrogation, in return for a defendant’s confession, deserve the same scrutiny under contract and due process principles as promises made in the context of plea bargains.” *State v. Sturgill*, 121 N.C. App. 629, 637, 469 S.E.2d 557, 562 (1996). The facts in *Sturgill* are distinguishable. At bar, the officers promised not to prosecute defendant if defendant would assist in their investigation of Flash. Unlike *Sturgill*, the officers here kept their promise and did not immediately arrest defendant even though defendant did not fully cooperate with them in assisting in the investigation.

No other alleged threats were made to defendant regarding his cooperation. No threats were made specifically to induce a statement. The officers promised not to charge defendant if he assisted in the investigation of Flash. Because defendant broke this prom-

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ise, he was charged. The trial court's findings of fact are supported by substantial evidence. The court's conclusions of law that defendant was not coerced into making a statement and that his confession was given voluntarily and freely after having waived his *Miranda* rights are supported by those facts. This assignment of error is overruled.

IV. Denial of Motion to Dismiss

[3] Defendant contends that the trial court erred in denying his motion to dismiss, and asserts that the State produced insufficient evidence that defendant trafficked in drugs by transportation. Defendant argues that the police delayed stopping defendant in order to entrap him into the offense of trafficking by transportation.

The trial court must consider all of the evidence admitted in the light most favorable to the State and determine whether substantial evidence exists of defendant's commission of the crime charged prior to ruling on a motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 65-67, 296 S.E.2d 649, 651-53 (1982). 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 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

Trafficking refers to large scale distribution of controlled substances. *See State v. McCoy*, 105 N.C. App. 686, 689, 414 S.E.2d 392, 394 (1992). The offense of trafficking by transportation includes any actual carrying about or movement of a particular quantity of drugs from one place to another. *See State v. Outlaw*, 96 N.C. App. 192, 196, 385 S.E.2d 165, 168 (1989), *disc. rev. denied*, 326 N.C. 266, 389 S.E.2d 118-19 (1990) (citing *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122, 67 L. Ed. 894, 901 (1922)). In determining whether a "substantial movement" has occurred "all the circumstances surrounding the movement and not simply the fact of a physical movement of the contraband from one spot to another" should be considered. *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991). Here, defendant obtained the cocaine from Flash's car, put the cocaine in his jacket, walked over to the pay telephone, walked toward and entered his girlfriend's car, and rode away with her.

This Court previously upheld a defendant's conviction of trafficking by transportation where the defendant removed drugs from his dwelling, placed them in his truck and backed down his driveway. *Outlaw*, 96 N.C. App. 192, 385 S.E.2d 165.

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Wagoner testified that the seized cocaine weighed 55.4 grams. The threshold amount for a charge of trafficking is 28 grams. N.C.G.S. § 90-95(h)(3)(a) (2001). The State presented substantial evidence of each element of the crime charged to preclude a motion to dismiss.

[4] We also find defendant's entrapment defense inapplicable to the facts. Entrapment is "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." *State v. Stanley*, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975). Trafficking by transportation requires a real carrying about or movement, but this movement can be slight. *See State v. Manning*, 139 N.C. App. 454, 468, 534 S.E.2d 219, 228 (2000), *aff'd*, 353 N.C. 449, 545 S.E.2d 211 (2001). Defendant carried the cocaine around the parking lot and planned to leave the parking lot with his girlfriend. There is no evidence substantiating his claim that the officers induced him to commit an offense that he was already in the process of committing.

V. Improper Lay Testimony

[5] Defendant assigns error to Madigan's characterization of defendant's behavior as "paranoia." Madigan testified that defendant's behavior in the parking lot was "one of the most extreme cases of paranoia that I've seen in a long time." Defendant objected, and the court responded and inquired: "Well, I think that's a shorthand statement. Overruled. You're [sic] don't literally mean paranoia; you mean it in a descriptive way?" Madigan explained his statement to include more specific observations of how defendant looked all around the area, circling 360 degrees, several times.

N.C. Rule of Evidence 701 limits lay opinion testimony 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 fact in issue." Madigan was not qualified as an expert in the field of psychology, and should not have testified to defendant's "paranoia."

After being questioned by the trial court, Madigan explained to the jury exactly what he meant by the term, "paranoia." We find any error to be harmless.

VI. Testimony of Wagoner

Defendant assigns error to the trial court's allowance of (A) the prosecutor's cross-examination of Wagoner as to the amount of crack

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cocaine that a person could generate from the evidence seized and (B) Wagoner's testimony about Suggs' testing of the cocaine.

A. Possible Amounts Generated from Seized Evidence

[6] Defendant contends that Wagoner's testimony concerning how much crack cocaine could be produced from the powder seized was irrelevant and unfairly prejudicial.

This evidence was duplicative. The State had already proven, through Officer Holland's testimony, the element of the amount needed to constitute trafficking cocaine and the quantity of cocaine seized from defendant. Any error in allowing duplicative testimony on the quantity of cocaine seized is harmless.

B. Testimony about the Testing of Another Officer

[7] Defendant assigns error to the trial court's allowance of testimony by Wagoner concerning testing performed by Suggs. Defendant alleges this error breached his constitutional right to confront and cross examine any witness. Wagoner was tendered and accepted without objection as an expert on the testing of controlled substances. His opinion relied on the results of the tests performed by Suggs.

Our Supreme Court has previously held that an expert may base his opinion on tests performed by others if those tests are the type reasonably relied upon by experts in the field. *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001), *cert. denied*, — U.S. —, 153 L. Ed. 2d 162 (2002). The opportunity to fully cross-examine an expert insures that the defendant's right of confrontation guaranteed by the Sixth Amendment is not violated. *State v. Huffstetter*, 312 N.C. 92, 108, 322 S.E.2d 110, 120-21 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). *See also State v. Daughtry*, 340 N.C. 488, 511, 459 S.E.2d 747, 758-59 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996). Wagoner based his opinion on data reasonably relied upon by experts in his field. Defendant's assignment of error is overruled.

VII. Plain Error Review

Defendant assigns plain error to the trial court's denial of an opportunity to poll the jury and an opportunity to address the court prior to imposition of judgment. Plain error is error that is "fundamental", "seriously affect[s] the fairness, integrity or public reputa-

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tion of judicial proceedings”, or “had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Moore*, 311 N.C. 442, 445, 319 S.E.2d 150, 152 (1984). Plain error analysis is appropriate in exceptional cases involving the improper admission of evidence or jury instructions. *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000).

A. Polling of the Jury

[8] Defendant relies upon this Court’s recent decision in *State v. Holadia*, 149 N.C. App. 248, 561 S.E.2d 514, *disc. rev. denied*, 355 N.C. 497, 562 S.E.2d 432 (2002). In *Holadia*, a consolidated trial of two defendants, defendant Cooper requested the jury be polled. *Id.* at 252, 561 S.E.2d at 518. The court polled the jury collectively. *Id.* at 253, 561 S.E.2d at 518. Defendant Cooper was granted a new trial because the jury should have been polled individually according to the statutory mandate in N.C.G.S. § 15A-1238. *Id.* at 263-63, 561 S.E.2d at 524.

Here, defendant failed to request that the jury be polled. He asserts that the trial court did not provide him with that opportunity by dismissing the jurors after the verdict was read. We hold that it was not plain error for the trial court to dismiss the jury without asking defendant if he wished to poll the jury. It was the responsibility of defendant to make this request, even if at an inopportune time.

B. Denial of Statement Prior to Sentencing

[9] Defendant assigns plain error to the trial court’s denial of an opportunity for defendant to individually address the court prior to sentencing.

Defendant’s attorney spoke on his behalf prior to sentencing. Defendant did not request to individually address the court nor lodge any objection to the trial court after his attorney spoke on his behalf. This is sufficient to satisfy the requirement that defendant have the opportunity to speak in his own behalf to conform with N.C.G.S. § 15A-1334(b). *State v. Martin*, 53 N.C. App. 297, 305, 280 S.E.2d 775, 780 (1981). Defendant’s attorney has apparent authority to speak for the defendant as his agent. The trial court is not required to specifically address the defendant nor to ask whether defendant wishes to make a statement after his attorney has addressed the court on his behalf. *Id.* We find no error, plain or otherwise, in the trial court’s procedure.

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VIII. Conclusion

We affirm the trial court's denial of defendant's motions to suppress and dismiss. We find no prejudicial error and overrule the assignments of error that defendant asserted and argued.

No prejudicial error.

Judge LEVINSON concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I disagree with the majority's conclusion that the trial court properly admitted defendant's statement into evidence, I respectfully dissent.

The Fourteenth Amendment of the United States Constitution requires that, in order to be admissible, a defendant's confession must be voluntary and "the product of an essentially free and unconstrained choice by its maker." *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973)). In determining whether a statement is voluntary, the court considers such factors as

whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. The trial court's findings of fact regarding the voluntariness of a defendant's statement are conclusive on appeal if they are supported by competent evidence in the record. *See State v. Gray*, 268 N.C. 69, 78-79, 150 S.E.2d 1, 8 (1966), *cert. denied*, 386 U.S. 911, 17 L. Ed. 2d 784 (1967). The determination, however, of what facts amount to such threats or promises as to make a confession involuntary and inadmissible in evidence is a question of law, and is fully reviewable by the appellate court. *See State v. Fuqua*, 269 N.C. 223, 226-27, 152 S.E.2d 68, 71 (1967). "So, whether there be *any evidence* tending to show that confessions were not made voluntarily, is a question

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of law.’” *Id.* (quoting *State v. Andrew*, 61 N.C. 205, 206 (1867) (Phil. Law)). This Court must therefore decide as a matter of law whether the circumstances of the instant case rendered the confession inadmissible.

In considering whether a confession is free and voluntary, our Supreme Court in the landmark case of *State v. Roberts*, 12 N.C. 259 (1827) (1 Dev.), stated that

Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected.

Id. at 261-62. These principles enunciated by the *Roberts* Court “long before the insertion of the Fourteenth Amendment into the Constitution of the United States” have been consistently recognized and followed by our courts. *Gray*, 268 N.C. at 77, 150 S.E.2d at 7-8; *Fuqua*, 269 N.C. at 227, 152 S.E.2d at 71 (noting that “ ‘a confession obtained by the slightest emotions of hope or fear ought to be rejected’ ” (quoting *Roberts*, 12 N.C. at 260)). Accordingly, our Supreme Court has found inadmissible a statement induced by an officer’s promise to testify that the defendant was cooperative in confessing, *see Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72, a statement induced by assistance on pending charges and promises of assistance on potential charges arising out of the confession, *see State v. Woodruff*, 259 N.C. 333, 338, 130 S.E.2d 641, 645 (1963), a statement influenced by a suggestion that the defendant might be charged with accessory to murder rather than murder if he confessed, *see State v. Fox*, 274 N.C. 277, 293, 163 S.E.2d 492, 503 (1968), and a statement given after the defendant was told that any confession he made could not be used against him since he was in custody, and that if he confessed “it would be more to his credit hereafter.” *Roberts*, 12 N.C. at 259. *See also Gray*, 268 N.C. at 77, 150 S.E.2d at 7 (noting that a confession may not be admitted where induced by the police through the slightest emotions of hope or fear); *State v. Livingston*, 202 N.C. 809, 810, 164 S.E. 337, 337 (1932) (stating that “a confession wrung from

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the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration); *State v. Campbell*, 133 N.C. App. 531, 537, 515 S.E.2d 732, 737 (1999) (noting that “[i]ncriminating statements obtained by the influence of hope or fear are involuntary and thus inadmissible”), *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999).

In the instant case, the trial court found that law enforcement officers neither threatened nor made any promises to defendant in obtaining his confession, except for those promises “regarding his cooperating in helping the police to apprehend the person from whom he had obtained the cocaine.” These findings and conclusions contradict, however, the evidence presented at trial. As recognized in the majority opinion, Officer Holland acknowledged that he informed defendant that his girlfriend could be charged with a crime and her car seized if defendant did not cooperate. Officer Holland stated that the possibility of the arrest of defendant’s girlfriend was “the topic of discussion through the whole process” of obtaining defendant’s statement. Officers also used the threat against defendant’s girlfriend in inducing his promise to assist the officers in their investigation of “Flash.”

Like the *Fuqua* Court, I conclude that the evidence presented at the instant trial tends to show that “[t]he total circumstances surrounding the defendant’s confession impels the conclusion that there was aroused in him an ‘emotion of hope [or fear]’ so as to render the confession involuntary.” *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72. Because the confession was involuntary and therefore inadmissible, I would hold that the trial court erred in admitting this evidence.

“Error committed at trial infringing upon one’s constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error was harmless beyond a reasonable doubt.” *State v. Russell*, 92 N.C. App. 639, 644, 376 S.E.2d 458, 461 (1989); N.C. Gen. Stat. § 15A-1443(b) (2001). The burden of showing harmless error is on the State. *See* N.C. Gen. Stat. § 15A-1443(b). Such error is only harmless where it can be shown that the improper admission of the evidence had no reasonable possibility of affecting the verdict of the jury. *See State v. Easterling*, 119 N.C. App. 22, 38, 457 S.E.2d 913, 922, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 762 (1995). In his statement to law enforcement officers, defendant confessed to meeting a known drug dealer and receiving substantial amounts of cocaine from him. Because I conclude that there is a reasonable possibility

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that defendant's statement influenced the jury verdict against him, I would hold that the trial court's improper admission of this evidence entitles defendant to a new trial.

STATE OF NORTH CAROLINA v. CUSTODIO OLEA RAMIREZ

No. COA02-453

(Filed 4 March 2003)

1. Criminal Law— mistrial—other offenses on fingerprint card—curative instruction

The trial court did not err in an assault and attempted murder prosecution by not declaring a mistrial ex mero motu after the jury noticed that defendant's fingerprint card listed other charges which had been dismissed. The court cured any possibility of prejudice by instructing the jury not to consider the evidence.

2. Constitutional Law— effective assistance of counsel—failure to object and move for mistrial

An attempted murder and assault defendant was not denied effective assistance of counsel where his attorney did not object and move for a mistrial after the jury saw references to dismissed offenses on defendant's fingerprint card. The court gave a curative instruction and there was ample evidence to support the conviction.

3. Homicide— attempted murder—not abrogated by assault statute

Defendant was not afforded ineffective assistance of counsel in his attorney's failure to move to dismiss the common law charge of attempted murder on the theory that attempted murder was abrogated by N.C.G.S. § 14-32(a), assault with a deadly weapon with intent to kill inflicting serious injury. Attempted murder may occur through a multitude of circumstances.

4. Assault— bystander wounded—intent to kill

There was no plain error in the trial court's failure to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury upon a bystander, and defendant was not deprived of the effective assistance of counsel in his attorney's failure to move for the dismissal. Intent follows the bullet.

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5. Evidence— unavailable witness—testimony from bond hearing

The trial court did not err in an assault prosecution by admitting the testimony of defendant's girlfriend from a bond hearing when the girlfriend was not available at trial. Defendant did not dispute her unavailability, but contended that the bond hearing raised different issues. Defendant had the same motive at the hearing as at trial to expand upon and possibly discredit her testimony, but chose to ask no questions.

6. Sentencing— presumptive—mitigating factor—no findings

The trial court did not err when sentencing defendant for assault and attempted murder by sentencing defendant within the presumptive range without making findings as to the mitigating factor of accepting responsibility. The court may in its discretion sentence defendant within the presumptive range without making findings regarding proposed mitigating factors.

7. Sentencing— overlapping presumptive and aggravated range—no findings

The trial court did not err when sentencing defendant for assault and attempted murder by imposing a sentence which fell into an overlapping presumptive and aggravating range without making findings required for the aggravating range.

8. Constitutional Law— double jeopardy—assault and attempted murder

Double jeopardy was not violated by consecutive sentences for assault and attempted murder. Each offense requires proof of at least one element that the other does not.

Appeal by defendant from judgments entered 6 December 2001 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 23 January 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

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

CALABRIA, Judge.

Custodio Olea Ramirez ("defendant") was indicted by the Wake County Grand Jury on 17 September 2001 and was charged with

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two counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of attempted murder. The case was tried before a jury at the 3 December 2001 session of Wake County Superior Court, Judge Abraham Penn Jones (“Judge Jones”) presiding.

The evidence tended to show that between midnight and 1 a.m. on 29 July 2001 defendant slowly drove through the parking lot of the Top Rank Sports Bar (“the bar”) on Poole Road in Raleigh. Approximately five minutes later, defendant again slowly drove through the parking lot, but this time he stopped and blocked the flow of traffic. After a few moments, Officer David Powell (“Officer Powell”), a Raleigh Police Detective working off-duty as a security officer for the bar, blinked his flashlight twice at defendant, indicating that he should move along because another car had pulled up behind defendant. Defendant did not move his car, and Officer Powell testified he then walked toward defendant to “tell the guy he needs to pull his car over so that the other car that’s behind him can get by.” Officer Powell further testified that when he had taken three or four steps and was six to ten feet away from the car, defendant raised his gun and “he just started firing off rounds as fast as he could.”

Officer Powell was hit five times, including his right and left arms, his pelvic area, his left side near his waist, and his right leg. As a result, Officer Powell has nerve damage in his left arm and right leg, the bone in his left arm was shattered, his bladder was pierced, and he is now unable to walk without assistance of a cane. Officer Powell testified that he is able to stand as long as he keeps his right knee locked. Mr. Melvin Williams (“Mr. Williams”) was a patron at the bar who was waiting outside the bar for a ride home when defendant began firing at Officer Powell. Mr. Williams was shot in the leg. Mr. Williams’ leg was in a cast for six to eight weeks. Mr. Williams is an electrician, and his work has suffered because “[e]ven now if I stay on the ladder for awhile, I have to come down and for some reason my toe, it like—my big toe stays numb a lot.” Defendant declined to offer evidence.

On 6 December 2001, the jury returned verdicts finding defendant guilty of all three charges. Judge Jones made no findings of aggravating or mitigating factors, and sentenced defendant within the presumptive range for each offense. Judge Jones sentenced defendant to 73 months to 97 months for each of the two convictions for assault with a deadly weapon with intent to kill inflicting serious

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injury, and to 157 months to 198 months for attempted murder. Defendant appeals.

Defendant asserts (I) the trial court erred by failing to declare a mistrial, and his counsel provided ineffective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States by not requesting an instruction, when improper evidence was discovered by the jury. Defendant asserts (II) his counsel provided ineffective assistance of counsel by failing to move to dismiss the common law crime of attempted murder. Defendant further asserts the trial court erred by: (III) failing to dismiss the intent to kill element of the charge concerning Mr. Williams; (IV) admitting the transcript of Lisa Ruffin's ("Ms. Ruffin") testimony; and (V) sentencing defendant without finding that he accepted responsibility for his criminal conduct as a mitigating factor, without finding aggravating factors but imposing a sentence within the aggravated range, and imposing consecutive sentences for the assault and attempted murder charges.

I. Improper Evidence of Dismissed Charges

[1] Defendant asserts both the trial court and his counsel erred when the jury noticed that a fingerprint card of defendant's fingerprints contained inadmissible evidence of three dismissed charges: assault with a deadly weapon with intent to kill inflicting serious injury; possession of stolen goods; and felony possession of cocaine. The jury noticed this information, and asked Judge Jones "Are the charges listed on page #2 [of the fingerprint card] relevant to this case? (Assault, felony possession of cocaine and possession of a stolen vehicle)." Judge Jones discussed the court's response with the attorneys, and defense counsel asserted:

Your Honor, in your response to that, the defendant's position to be as follows. The State made a motion to put that fingerprint card into evidence. There was no objection from the defendant. The Court allowed that card into evidence.

To now draw attention to the card or essentially telling the jury to ignore the card is in effect reopening the case for the purpose of removing a piece of evidence. We would object to you doing that.

What I would ask you to tell the jury, the card is in evidence for whatever value they want to give it and let it go at that.

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The State responded that “if the defense doesn’t feel there is a need for a curative instruction, then its not a problem for me and I don’t mind if we not call any further attention to it.” Judge Jones, disagreed with the attorneys,

well, let me tell you my take on it. The question is are the charges listed on the card relevant. They asked a point blank question to which there is a point blank answer. The answer, as we all know, is no, absolutely not. . . . So Court’s inclined to, despite the comments of two—you two learned attorneys, to tell the jury that it has no relevance, that it should be disregarded because that is the truth.

Defense counsel asked that his exception to the Court’s decision be noted for the record. The Court instructed the jury:

[A]re the charges listed on page two relevant to this case[?] The answer to that question is absolutely not. It has nothing to do with this case and these matters were brought up at a time of the incident, the State chose not to proceed on it and they have nothing to do with the case at hand.

Defendant asserts the trial court erred by not declaring a mistrial *ex mero motu*. “[U]pon his own motion, a judge may declare a mistrial if: (1) it is impossible for the trial to proceed in conformity with law.” N.C. Gen. Stat. § 15A-1063 (2001). “This statute allows a judge . . . to grant a mistrial where he could reasonably conclude that the trial will not be fair and impartial.” *State v. Lyons*, 77 N.C. App. 565, 566, 335 S.E.2d 532, 533 (1985). “An order of a mistrial on a motion of the court is ‘addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion.’ ” *Id.*, at 77 N.C. App. at 566, 335 S.E.2d at 533-34. (quoting *State v. Malone*, 65 N.C. App. 782, 785, 310 S.E.2d 385, 387 (1984) (citations omitted)). Moreover, the trial court may use a curative instruction to remove possible prejudice arising from improper material put before the jury. *See generally State v. Holmes*, 120 N.C. App. 54, 65, 460 S.E.2d 915, 922 (1995). There is no dispute that this evidence was inadmissible and improper for the jury. In this case, however, we do not find the jury’s discovery of the former charges created a situation where the trial could not proceed in conformity with law. Rather, we find the court properly cured any possibility of prejudice by instructing the jury not to consider the inadmissible evidence. Therefore, we hold the court did not abuse its discretion by not declaring a mistrial.

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[2] Defendant asserts that his counsel's decision not to object to the evidence and move for a mistrial constitutes ineffective assistance of counsel. "A stringent standard of proof is required to substantiate ineffective assistance claims. In fact, . . . relief based upon such claims should be granted only when counsel's assistance is 'so lacking that the trial becomes a farce and mockery of justice.'" *State v. Montford*, 137 N.C. App. 495, 502, 529 S.E.2d 247, 252, cert. denied, 353 N.C. 275, 546 S.E.2d 386 (2000) (quoting *State v. Pennell*, 54 N.C. App. 252, 261, 283 S.E.2d 397, 403 (1981) (citations omitted)). "[D]efendant must show that [(1)] his counsel's representation was deficient and [(2)] there is a reasonable possibility that, but for the inadequate representation, there would have been a different result." *State v. Maney*, 151 N.C. App. 486, 490, 565 S.E.2d 743, 746 (2002). "If this Court 'can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different,' we do not determine if counsel's performance was actually deficient." *State v. Frazier*, 142 N.C. App. 361, 368, 542 S.E.2d 682, 687 (2001) (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985)).

We find no reasonable possibility that but for defense counsel's alleged errors another verdict would have been reached. Despite defense counsel's failure to object to the inadmissible evidence, the court gave a curative instruction, explaining that the evidence has "nothing to do with this case." Moreover, even had counsel objected and moved for a mistrial, such a motion must be granted by the court only if defense counsel shows that the error "result[ed] in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2001). We do not find the jury's discovery that defendant was originally charged with different crimes than those he faced at trial resulted in substantial and irreparable prejudice to defendant's case. Moreover, even considering counsel's failure to make this motion a deficiency, there is ample evidence to support the convictions in this case. Therefore, even if defense counsel had objected to the evidence and moved for a mistrial, defendant has failed to meet his burden of showing a reasonable possibility exists that a different result would have been reached. We hold there was no violation of defendant's right to effective assistance of counsel.

II. Abrogation of the Common Law Crime of Attempted Murder

[3] Defendant asserts he was afforded ineffective assistance of counsel when his counsel failed to move to dismiss the common law

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charge of attempted murder arguing the charge was abrogated by N.C. Gen. Stat. § 14-32(a), assault with a deadly weapon with intent to kill inflicting serious injury. “[D]efendant must show that [(1)] his counsel’s representation was deficient and [(2)] there is a reasonable possibility that, but for the inadequate representation, there would have been a different result.” *Maney*, 151 N.C. App. at 490, 565 S.E.2d at 746. If counsel’s failure to move to dismiss the charges on the grounds of abrogation amounts to deficient representation, then we find we must conclude a reasonable possibility exists that a different result might have been reached and defendant would not have been convicted of all the charges. Therefore, the question for the Court is whether defense counsel’s representation was deficient and “fell below an objective standard of reasonableness.” *State v. McMillian*, 147 N.C. App. 707, 714, 557 S.E.2d 138, 144 (2001), *disc. review denied*, 355 N.C. 219, 560 S.E.2d 152 (2002).

To consider whether counsel’s representation was deficient, we must determine whether counsel erred by not moving for dismissal of the charge based on abrogation. “All such parts of the common law . . . not abrogated, repealed or . . . obsolete, are hereby declared to be in full force within this State.” N.C. Gen. Stat. § 4-1 (2001). “[W]hen [the General Assembly] elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.” *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956).

Defendant asserts the adoption of the assault statute abrogated the offense of attempted murder because they address the same subject matter. We disagree. While a person might attempt to murder another person by assaulting that person, with the intent to kill, using a deadly weapon and thereby inflict serious injury, a person need not do so to commit the crime of attempted murder. Attempted murder is a crime that may occur through a multitude of circumstances, requiring simply (1) intent to kill and (2) an overt act which is more than mere preparation and committed with malice, premeditation, and deliberation. *State v. Gartlan*, 132 N.C. App. 272, 275, 512 S.E.2d 74, 76-77 (1999). We find no support for the proposition that the General Assembly intended to abrogate the crime of attempted murder with the assault statute, thereby limiting the crime of attempted murder to those situations where the assailant assaults the victim with a deadly weapon, intending to kill him, but only succeeds in inflicting serious bodily injury. We hold defendant is incorrect in his assertion that the

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General Assembly abrogated attempted murder with the crime of assault with a deadly weapon with intent to kill inflicting serious injury. Since we disagree with defendant's assertion of abrogation, we hold his counsel was not deficient in his representation and did not provide ineffective assistance of counsel by not presenting this argument to the trial court.

III. Intent to Kill

[4] Defendant asserts the trial court committed plain error by failing to dismiss the intent to kill element with respect to the charge for assault with a deadly weapon with intent to kill inflicting serious injury upon Mr. Williams. Defendant argues that since he was charged with the intent to kill element for Officer Powell, he should not also face this element with Mr. Williams, a mere bystander whom he never intended to shoot. Defendant further asserts that his counsel's failure to move to dismiss the charge based on insufficiency of the evidence for the intent to kill element amounts to ineffective assistance of counsel.

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. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987). "To satisfy the requirements of the plain error rule, the Court must find error, and that if not for the error, the jury would likely have reached a different result." *State v. Holmes*, 120 N.C. App. 54, 64, 460 S.E.2d 915, 921 (1995). Similarly, to properly assert a claim of ineffective assistance of counsel, defendant must show his counsel's representation was deficient and that there is a reasonable possibility that but for the deficient representation there would have been a different result. *Maney*, 151 N.C. App. at 490, 565 S.E.2d at 746.

In this case, we find neither the trial court nor defendant's counsel erred.

"It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that 'The malice or intent follows the bullet.' "

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State v. Locklear, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (citations omitted)). In *Locklear*, defendant shot and killed an estranged girlfriend, and hit the girlfriend's daughter in the neck with a stray bullet. Defendant was convicted of first degree murder of his girlfriend and assault with intent to kill inflicting serious injury upon the daughter. The Court upheld the conviction, noting that defendant could be convicted for separate crimes involving his intent to kill since "it is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward someone, that intent suffices as the intent element of the crime charged as a matter of substantive law." *Locklear*, 331 N.C. at 245, 415 S.E.2d at 730 (1992). Moreover, this Court recently upheld the convictions of two counts of attempted first degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury where defendant ran down his estranged wife and also struck a bystander. *State v. Andrews*, — N.C. App. —, —, — S.E.2d —, — COA01-1305 (12-17-2002). The Court explained that "[b]ecause defendant acted with the specific intent to kill [the wife], evidence of that intent could properly serve as the basis of the intent element of the offense against [the bystander]." *Id.*, — N.C. App. at —, — S.E.2d at —. Accordingly, we hold that defendant's counsel did not err by failing to move to dismiss and the trial court did not err in failing to dismiss the charge of intent to kill with regards to the assault upon Mr. Williams.

IV. Admission of Transcript Testimony

[5] Defendant asserts the trial court erred in admitting the former testimony of defendant's girlfriend, Ms. Ruffin, which was taken at a bond hearing in this case. Ms. Ruffin testified that earlier in the evening of the night in question, defendant fought with her, hit her in the face, and shot at the ground with a gun. Defendant asserts the testimony should have been excluded as hearsay. The State asserts the testimony was properly admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(1) (2001).

" '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). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2001).

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The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Former Testimony. — Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(1). Therefore,

[t]estimony taken at a prior proceeding is admissible when (1) the witness is unavailable; (2) the proceeding at which the former testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendant was present at the former proceeding and was represented by counsel.

State v. Chandler, 324 N.C. 172, 181, 376 S.E.2d 728, 734 (1989).

Defendant does not dispute the witness' unavailability, but asserts the bond hearing raised different issues than the trial, and therefore defendant did not have "an opportunity and similar motive" to cross-examine the witness. We disagree. The testimony was taken at a preliminary stage of this case, and defendant had the same motive at that time as he would have had at trial, to expand upon and possibly discredit Ms. Ruffin's testimony. Defendant chose to ask no questions. Therefore, we hold, pursuant to Rule 804(b)(1), the trial court did not err in admitting the former testimony of Ms. Ruffin.

V. Imposition of Sentence

[6] Defendant asserts the trial court erred by failing to find as a mitigating factor that defendant "has accepted responsibility for the defendant's criminal conduct." N.C. Gen. Stat. § 15A-1340.16(e)(15) (2001). "[T]he offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 15A-1340.16(a) (2001). "The 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." *Id.* "The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences." N.C. Gen. Stat. § 15A-1340.16(c) (2001). Since the court may, in its discretion, sentence defendant within the

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presumptive range without making findings regarding proposed mitigating factors, we hold the trial court did not err by sentencing defendant within the presumptive range without making findings as to this mitigating factor.

[7] Defendant further asserts the trial court erred by imposing sentences which fall into the aggravated range without finding aggravated factors. Defendant admits the trial court sentenced defendant within the presumptive range, but asserts that because the presumptive range and the aggravated range overlap, an offender may not be sentenced within this overlapping range without a finding that aggravating factors outweigh mitigating factors. Defendant asserts this overlap is a quirk in our sentencing laws and creates an ambiguity. This argument was also presented by the defendant in *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240 (2001), *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2002). In accord with *Streeter*, we disagree with defendant's argument. In both *Streeter* and the case at bar, the defendant was properly sentenced within the presumptive range. The fact that the trial court could have found aggravating factors and sentenced defendant to the same term does not create an error in defendant's sentence. We hold the statute is not ambiguous, and accordingly find no error.

[8] Defendant asserts the trial court violated defendant's right to be free of double jeopardy secured by the Fifth and Fourteenth Amendments to the United States Constitution by imposing consecutive sentences for the attempted murder and two assault with a deadly weapon with intent to kill inflicting serious injury convictions. We disagree. In *State v. Peoples*, 141 N.C. App. 115, 120, 539 S.E.2d 25, 29 (2000), this Court held that separate sentences for attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury does not constitute double jeopardy "because each offense requires proof of at least one element that the other does not." Accordingly, we hold the trial court did not err in ordering consecutive sentences.

No error.

Judges MCGEE and HUNTER concur.

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NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, VOCATIONAL REHABILITATION, PETITIONER v. MICHAEL DUANE MAXWELL, RESPONDENT

No. COA02-92

(Filed 4 March 2003)

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

Although petitioner assigned error to numerous findings, those assignments of error that are not set out in the brief are deemed abandoned, N.C. R. App. P. 28(b)(6).

2. Public Officers and Employees— employment dismissal—handicapped—findings of fact

The whole record test in an employment dismissal case reveals that substantial evidence exists to support the trial court's upholding of the Administrative Law Judge's findings of fact that respondent employee who suffers from diabetes mellitus, peripheral neuropathy, and hypothyroidism is handicapped, that the provision of vocational rehabilitation services to respondent by the North Carolina Commission of the Blind is evidence that respondent suffers from a handicapping condition, and that respondent's inability to keep up with his caseload was directly related to his visual impairment for which he sought accommodations that were not provided.

3. Public Officers and Employees— employment dismissal—discrimination based on handicap—conclusions of law

A de novo review reveals that the trial court did not err in an employment dismissal case by upholding the State Personnel Commission's conclusions of law that respondent employee who suffers from diabetes mellitus, peripheral neuropathy, and hypothyroidism is a qualified handicapped person under N.C.G.S. § 168A-3 and that respondent's dismissal was directly related to discrimination against respondent based on his disability.

Appeal by Petitioner from an order entered 23 October 2001 by Judge John R. Jolly, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 October 2002.

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Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for petitioner-appellant.

Voerman & Gurganus, by David E. Gurganus, for respondent-appellee.

HUDSON, Judge.

Respondent, Michael Duane Maxwell, was employed by Petitioner, North Carolina Department of Health and Human Services, Division of Vocational Rehabilitation (“State VR”) from 6 July 1998 until his termination on 30 April 1999. Thereafter, he appealed through internal grievance procedures without success and then filed a Petition for a Contested Case with the Office of Administrative Hearings (“OAH”). The Administrative Law Judge (“ALJ”) and State Personnel Commission (“SPC”) ruled in his favor, and the State VR sought review in superior court. The superior court adopted the decision of the SPC and remanded for entry of the appropriate order and for compliance. The State VR appealed to this Court, and, for the reasons explained below, we affirm.

Respondent suffers from diabetes mellitus, peripheral neuropathy, and hypothyroidism. He has had diabetes since birth and is completely insulin dependent. Fluctuations in his medication and his diet, coupled with his hypothyroidism, can result in lethargy, loss of concentration, difficulty with short-term memory, and depression.

Among the severe effects of Respondent's diabetes is visual impairment. He has had six operations on his eyes since 1989, most recently in March of 1999, one month prior to his termination. He suffers from detached retinas, macular holes, and floaters in his eyes. Respondent testified that the effect of these conditions is to “distort[] [his] vision in such a fashion that it's like looking at a fun-house mirror.” Respondent testified further that his vision “oscillated back and forth rather rapidly.” He uses over-the-counter reading glasses and a magnifying glass to read, but reading still takes him four times longer than it would a person with normal vision. Respondent testified that his visual impairment also affects his ability to write.

Respondent served as an intern in the Kinston office of the State VR from 26 March 1998 until 2 July 1998. During his internship, the Kinston office afforded him various accommodations, including additional illumination with a built-in magnifier for his work space. Respondent also had an assistant.

On 6 July 1998, the State VR hired Respondent to work in its Greenville office. Shortly thereafter, Respondent began to have trouble keeping up with his case load, due to his difficulties with the paperwork requirements of the job. In September 1998, Respondent met with his manager, Carlton Hardee, and provided him with a written summary of his visual problems and trouble with short-term memory.

As the paperwork became more difficult for Respondent, he repeatedly requested assistance, and he also contacted the Division of Services for the Blind to request accommodations. Specifically, Respondent requested the following accommodations: a table (provided); a lamp for his workspace (not provided); a copy of the Vocational Rehabilitation Manual index on audio tapes or compact discs (not provided to Respondent but provided to others); and a technical or other clerical assistant to help with his paperwork (provided by telephone from off-site).

Petitioner terminated Respondent on 30 April 1999, and Respondent filed an internal grievance. Department Secretary David Bruton upheld Respondent's dismissal on 26 July 1999. Respondent then filed a petition for a contested case with the Office of Administrative Hearings, which held a hearing on 25 August 1999. On 3 August 2000, Administrative Law Judge Robert Roosevelt Reilly, Jr., filed a Recommended Decision proposing that the dismissal be overturned. On 14 December 2000, the case came before the SPC. Its order, entered 11 January 2001, adopted the ALJ's Recommended Decision with modifications and ordered that Respondent be reinstated with back pay, benefits, and attorneys' fees. Petitioner then filed a Petition for Judicial Review on 21 February 2001. Superior Court Judge John R. Jolly, Jr., heard the matter on 21 May 2001, and entered an order 23 October 2001 upholding the decision of the SPC. Petitioner now appeals to this Court.

This Court's review of the superior court's order on appeal from an administrative agency decision 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 v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994). Thus, in its order regarding an agency decision, the superior court facilitates our review when it states the standard of review it applied to each issue. *Deep River Citizen's*

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Coalition v. N.C. Dep't of Env. and Natural Res., 149 N.C. App. 211, 215, 560 S.E.2d 814, 817 (2002) (citation omitted). However, this Court recently explained that:

an appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency . . . and the superior court *without* [(1)] examining the scope of review utilized by the superior court and (2) remanding the case

Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment (II), 152 N.C. App. 474, 567 S.E.2d 440 (2002) (quoting *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment (I)*, 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)); *Cf. Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001), *appeal after remand*, 153 N.C. App. 652, 571 S.E.2d 262 (2002). Here, the superior court's order clearly reflects the standard of review applied to each issue. Thus, we must determine whether the superior court properly applied that standard of review.

On review of the sufficiency of the evidence to support the findings of fact, this Court applies the "whole record" test. *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). Under the "whole record" test, we must determine "whether the [agency'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.* Moreover,

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), *disc. review denied*, 327 N.C. 482, 357 S.E.2d 217 (1990) (citations omitted). As to the credibility of the witnesses, this Court noted that:

Credibility determinations and the probative value of particular testimony are for the administrative body to determine, and it

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may accept or reject in whole or part the testimony of any witness. Moreover, even though the ALJ has made a recommended decision, credibility determinations, as well as conflicts in the evidence, are for the agency to determine.

Oates v. N.C. Dept. of Correction, 114 N.C. App. 597, 601, 442 S.E.2d 542, 545 (1994) (internal citations and quotation marks omitted).

However, “[w]hen the petitioner contends the agency decision was affected by an error of law, . . . *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). Upon *de novo* review, this court must review the record “as though the issue had not yet been determined.” *Whiteco Outdoor Adver.*, 132 N.C. App. at 470, 513 S.E.2d at 74.

[1] First, we note that Petitioner assigned error to the ALJ’s findings of fact 8, 13, 17, 18, 19, 24, and 25 through 30 in their entirety and to findings of fact 5, 6, 7, 10, 11, 20, 21, 22, and 32 in part. In its brief, however, Petitioner discusses only findings 13 and 29. Thus, the assignments of error to the remaining findings are deemed abandoned. N.C. R. App. P. 28(b)(6) (2002).

[2] Petitioner first argues that the ALJ’s findings of fact 13 and 29 “are not supported by the record when reviewed as a whole and that the trial court erroneously affirmed these findings.” These findings of fact properly before us read as follows:

* * *

13. [Respondent] is a handicapped individual because he suffers from diabetes mellitus, diminished vision and hypothyroidism. These conditions affect his everyday life activities, in respect to his ability to see like a normal person, his ability to read and understand and write like a normal person, and his ability to work and concentrate like a normal person. The providing of vocational rehabilitation services to [Respondent] by the North Carolina Commission of the Blind through the Department of Health and Human Resources of the State of North Carolina is evidence that he suffers from a handicapping condition. [Respondent’s] condition can be expected to last for the rest of his life and there is no recognized cure for diabetes mellitus with diminished vision and hypothyroidism. [Respondent] is

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insulin dependent and will remain insulin dependent for the rest of his life.

* * *

29. [Respondent] was dismissed during his probationary and trainee status because of his inability to provide necessary documentation in his case load files and his inability to, essentially, keep up with the paperwork necessary to show progress in respect to the case load he was assigned. In addition, the placing of [Respondent] in a separate office with no direct access to clerical assistance directly hampered his ability to perform his job.

As to finding of fact 13, Petitioner argues that there is insufficient evidence to support this finding and that the finding that Respondent is handicapped is erroneous as a matter of law. Thus, we apply the whole record test to the finding of fact and *de novo* review to the alleged error of law.

A review of the whole record discloses substantial evidence to support this finding of fact. In his testimony, Respondent described having had diabetes mellitus since birth and being completely insulin dependent. He expects to remain insulin dependent for the duration of his natural life. Further, Respondent testified that it takes him four times longer to read than it does a person with normal vision and that his vision is distorted like "looking at a fun-house mirror."

In challenging the sufficiency of the evidence to support this finding, Petitioner argues that Respondent "was not a credible witness." However, as we noted above, the credibility of the witnesses and the weight given to their testimony is for the agency to determine. *See Oates*, 114 N.C. App. at 601, 442 S.E.2d at 545. The SPC having found Respondent to be credible, his testimony supports this finding. Thus, substantial evidence in the whole record supports this finding.

Petitioner further argues that "[t]he portion of finding of fact 13 that Respondent received services from DSB and therefore is a handicapped person . . . is erroneous as a matter of law." Finding 13 itself does not support this contention. The portion of finding 13 that Petitioner challenges reads: "The providing of vocational rehabilitation services to [Respondent] by the North Carolina Commission of the Blind . . . is evidence that he suffers from a handicapping condition." This finding does not purport to conclude that because Respondent sought assistance from Blind Services he is automati-

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cally qualified as handicapped. It merely indicates that such assistance is evidence that he is handicapped, which is supported by the evidence and not contrary to law.

Likewise, we find substantial evidence in the whole record to support finding of fact 29. By letter 12 April 1999, Mr. Hardee notified Respondent that he would not be recommended for permanent status and that his employment with Petitioner would be terminated during his probationary period on 30 April 1999. Mr. Hardee explained to Respondent that “there has been a significant lack of progress and your overall adjustment has not been satisfactory” and that Respondent has “not closed a case during the past 8 months” The record reflects that Respondent’s inability to keep up with his case load was directly related to his visual impairment for which he sought accommodations that were not provided. Thus, after reviewing the whole record, we find substantial evidence to support these findings of fact.

[3] Petitioner next argues that the SPC’s Conclusions of Law 2, 8, and 9 are “not supported by the substantial credible evidence in the record as a whole, and [are] contrary to existing case law.” We disagree.

The SPC’s Conclusions of Law 2, 8, and 9 provide as follows:

2. The [Respondent], is a qualified handicapped individual with a recognized disability.

* * *

8. Dismissal of [Respondent] herein from his trainee position, therefore, was directly related to the discrimination against [Respondent] based on his disability.

* * *

9. [Respondent], therefore, has been discriminated against in violation of the provisions of N.C.G.S. § 126-16, in that he was discriminated against on the basis of his disability.

Petitioner first contends that Conclusion of Law 2 is erroneous because Respondent “failed to meet his burden of showing that he met the statutory definition of a ‘qualified handicapped person.’” We disagree.

The North Carolina Handicapped Persons Protection Act (NCHPPA) was re-titled the North Carolina Persons with Disabil-

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ities Protection Act effective 1 October 1999, and amended such that “person with a disability” is generally substituted for “handicapped person” throughout the chapter. Section 168A-3 was also amended to include “working” as a “major life activity.” However, since Respondent’s contested case was filed prior to the effective date of the amendment, we apply the terminology of the NCHPPA. 1999 N.C. Sess. Laws ch. 160, § 1; *see also Simmons v. Chemol Corp.*, 137 N.C. App. 319, 322, 528 S.E.2d 368, 370 (2000).

“[O]ne’s status as a qualified handicapped person must be preceded by a determination that one is a handicapped person” *Simmons*, 137 N.C. App. at 323, 528 S.E.2d at 371 (citations and quotation marks omitted). Section 168A-3(4) defines a handicapped person as:

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 impairment; or (iii) is regarded as having such an impairment.

N.C. Gen. Stat. § 168A-3(4) (1998 Cum. Supp.). Section 168A-3(4)(b) defines “major life activities” as “functions such as caring for one’s self, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, and *learning*.” N.C. Gen. Stat. § 168A-3(4)(b) (1998 Cum. Supp.) (emphasis added). In addition, section 168A-3(9)(a) defines a “qualified handicapped person” with regard to employment as:

a handicapped person who can satisfactorily perform the duties of the job in question with or without reasonable accommodation, (i) provided that the handicapped person shall not be held to standards of performance different from other employees similarly employed.

N.C. Gen. Stat. § 168A-3(9)(a) (1998 Cum. Supp.).

This Court recently held that 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.” *Campbell v. N.C. Dep’t of Transp.*, 155 N.C. App. 652, 663, — S.E.2d —, — (2003).

The term reasonable accommodation with regard to employment as defined under the NCHPPA is:

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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 handicapping conditions of the handicapped person 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) (1998 Cum. Supp.).

Here, Respondent testified that his diabetic retinopathy causes visual distortion. Because of this impairment, he takes four times as long to read materials and comprehend them as one with normal vision. Further, fluctuations in his blood sugar level due to his diabetes and insulin dependency cause him to be lethargic and inattentive. Respondent testified that he sought accommodations from Petitioner, including better lighting for his work area and access to the Vocational Rehabilitation Manual index in audio form, and that such accommodations would have enabled him to perform his job duties satisfactorily. Thus, after *de novo* review, we conclude that Respondent is a qualified handicapped person.

Petitioner next argues that the SPC's conclusions of law 8 and 9 and the superior court's conclusion of law 1(g) are erroneous as a matter of law because Respondent did not put on any direct evidence of discrimination and failed to satisfy the three-prong test set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973). We disagree.

According to *McDonnell-Douglas*, the plaintiff (here Respondent) bears the burden of showing *prima facie* that he is a member of a protected class, here handicapped, and that adverse employment action was taken against him because he is handicapped. Once he makes this *prima facie* showing, the burden shifts to the defendant (here Petitioner) to produce legitimate non-discriminatory reasons for dismissing plaintiff. If the defendant shows non-discriminatory reasons for the discharge, the burden shifts back to the plaintiff to show that those reasons were pretextual. *Dep't of Correction v. Gibson*, 308 N.C. 131, 137-40, 301 S.E.2d 78, 82-84 (1983) (adopting evidentiary standards set forth in *McDonnell-Douglas* as appropriate for state law claims).

Here, Respondent's evidence established *prima facie* that he is a member of a protected class (handicapped) and that he was termi-

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nated while requesting accommodations to enable him to do his work despite his handicap. Thus, the burden shifted to Petitioner to articulate legitimate business reasons for Respondent's termination. Petitioner contended that Respondent was a poor employee because in the nine months he was employed there he did not successfully close a single case. However, the record shows that the particular unit Respondent was assigned to, Greenville's Probation and Parole, had among the most difficult case loads to handle. Ellis Parker Stokes, a twenty-six year employee of Vocational Rehabilitation, testified that Probation and Parole had "[p]robably the most difficult clientele [Respondent] could have to work with" and that not having an on-site assistant would hamper even his (Stokes') ability to manage such a caseload.

The SPC specifically found that Respondent's inability to keep up with the case load, including the paperwork, "was directly related to [his] handicapping condition." This finding (No. 21) was not discussed by Petitioner in its brief and is thus binding. This, and the other findings that are supported by the evidence, in turn support the conclusions of law that Respondent's dismissal "was directly related to the discrimination against [Respondent] based on his disability" and that "he was discriminated against on the basis of his disability." On *de novo* review, we conclude, as the superior court did, that in order to reach the conclusion that Respondent was dismissed because of discrimination on the basis of his disability, the SPC necessarily rejected the State VR's argument that the dismissal was for a legitimate reason. Thus, we hold that the superior court's conclusion of law 1(g), which provides that "even though the Final Decision does not specifically set forth the three prong test established by [*McDonnell-Douglas*], that both the Administrative Law Judge and the State Personnel Commission . . . considered evidence in respect thereto . . . and addressed each issue set forth in that decision," was adequate as a matter of law. We do not believe that the decision was arbitrary and capricious.

In sum, we hold that the findings of the SPC are supported by the whole record, that the findings support the conclusions of law, and that the conclusions of law are consistent with the applicable law. Accordingly, we affirm the decision of the superior court.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

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LARRY BARNES D/B/A ANYTHING ON WHEELS, PLAINTIFF V. ERIE INSURANCE EXCHANGE, DEFENDANT/THIRD-PARTY PLAINTIFF V. ROBERT HURLEY, THIRD-PARTY DEFENDANT

No. COA02-197

(Filed 4 March 2003)

1. Bailment— truck—fire loss—work completed at time of fire

In an action that arose from the destruction of vehicles in a fire at Hurley's (the third-party defendant's) residence, deposition testimony raised a genuine issue of fact as to whether a bailment existed in plaintiff's Freightliner truck at the time of the fire, and the trial court erred by granting summary judgment for Hurley on the insurance company's subrogated claim for the truck.

2. Insurance— fire loss of car—exclusion for racing preparation

The trial court did not err by granting summary judgment for an insurance company on a claim for a fire loss of a car body and unassembled parts where the policy excluded autos being prepared for organized racing and plaintiff testified that he planned to race the car if he could. The contention that the loss was covered because the car was not being worked on in preparation for a race at the time of the fire is not a reasonable interpretation of the policy.

3. Pleadings— third-party complaint—after original answer— amendment of original complaint required

The trial court did not err by granting summary judgment for a third party defendant (Hurley) in an action arising from the destruction of plaintiff's property at Hurley's house where Hurley was not named as the defendant in the original complaint, the named defendant filed an answer and a third-party complaint against Hurley, and plaintiff filed a third-party complaint against Hurley without prior consent of the parties or leave of the court. A plaintiff filing a complaint against a third-party defendant arising from the same subject matter must follow N.C.G.S. § 1A-1, Rule 15(a) and, when the original complaint has been answered, must amend that complaint by leave of the court or consent of the adverse party.

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4. Statutes of Limitation and Repose; Pleadings— claims against third party—motion to amend—untimely—denied—no abuse of discretion

The trial court properly determined that plaintiff's claims against a third-party defendant were barred by the statute of limitations where plaintiff made an oral motion to amend the complaint at a summary judgment hearing after the statute had run. The court did not abuse its discretion in denying the motion because the matter did not concern the correction of a misnomer and plaintiff had been put on notice that the pleading was improper in time to make a written motion to amend the complaint before the statute ran.

5. Pleadings— improper third-party complaint—outside the statute of limitations—struck

The trial court properly struck a third-party complaint pursuant to N.C.G.S. § 1A-1, Rule 12(f) where the complaint was improper and outside the statute of limitations.

Appeal by plaintiff and defendant/third-party plaintiff from summary judgment entered 12 October 2001 and appeal by plaintiff from an order entered 25 October 2001, by Judge Michael E. Beale in Rowan County Superior Court. Heard in the Court of Appeals 13 November 2002.

Law Office of Michael S. Adkins, by Michael S. Adkins, for plaintiff-appellant.

Dean & Gibson, L.L.P., by Thomas G. Nance and Michael G. Gibson, for defendant/third-party plaintiff-appellant.

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

HUNTER, Judge.

Defendant/third-party plaintiff Erie Insurance Exchange ("Erie") appeals from the trial court's summary judgment in favor of third-party defendant Robert Hurley ("Hurley") as to Erie's subrogation claim against Hurley, for the loss of Larry Barnes' ("plaintiff") 1989 Freightliner truck chassis ("Freightliner") caused by Hurley's alleged negligence. In addition, plaintiff appeals from the trial court's summary judgment in favor of Erie and the trial court's summary judgment in favor of Hurley as to all of plaintiff's claims against Erie and

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Hurley. We affirm in part and reverse and remand in part for further proceedings for the reasons set forth herein.

This action arises from a fire that occurred on 8 February 1998 at Hurley's residence. Plaintiff had property on Hurley's premises that was destroyed at the time of the fire, including a Pro-Stock Pontiac Firebird race car body, a racing engine and other assorted unassembled parts, tools, and a Freightliner. The fire began when Hurley, who was draining gasoline from his boat into a container, overflowed the container causing gasoline to run across the floor and come into contact with a kerosene heater that had recently been shut off but was hot enough to ignite the gasoline on the floor.

Plaintiff made a claim to its insurer, Erie, for insurance coverage. Erie paid the claim for the Freightliner in the amount of \$55,876.73, but denied coverage for the Pontiac Firebird body and the parts and tools that were located in Hurley's garage at the time of the fire. Following Erie's refusal to pay this claim, plaintiff filed a complaint against Erie on 22 October 1999 alleging breach of contract and unfair and deceptive trade practices. Subsequently, on 13 January 2000, Erie filed an answer to plaintiff's complaint; on 16 February 2000, Erie filed a third-party complaint against Hurley, asserting a subrogation claim alleging that Hurley, as bailee, had been negligent. Thereafter, on 2 May 2000 Hurley filed an answer to the third-party complaint.

On 1 November 2000, plaintiff filed a document entitled "Plaintiff's Third-Party Complaint Against Third-Party Defendant Robert Hurley," to which Hurley responded in an answer filed 4 January 2001. Hurley's answer included a Motion to Strike plaintiff's third-party complaint against Hurley pursuant to Rules 12, 14, and 15 of the North Carolina Rules of Civil Procedure.

Erie and Hurley each moved for summary judgment. The trial court granted both motions by orders filed 12 October 2001 and 25 October 2001. In the 12 October 2001 summary judgment order, the court granted Hurley's motion for summary judgment as to all of plaintiff's and defendant's claims. The trial court ruled as follows in the 12 October 2001 order: (1) Plaintiff's direct claims against Hurley were barred by the statute of limitations and no proper and timely motion to amend was before the court. Therefore, plaintiff's "Third-Party Complaint Against Third-Party Defendant Robert Hurley" was stricken and summary judgment was entered in favor of Hurley as to all claims asserted by plaintiff against Hurley; (2) summary judgment

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was entered in favor of Hurley as to the claims brought by defendant against Hurley for any loss associated with the Pontiac Firebird race car as a result of the court's separate order of summary judgment in defendant's favor as to plaintiff's claims against defendant; (3) summary judgment was entered in favor of Hurley regarding defendant's claims concerning the loss of the Freightliner. The court determined as a matter of law, that as of the date of the loss, there was no bailment of the Freightliner from plaintiff to Hurley. In its 25 October 2001 order, the trial court granted Erie's motion for summary judgment as to all of plaintiff's claims asserted against it. The trial court did not include any specific findings of fact in this order. Plaintiff and Erie appeal.

At the outset, in reviewing a motion for summary judgment, the trial court 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." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664, *appeal dismissed and disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001); see also N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The evidence must be viewed in the light most favorable to the non-moving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 504 S.E.2d 574 (1998). A motion for summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence . . ." *Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E.2d 319, 322 (1980).

I.

[1] Defendant/third-party plaintiff Erie contends the trial court erred in concluding as a matter of law, that as of the date of the loss, 8 February 1998, there was no bailment for the Freightliner from plaintiff to third-party defendant Hurley. Erie argues there was an issue of material fact as to whether a bailment existed and accordingly, the entry of summary judgment was improper. We agree.

"A bailment is created when a third person accepts the sole custody of some property given from another." *Bramlett v. Overnight Transport*, 102 N.C. App. 77, 82, 401 S.E.2d 410, 413 (1991). "The bailor has the burden of establishing the existence of a bailor-bailee relationship." *Fabricks, Inc. v. Delivery Service*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 725 (1979). When a bailment is created for the benefit

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of both the bailor and bailee, the bailee is required to exercise ordinary care to protect the subject of the bailment from negligent loss, damage, or destruction. *Strang v. Hollowell*, 97 N.C. App. 316, 387 S.E.2d 664 (1990); *Ward v. Newell*, 68 N.C. App. 646, 315 S.E.2d 721 (1984).

A *prima facie* case of actionable negligence . . . is made when the bailor offers evidence tending to show or it is admitted that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition.

McKissick v. Jewelers, Inc., 41 N.C. App. 152, 155, 254 S.E.2d 211, 213 (1979).

In the case *sub judice*, the evidence shows that plaintiff delivered the Freightliner to Hurley so that the truck could be converted into a motor home. Plaintiff paid Hurley for making improvements to the truck. Therefore, the alleged bailment was for the mutual benefit of both the alleged bailor (plaintiff) and alleged bailee (Hurley), obligating Hurley to exercise ordinary care to protect the Freightliner from negligent loss and destruction. *See Strang*, 97 N.C. App. 316, 387 S.E.2d 664; *Ward*, 68 N.C. App. 646, 315 S.E.2d 721.

Hurley asserts, however, that at the time of the fire, he did not have the necessary exclusive possession, custody and control of the Freightliner required for a bailment to exist. *See Fabrics, Inc.*, 39 N.C. App. at 447, 250 S.E.2d at 726. According to Hurley, plaintiff's testimony from his deposition demonstrated that the improvements on the Freightliner had been completed in July 1997, well before the Freightliner was lost in the fire on 8 February 1998. Hurley therefore argues that the bailment ended in July 1997 and thus, he was not in exclusive control of the Freightliner. Hurley additionally points out that plaintiff testified that he was on Hurley's property ten or fifteen times after the improvements on the Freightliner were allegedly completed in July 1997 but before the occurrence of the loss in February 1998 and thus, had an obligation to retrieve the Freightliner from Hurley's property.

After reviewing plaintiff's deposition, we acknowledge that at one point plaintiff testified that he finished some improvements on the Freightliner in July 1997 and was paid for those improvements. However, later in the deposition, when plaintiff was asked why the

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Freightliner remained on Hurley's premises, plaintiff responded: "The inside hadn't been finished out on it, and we was [sic] waiting to finish the inside and started work on the trailer in the other shop." Therefore, we conclude there is a genuine issue of material fact as to whether a bailment existed at the time the Freightliner was destroyed by fire. Accordingly, the trial court erred in determining as a matter of law that as of the date of the loss, there was no bailment of the Freightliner. Defendant Erie provided ample evidence to make out a *prima facie* case of actionable negligence based on bailment. Thus, summary judgment was entered in error on Erie's negligence claim against Hurley. We therefore reverse the court's summary judgment as to Erie's subrogation claim against Hurley for the loss of the Freightliner and remand for further proceedings on this claim.

II.

[2] Plaintiff contends the trial court erred in granting defendant Erie's motion for summary judgment against plaintiff since there was a genuine issue of material fact as to whether the insurance policy covered plaintiff's loss of the Pontiac Firebird body and unassembled parts. We disagree.

"The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 783 (2000). If an insurance "policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision." *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 492, 467 S.E.2d 34, 40 (1996). Moreover,

"a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language."

Trujillo v. N.C. Grange Mut. Ins. Co., 149 N.C. App. 811, 813, 561 S.E.2d 590, 592 (quoting *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978)), *disc. review denied*, 356 N.C. 176, 569 S.E.2d 280 (2002).

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The pertinent issue before us is whether, as a matter of law, plaintiff's loss of the Pontiac Firebird body and unassembled parts was barred from coverage under Erie's insurance policy. Erie refused to pay for plaintiff's loss of his Pontiac Firebird because, according to Erie, it was not an "auto" as that term is defined in the policy; or in the alternative, plaintiff's Pontiac Firebird was being prepared for organized racing activities which is excluded under the express terms of the policy.

Assuming *arguendo* that plaintiff's Pontiac Firebird was an "auto" as defined in the insurance policy, we conclude that plaintiff's loss was excluded from coverage under the policy since the Pontiac Firebird was being worked on in preparation for racing. The insurance policy issued by Erie to plaintiff contains the following exclusionary language in pertinent part:

LIMITATIONS ON OUR DUTY TO PAY**What We Do Not Cover—Exclusions**

We will not pay for loss:

....

9. to any **owned auto** while:

....

b. being used in an organized racing or demolition contest or in any stunting activity or preparation for any of these.

Plaintiff argues that the Pontiac Firebird body and unassembled parts were not being worked on in preparation for a race at the time of the fire and therefore, plaintiff's loss was covered under the insurance policy. In addition, plaintiff points out that he testified during a deposition that he and Hurley had no timetable or schedule for racing the car, and in fact, were not sure if they ever would be able to race the car. Plaintiff claims that the car was being "stored" in Hurley's garage and therefore was not being prepared for racing.

We note that plaintiff's deposition testimony indicates that plaintiff's Pontiac Firebird and unassembled parts were on Hurley's premises so that plaintiff and Hurley could assemble and prepare the car for racing activities. The Pontiac Firebird body had no motor vehicle title, no functional lights, and was not intended to be used on public streets. Plaintiff testified that he planned to race the Pontiac

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Firebird if he could, otherwise, he would sell it and make a profit. Plaintiff never indicated that he and Hurley were preparing the car for public street use.

Further, we are unpersuaded by plaintiff's contention that because the Pontiac Firebird body and parts were not being worked on in preparation for a race at the precise time of the fire, plaintiff's loss was covered by the insurance policy. We do not find this to be a reasonable interpretation of the exclusionary provision. For the aforementioned reasons, we conclude as a matter of law that plaintiff's loss of the Pontiac Firebird body and parts were excluded from coverage under the insurance policy. Accordingly, the trial court properly entered summary judgment in favor of Erie.

III.

[3] Plaintiff next argues the trial court erred in entering summary judgment in favor of third-party defendant Hurley, ruling that plaintiff's claims were barred by the statute of limitations and denying plaintiff's oral motion to amend his complaint to include Hurley as a defendant. Hurley was not named as a defendant in plaintiff's original complaint, filed 22 October 1999. Erie filed an answer to plaintiff's original complaint on 13 January 2000 and Erie filed a third-party complaint against Hurley on 16 February 2000. Subsequently, plaintiff filed a document entitled "Plaintiff's Third-Party Complaint Against Third-Party Defendant Robert Hurley" on 1 November 2001. Hurley filed an answer to this complaint on or about 4 January 2001. The trial court found that the pleading entitled "Plaintiff's Third-Party Complaint Against Third-Party Defendant Robert Hurley," "was filed without prior consent of the parties and without leave of Court and without any pending Motion before the Court for leave to amend the Complaint or leave to amend to add an additional party Defendant or leave to amend to add the Third Party Defendant as an original Defendant." The trial court relied on *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995), *Wicker v. Holland*, 128 N.C. App. 524, 495 S.E.2d 398 (1998), and the North Carolina Rules of Civil Procedure in determining that plaintiff's claims against Hurley were barred by the statute of limitations.

Plaintiff asserts that his pleading entitled "Plaintiff's Third-Party Complaint Against Third-Party Defendant Robert Hurley" was proper pursuant to Rule 14 of the North Carolina Rules of Civil Procedure. Plaintiff specifically relies on the following language of Rule 14(a) to support his contention: "The plaintiff may assert any claim against

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the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff" N.C.R. Civ. P. 14(a). Plaintiff contends that Rule 14 provides that a plaintiff may assert a complaint against a third-party defendant without adhering to the requirements of Rule 15 of the North Carolina Rules of Civil Procedure which applies to amendments of pleadings. However, a plaintiff's assertion of a complaint against a third-party defendant after already having filed an original complaint is, in effect, an amendment to the original complaint. Therefore, the requirements of Rule 15 would apply. Since Erie had already filed an answer to plaintiff's original complaint by the time plaintiff filed his complaint against Hurley, pursuant to Rule 15(a), plaintiff *was only allowed to amend his complaint by leave of court or by written consent of the adverse party*. N.C.R. Civ. P. 15(a). We note that plaintiff did not have leave of court nor written consent of the adverse party prior to filing his complaint against Hurley. In addition, plaintiff has not cited, nor have we found, any cases in which our Courts have authorized the pleading method that plaintiff attempted to utilize. Therefore, we conclude plaintiff's pleading was improper under Rule 15.

We must interpret Rule 14(a) and Rule 15(a) in such a way that both provisions are given effect based on the following rules of construction. "Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each . . ." *Swain v. Elfland*, 145 N.C. App. 383, 390, 550 S.E.2d 530, 535 (quoting *State v. Hutson*, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971)), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001). Further, "[i]nterpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 593, 551 S.E.2d 873, 876 (2001). If we interpret Rule 14(a) in the way that plaintiff argues, giving a plaintiff the ability to assert a claim against a third party defendant without requiring leave of court to amend or written consent of the adverse party after a responsive pleading has been filed to the original complaint, such interpretation would bypass Rule 15(a) requirements for amending a complaint. We conclude the provisions at issue from Rule 14(a) and Rule 15(a) must be interpreted in such a way as to give effect to both. Therefore, we hold a plaintiff filing a claim against a third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim

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against the defendant/third-party plaintiff must follow the requirements pursuant to Rule 15(a) in order to amend the plaintiff's original complaint. Hence, when the defendant or third-party plaintiff has filed an answer to the plaintiff's original complaint, in order for the plaintiff to assert a claim against the third-party defendant, he must amend his complaint by leave of court or by written consent of the adverse party.

[4] During the summary judgment hearing on 1 October 2001, which was after the three year statute of limitations had run on 8 February 2001, plaintiff made an oral motion to amend the complaint, to name Hurley as an original defendant and to assert claims against Hurley. This motion was denied by the trial court. "A motion to amend the pleadings is addressed to the sound discretion of the trial court." *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185-86, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001). We conclude the trial court properly determined that plaintiff's claims against third-party defendant Hurley were barred by the statute of limitations and did not abuse its discretion in denying plaintiff's oral motion to amend his complaint to add Hurley as a defendant. N.C. Gen. Stat. § 1A-1, Rule 15(c) governs the relation back of amendments to pleadings. Our Supreme Court has provided the following interpretation of Rule 15(c):

Nowhere in the rule is there a mention of parties. It speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. . . . We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

Crossman, 341 N.C. at 187, 459 S.E.2d at 717. Applying this interpretation, the *Crossman* Court held that an amendment to the complaint naming Van Dolan Moore, II as the defendant (where the original complaint named as the defendant Van Dolan Moore) could not relate back to the filing of the original complaint pursuant to Rule 15(c).

Wicker, 128 N.C. App. 524, 495 S.E.2d 398, is perhaps even more instructive on the particular facts of the instant case. In *Wicker*, the plaintiff made a motion to amend in order to name the third-party defendant as a defendant to her original complaint. The plaintiff in

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Wicker attempted to distinguish her case from *Crossman*, as does plaintiff in this case, by noting that the third-party defendant would not suffer any prejudice by being designated as a party-defendant because it was on notice of the claim. However, this Court concluded that the lack of prejudice argument based on the third-party defendant's notice of the claim was irrelevant under the *Crossman* Court's analysis of the limited reach of Rule 15(c). *Wicker*, 128 N.C. App. at 527, 495 S.E.2d at 400. This Court therefore found no error in the trial court's denial of the plaintiff's motion to amend.

Plaintiff attempts to compare this case with *Liss v. Seamark Foods*, 147 N.C. App. 281, 555 S.E.2d 365 (2001), in which this Court allowed a motion to amend to relate back to the date of the original complaint, even though the statute of limitations had run, in order to correct a misnomer of the defendant. We do not find the *Liss* case controlling since the case *sub judice* does not concern the correction of a misnomer but instead involves the addition of a third-party defendant not named in the original complaint.

In following *Crossman* and *Wicker*, we conclude the trial court did not err in denying plaintiff's oral motion to amend his complaint and concluding that plaintiff's direct claims against Hurley were barred by the statute of limitations. Therefore, summary judgment was properly entered in Hurley's favor as to all of plaintiff's claims.¹

[5] Plaintiff argues that the trial court erred in striking his third-party complaint against Hurley pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f) because plaintiff asserts that Rule 12(f) would not apply since it is designed to allow a court to strike any "insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C. Gen. Stat. § 1A-1, Rule 12(f) (2001). We conclude that since plaintiff's third-party complaint against Hurley was improper under the North Carolina Rules of Civil Procedure and the statute of limitations had run at the time of the hearing on Hurley's motion for summary judgment, plaintiff's pleading was immaterial and had no

1. We note that Hurley's answer to plaintiff's pleading entitled "Plaintiff's Third-Party Complaint Against Third-Party Defendant Robert Hurley" provided plaintiff notice that his pleading was improper by including a motion to strike plaintiff's third-party complaint pursuant to Rules 12, 14, and 15 of the North Carolina Rules of Civil Procedure. Hurley's responsive pleading was filed on 4 January 2001, which was over a month before the running of the statute of limitations on 8 February 2001. Therefore, plaintiff had an opportunity to make a written motion to amend his original complaint before the running of the statute of limitations, but failed to do so.

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possible bearing upon the litigation. Therefore, the court was proper in striking plaintiff's third-party complaint against Hurley pursuant to Rule 12(f).

In sum, we reverse the trial court's summary judgment entered in favor of Hurley as to Erie's subrogation claim against Hurley for the loss of plaintiff's Freightliner and remand for further proceedings on this claim. We affirm the trial court's summary judgment in favor of Erie as to all of plaintiff's claims against Erie since we conclude as a matter of law that plaintiff's loss of the Pontiac Firebird body and parts were excluded from coverage under the insurance policy. Finally, we also affirm the trial court's summary judgment entered in Hurley's favor as to all of plaintiff's claims.

Reversed and remanded in part; affirmed in part.

Judges WYNN and TIMMONS-GOODSON concur.

IN THE MATTER OF: BUDDY SHERMER

No. COA02-427

(Filed 4 March 2003)

Termination of Parental Rights— clear, cogent, and convincing evidence standard—neglect—willfully left in foster care—willfull abandonment

The trial court abused its discretion by terminating respondent father's parental rights regarding his younger son under N.C.G.S. § 7B-1111, because: (1) the finding of neglect or the probability of its repetition at the time of the termination proceeding was not based on clear, cogent, and convincing evidence; (2) the Department of Social Services (DSS) did not prove by clear, cogent, and convincing evidence that respondent willfully left his children in foster care for more than twelve months and that he had not made reasonable progress to correct those conditions that led to the children's removal when respondent was incarcerated and there was little involvement he could have beyond what he did; and (3) DSS did not prove by clear, cogent, and convincing evidence that respondent willfully abandoned his children.

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Appeal by respondent from judgment entered 10 October 2001 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 8 January 2003.

Hall & Hall Attorneys At Law, P.C., by Susan P. Hall, for respondent-appellant.

No brief filed by petitioner-appellee.

HUDSON, Judge.

The district court terminated the parental rights of Jimmy Shermer (“respondent”) as to his son Buddy on September 19, 2001. Respondent appealed, arguing that there was not clear, cogent, and convincing evidence to support the trial court’s findings and conclusions. We agree and reverse the decision of the district court.

BACKGROUND

Respondent and Terri McDowell are the biological parents of Ernest Lee Shermer, born September 18, 1986, and Buddy Edward Shermer, born October 8, 1988. Both children are currently residing in foster care under the supervision of the Wilkes County Department of Social Services (“DSS”) and have been under DSS’s supervision since April 1999.

On June 28, 1999, the district court found both juveniles to be neglected as defined by North Carolina law. Respondent, who was incarcerated at the time and had been incarcerated since 1998, was not served with summons and, therefore, did not attend the hearing or seek the assistance of an attorney. He also did not attend other hearings in 1999 and 2000.

Prior to November 1999, DSS had been attempting to reunite Buddy and Ernest with their parents and was not seeking to terminate the parents’ rights. By April 2000, however, DSS had changed its course of action and was seeking to terminate both parents’ rights. The record only contains the last page of this April 2000 order, and we cannot discern the basis for DSS’s change of direction.

On June 7, 2000, DSS filed a petition to terminate the parental rights of both parents. The mother voluntarily relinquished her rights. From prison, respondent contacted DSS and informed it that he did not want his rights terminated. He also sent a letter to the clerk of court stating that he was currently in prison but that he desired to be

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present at all hearings, that he wanted an attorney, and that he intended to take responsibility for his children.

Respondent was released from prison on March 23, 2001. On April 4, 2001, he again contacted DSS and informed it that he did not want his parental rights terminated. The social worker told respondent that she would put a service and visitation plan in place but did not go into further detail at that time as to what these case plans would entail.

Respondent attended an agency review on July 5, 2001, when a DSS employee reviewed with respondent what would be expected from him. Respondent signed the case plan on July 13, 2001. It required respondent to (1) maintain appropriate housing and employment; (2) remain free of criminal activity; (3) attend parenting classes; (4) obtain a psychological evaluation; (5) have a drug and alcohol assessment and follow through with any recommendations from the assessment; (6) have regular contact with the social worker and keep her informed of any changes in housing, job, or finances; (7) have positive and ongoing visits with the boys at least once per month; (8) contact the social worker once per week to check on the boys; (9) participate in any therapy sessions with the boys as might be requested by the social worker; and (10) contact DSS to set up ongoing support for the children.

The district court held a hearing on September 19, 2001. It received testimony from Stephanie Sparks, a DSS employee and the caseworker for Buddy and Ernest. Sparks testified that respondent lived with his mother and had been living with her since he was released from prison. According to Sparks, respondent was not employed but had been attending vocational classes. There was no evidence that he had been involved in any criminal activity. Sparks testified that she had a certificate dated June 27, 2001, showing that respondent had completed the Alcoholics Anonymous program in prison.

Sparks testified that respondent had two visits with his children, one in July 2001 and one in September 2001, each with appropriate father-son type conversation. When the children see respondent, Sparks testified, they immediately run up and hug him. Sparks also indicated that respondent wrote her and asked her to have another visit near the end of August but that she could not accommodate the request. Respondent also wrote letters to his children on various occasions since he was released from prison.

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Sparks further explained that she told respondent by letter in July 2001 that he could telephone the boys as long as he was working on his service and visitation plan. Respondent had expressed a desire to speak to the boys on the phone. Sparks was aware that respondent did not have a telephone but explained that respondent nonetheless called Ernest once or twice a week up until a few weeks before the hearing. Sparks testified that Buddy had moved to a new foster home shortly after respondent was released from prison and that she had not given respondent the telephone number where Buddy was residing.

Sparks had never done a home study of respondent's home, even though respondent had given her the address. She admitted that it would have been impossible for respondent to complete the service plan by the date of the hearing if respondent had been required to attend long-term therapy. Sparks also testified that respondent obtained a psychological examination but that the results were not back by the time of the hearing. Sparks indicated, however, that the examination did not reveal any areas of immediate concern.

Respondent also testified at the hearing. He explained that he loved his children and wanted to take responsibility for them. He also testified that he was making progress on the case plan. He described his visits with his sons and his other attempts to contact them by phone and letter. He testified that he did not have a problem attending the parenting classes required by the case plan but that he had not yet attended them because he could not leave the county as a condition of his parole. He also testified that DSS had wanted him to start the case plan in October but that he started it in July, two months early.

Respondent further testified that he does not read or write well and that his mother has been writing his letters to his children since his release from prison. While incarcerated, he had to ask others to write the letters for him. Regarding the phone calls, respondent testified that Sparks told him that the foster parents would not permit him to call Buddy. He explained that he had attempted to contact Sparks about this but that he only got her voice mail. As he did not have a phone, he could not leave a number for her to call him back. He explained that he had had a temporary job through Work Force for five weeks and that he is still signed up with that agency. Currently he is attending vocational classes.

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The court also conducted an in-camera review of Buddy. Buddy told the court that he did not want his father's parental rights to be terminated and that he wanted to get along with his dad.

After hearing all the evidence, the court found that both children were neglected; that respondent willfully left them in foster care for more than 12 months; and that he willfully abandoned the children for at least six consecutive months. The court then determined that it was in Buddy's best interests that respondent's parental rights be terminated as to Buddy only. The court did not terminate respondent's parental rights as to Ernest.

Respondent now appeals.

ANALYSIS

A termination of parental rights proceeding consists of two phases. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, the petitioner—here, DSS—has the burden of proving by clear, cogent, and convincing evidence at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111. *Id.* We review whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If DSS meets its burden of proving at least one ground for termination, the trial court proceeds to the dispositional phase and must consider whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2001); *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. It is within the trial court's discretion to terminate parental rights upon a finding that it would be in the best interests of the child. *Id.* at 613, 543 S.E.2d at 910. We review the trial court's decision to terminate parental rights for abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

Here, the trial court found that DSS had proven three separate statutory grounds for termination. Since a court need only determine that one statutory ground exists in order to move to the dispositional stage, N.C. Gen. Stat. § 7B-1111(a), we must address each of the three grounds.

A.

In his first argument, respondent contends that the finding of neglect or the probability of its repetition at the time of the termina-

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tion proceeding was not based on clear, cogent, and convincing evidence. We agree.

N.C. Gen. Stat. § 7B-1111 lists neglect as one of the grounds for terminating parental rights and provides, in pertinent part:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a)(1). Neglect, in turn, is defined as follows:

Neglected juvenile.—A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15).

Where, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect. *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). This is because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible. *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* at 715, 319 S.E.2d at 232. Although prior adjudications of neglect may be admitted and considered by the trial court, they will rarely be sufficient, standing alone, to support a termination of parental rights, since the petition must establish that neglect exists at the time of hearing. *Id.* at 713-14, 319 S.E.2d at 231. Thus, the trial court must also consider evidence of changed conditions in light of the history of neglect by the parent and the probability of a repetition of neglect. *Id.* at 715, 319 S.E.2d at 232. In addition, visitation by the

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parent is a relevant factor in such cases. *Pierce*, 146 N.C. App. at 651, 554 S.E.2d at 31.

Here, we see no clear, cogent, and convincing evidence and no finding that respondent has neglected his children or that any past neglect was likely to reoccur. The trial court took judicial notice of past orders in which it had found that both children were neglected. However, as respondent points out in his brief, conditions have changed since then. When the previous orders were entered, the children lived with Sherry Shermer, respondent's ex-wife, and respondent was in prison. The orders concerned one incident where Ms. Shermer allegedly fired a gun around the children and another where Ms. Shermer brought Buddy along on an attempt to help respondent escape from prison. Although these orders are relevant evidence in the termination proceeding, the trial court also was required to consider how conditions have changed since the time the orders were entered. *In re Tyson*, 76 N.C. App. 411, 416-17, 333 S.E.2d 554, 557-58 (1985).

Upon careful review of the evidence, we hold that the evidence of circumstances at the time of hearing did not support the conclusion that respondent was neglecting the children at that time or that any previous neglect was likely to reoccur. Ms. Shermer was no longer involved with the children. Respondent was out of prison and able and willing to care for his children. In fact, he told DSS from prison that he did not want his parental rights terminated, and he contacted DSS again less than two weeks after being released from prison. He lived with his mother, not Ms. Shermer. And, although he was not working, respondent was attending classes to better qualify him for employment. There was no evidence that he was engaged in any criminal activity.

Respondent visited with both Buddy and Ernest twice, once in July 2001 and once in September 2001. The first visit came just days after respondent met with DSS to set up and go over his case plan. Each visit went well and included appropriate father-son conversation. Sparks, the DSS caseworker, also testified that respondent wrote her and asked for another visit with his children near the end of August but that she could not accommodate the request.

Moreover, the evidence showed that respondent wrote letters to both his sons and called Ernest once or twice a week, even though he did not have a phone. Respondent did not call Buddy because Sparks had not given him the telephone number.

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In short, DSS did not produce sufficient evidence of neglect at the time of the hearing to serve as the basis for terminating respondent's parental rights. *In re Tyson*, 76 N.C. App. at 416-17, 333 S.E.2d at 557-58 (holding that the evidence did not support termination of the mother's parental rights; although the juvenile had been adjudicated neglected in a prior hearing of which the mother did not have notice and in which she neither appeared nor was represented by counsel, the petitioner failed to present clear, cogent, and convincing evidence of neglect since that time).

The trial court did find that respondent had failed to complete various parts of his case plan; specifically, that he has not maintained employment, has not contacted the social worker once per week, has not participated in therapy sessions with either child, has not paid support or established a support obligation for the children, has not attended parenting classes, and has not had a drug and alcohol assessment. We do not agree that this finding constitutes clear, cogent, and convincing evidence of neglect or evidence that neglect could reoccur since respondent had been working on his case plan for less than two months at the time of the termination hearing. Respondent's obligations under DSS's case plan were first explained to him on July 5, 2001, and the plan was signed and agreed to on July 13, 2001. According to respondent, the plan was scheduled to begin in October 2001, but he began early. Sparks did not dispute this testimony about the time line.

The termination hearing took place in September 2001. We do not believe that adequate time had elapsed for an assessment of respondent's progress on the case plan. In light of the fact that many facets of the plan, such as the home study and psychological evaluation, had not been completed and were not scheduled for completion by the time of the hearing, we do not see clear, cogent, and convincing evidence one way or the other.

In sum, we conclude that the trial court's findings are not supported by clear, cogent, and convincing evidence of neglect at the time of the hearing and, in turn, that those facts do not support the trial court's conclusion that respondent neglected Buddy and Ernest within the meaning of N.C. Gen. Stat. § 7B-101(15).

B.

Respondent also contends that DSS did not prove by clear, cogent, and convincing evidence that he willfully left his children in

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foster care for more than twelve months and that he had not made reasonable progress to correct those conditions that led to the children's removal. Again, we agree.

At the time DSS originally petitioned the trial court for custody of the children, in May 2000, the relevant portion of the controlling statute permitted a court to terminate a respondent's parental rights if:

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(2) (2000).¹ To uphold the trial court's order, we must find that the respondent's failure was willful, which is established when the respondent had the ability to show reasonable progress but was unwilling to make the effort. *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002). Our Supreme Court has held, under the applicable version of the statute, that the relevant time frame is the twelve-month period preceding the date of filing of the petition for termination of parental rights. *In re Pierce*, 356 N.C. 68, 75, 565 S.E.2d 81, 86 (2002).² Thus, in the instant case, we must examine whether the trial court found sufficient facts—based on clear, cogent, and convincing evidence of circumstances occurring in the twelve months immediately preceding DSS's petition for terminating respondent's parental rights—to support its conclusion that respondent had failed to show that reasonable progress had been made in correcting those conditions that led to the removal of his children. *Id.* at 76, 565 S.E.2d at 87.

Looking at the findings pertaining to Buddy, we do not find them sufficient to support the conclusion that DSS has shown grounds to terminate under § 7B-1111(2). The order terminating respondent's rights contains only a few findings, findings 12 and 13, specifically

1. The statute was amended in 2001 to delete the language "within 12 months." N.C. Gen. Stat. § 7B-1111(b) (2001). However, as in *In re Pierce*, 356 N.C. 68, 75, 565 S.E.2d 81, 86 (2002), the previous language applies here.

2. Only when considering whether termination is in the best interests of the child should a court consider evidence that occurred before or after the twelve-month period leading up to the filing of the petition for termination of parental rights. *Pierce*, 356 N.C. at 76, 565 S.E.2d at 86-87.

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relating to Buddy. Subsection E of finding 13 is illegible and thus not reviewable by this Court. The court made no findings at all regarding respondent's progress or lack thereof during the twelve months prior to the filing of the petition on May 20, 2000, except that respondent had done little to contact the children. Although evidence beyond that period may be relevant in the dispositional phase, we do not consider findings regarding respondent's actions beyond that time frame (findings 25, 26, 27, 28) in determining whether adequate grounds were proven. *Pierce*, 356 N.C. at 75-76, 565 S.E.2d at 86-87.

We do not believe that these findings establish that respondent failed to make reasonable progress during the relevant time period. The petition to terminate his parental rights was filed on May 26, 2000. During the twelve months prior to that date, respondent was incarcerated. He had no involvement with the events that led to the children's removal—the children's stepmother was the custodian during that period, and it was her actions that precipitated these proceedings. Moreover, the record does not reflect when respondent learned that the children were in foster care, except to show that he was not served while in prison. Because respondent was incarcerated, there was little involvement he could have beyond what he did—write letters to Buddy and Ernest and inform DSS that he did not want his rights terminated. In sum, the evidence does not support findings or conclusions that respondent willfully left his children in foster care without making reasonable progress during the relevant time period.

C.

Respondent further argues that clear, cogent, and convincing evidence did not support the findings and conclusion that he had willfully abandoned his children. We agree.

Parental rights may be terminated where:

- (7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.

N.C. Gen. Stat. § 7B-1111(7).

For the reasons set forth in part B, *supra*, we conclude that the record does not reflect clear, cogent, and convincing evidence, nor does it contain sufficient findings, to support the trial court's conclu-

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sion that respondent willfully abandoned his children. Again, during the six months before DSS filed the termination petition, respondent was in prison. He did not have custody of the children, nor was he involved in their care. He maintained some contact with Buddy and Ernest, informed DSS that he did not want his rights terminated, and told DSS that he wished to maintain custody of his children. There are no findings to justify termination on this ground.

D.

Respondent also points out that he was not properly served in this case. Specifically, respondent never was served with summons in connection with the hearing held in June 1999 pursuant to which the trial court entered an order finding that Buddy and Ernest were neglected juveniles. Respondent also did not attend hearings held in October 1999, March 2000, and September 2000, although the record does not clearly reflect the reasons.

A defect in service of process is jurisdictional, rendering any judgment or order obtained thereby void. *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980). Thus, if service of process on the respondent were defective, the orders adjudicating respondent's children neglected would be void, and respondent could be relieved from the judgment. N.C. Gen. Stat. § 1A-1, Rule 60(b). However, we do not believe that the record is sufficiently clear on this issue to warrant voiding the order on this basis. Thus, in light of our holding on the sufficiency of the findings, we decline to void the order for defective service. We have concluded that the findings do not support the trial court's conclusion that DSS proved any statutory grounds to terminate respondent's parental rights.

CONCLUSION

For the reasons set forth above, the order terminating respondent's parental rights is reversed.

Reversed.

Judges MARTIN and STEELMAN concur.

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[156 N.C. App. 292 (2003)]

ANNA B. STRICKLAND, INDIVIDUALLY, AND ANNA B. STRICKLAND, AS GUARDIAN OF THE PERSON OF ANNA EUGENIA STRICKLAND, AN INCOMPETENT PERSON, PLAINTIFFS-APPELLANTS v. JOHN DOE, AN UNKNOWN DRIVER, DEFENDANT-APPELLEE

No. COA02-399

(Filed 4 March 2003)

Civil Procedure; Evidence— summary judgment—supplemental discovery—letter by plaintiff's attorney—unavailable witness—residual hearsay exception—officer's affidavit

The trial court did not err in a pedestrian's negligence action arising out of a hit and run accident by granting summary judgment in favor of unnamed defendant uninsured motorist carriers based on plaintiffs' failure to show they can offer competent evidence of how the accident occurred, because: (1) the pedestrian had no recollection of the accident or the events immediately preceding the accident; (2) supplemental discovery in the form of a letter by plaintiffs' attorney containing an unsigned summary of a report by a private investigator as to what the investigator was told by an alleged eyewitness was hearsay and not the type of evidence that may be relied on by the trial court in deciding a motion for summary judgment; (3) the statement of the private investigator was not admissible under the residual exceptions to the hearsay rule set forth in N.C.G.S. § 8C-1, Rules 804(b)(5) and 803 (24) because plaintiffs failed to make a showing that the eyewitness was unavailable other than by conclusory statement by their attorney and failed to offer evidence that the statement possessed circumstantial guarantees of trustworthiness; and (4) any facts or statements in an officer's affidavit dealing with any aspect of accident reconstruction would not be entitled to consideration by the trial court on a motion for summary judgment as they would be inadmissible at trial when the officer was never tendered as an expert.

Appeal by plaintiffs from order entered 14 January 2002 by Judge Gary E. Trawick in Superior Court, New Hanover County. Heard in the Court of Appeals 13 November 2002.

Mako & Robinson, P.A., by Bruce H. Robinson, Jr., for plaintiffs-appellant.

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Marshall, Williams, & Gorham, L.L.P., by William Robert Cherry, Jr., for defendant-appellee State Farm Mutual Automobile Insurance Company.

Johnson & Lambeth, by Maynard M. Brown, for defendant-appellee Nationwide Mutual Insurance Company.

McGEE, Judge.

Anna Eugenia Strickland (Anna) was struck by a vehicle operated by an unknown driver (defendant) on Maple Avenue in Wilmington, North Carolina at approximately 2:14 a.m. on 28 October 1997. Anna was walking across Maple Avenue after leaving a nearby bar. Anna has no recollection of the accident or events immediately preceding the accident. Defendant left the scene of the accident and has never been identified.

Plaintiffs filed a complaint against defendant on 11 September 2000 alleging defendant was negligent in striking Anna with defendant's vehicle. Plaintiffs allege that defendant's vehicle struck Anna approximately 60 feet from the intersection of Maple Avenue and South Kerr Avenue and dragged Anna under the vehicle for approximately 53 feet. State Farm Mutual Automobile Insurance Company (State Farm) and Nationwide Mutual Insurance Company (Nationwide), the alleged uninsured motorist insurers, filed answers alleging that Anna was contributorily negligent. State Farm filed an amended answer dated 18 October 2000, alleging additional contributory negligence defenses. Plaintiffs filed a reply on 14 November 2000 alleging last clear chance. State Farm and Nationwide filed motions for summary judgment on 17 December 2001 and 19 December 2001 respectively.

In support of their claim, plaintiffs submitted a letter from their attorney to the attorneys for State Farm and Nationwide which contained an unsigned summary of a private investigator who interviewed Travis Kelly (Kelly), a young man who was with Anna at the time of the accident. Kelly was not deposed, nor did he submit an affidavit stating what he observed at the time of the accident. The letter summarizing a report by the private investigator of what Kelly told the investigator about the accident during an interview was submitted as supplemental discovery. According to that letter, Kelly told the investigator that after the vehicle struck Anna, it continued down Maple Avenue with its brake lights jerking on and off, and then turned into a carwash driveway. In the letter, the investigator's summary said

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Kelly estimated that the vehicle was traveling 20 to 25 miles per hour and that Kelly told the investigator the car accelerated just before impact.

Plaintiffs also submitted an affidavit and police report of the officer who arrived at the scene of the accident shortly after it occurred. The investigating officer, Paul L. Nevitt (Officer Nevitt), stated in an affidavit that Anna was struck by an unknown motor vehicle while she was in the middle of Maple Avenue, approximately 60 feet from an intersection; that the unknown vehicle was straddling the center line; that there were no skid marks prior to impact; that Anna was dragged by the unknown vehicle approximately 53 feet; and that the weather was clear and the road was dry at the time of the accident. Officer Nevitt also attached a copy of the incident report to his affidavit.

Following a hearing, the trial court granted summary judgment to State Farm and Nationwide on 14 January 2002. Plaintiffs appeal from the order.

Plaintiffs' sole assignment of error is that the trial court erred in granting State Farm's and Nationwide's motions for summary judgment because there are genuine issues of material fact. In order to survive a defendant's motion for summary judgment in a negligence action, a plaintiff must set forth a prima facie case

(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances.

Lavelle v. Schultz, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). (citations omitted). While summary judgment is normally not appropriate in negligence actions, where the forecast of evidence shows that a plaintiff cannot establish one of these required elements, summary judgment is appropriate. *Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771, *disc. review denied*, 337 N.C. 803, 449 S.E.2d 749 (1994) (citing *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 414 S.E.2d 339 (1992); *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983)).

A party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth

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specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56(e), showing that there is a genuine issue of material fact for trial. *G & S Business Services v. Fast Fare, Inc.*, 94 N.C. App. 483, 486, 380 S.E.2d 792, 794, *appeal dismissed and disc. review denied*, 325 N.C. 546, 385 S.E.2d 497 (1989). The other methods for setting forth specific facts under Rule 56 are through depositions, answers to interrogatories, admissions on file, documentary materials, further affidavits, or oral testimony in some circumstances. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (citations omitted). “If [a party] does not so respond, summary judgment, if appropriate, shall be entered against him.” N.C. Gen. Stat. § 1A-1, Rule 56(e) (2001).

Affidavits submitted must meet the requirements of N.C.G.S. § 1A-1, Rule 56(e):

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

“The converse of this requirement is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment.” *Borden, Inc. v. Brower*, 17 N.C. App. 249, 253, 193 S.E.2d 751, 753, *rev'd on other grounds by*, 284 N.C. 54, 199 S.E.2d 414 (1973).

Our Court recently applied this rule to an affidavit submitted in support of a motion for summary judgment in *Williamson v. Bullington*, stating:

If an affidavit contains hearsay matters or statements not based on an affiant's personal knowledge, the court should not consider those portions of the affidavit. *See Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 499 S.E.2d 772 (1998). Similarly, if an affidavit sets forth facts that would be inadmissible in evidence . . . , such portions should be struck by the trial court. *See Borden, Inc. v. Brower*, 284 N.C. 54, 199 S.E.2d 414 (1973).

Portions of each of plaintiff's affidavits were properly stricken as inadmissible hearsay, irrelevant, or violative of the parole evidence rule. The portions that would remain after strik-

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ing the improper statements provide no support to plaintiff's motion for summary judgment.

139 N.C. App. 571, 578, 534 S.E.2d 254, 258 (2000), *aff'd by an equally divided court*, 353 N.C. 363, 544 S.E.2d 221 (2001); *see also Singleton*, 280 N.C. at 467, 186 S.E.2d at 405 (holding that portions of the submitted affidavit could not be considered for the purpose of ruling on a motion for summary judgment when those portions were not made on the affiant's personal knowledge); *Patterson v. Reid*, 10 N.C. App. 22, 29, 178 S.E.2d 1, 6 (1970) (statements in a party's affidavits based on hearsay should not be considered in determining a motion for summary judgment). In addition, our Court has also held that an affiant's legal conclusions, as opposed to facts "as would be admissible in evidence," are not to be considered by the trial court on a motion for summary judgment. *Singleton*, 280 N.C. at 467, 186 S.E.2d at 405.

The information before the trial court in this case consisted of the parties' pleadings, the deposition of Anna, plaintiffs' answers to interrogatories, the affidavit of Officer Nevitt and the attached incident report, and a letter from plaintiffs' attorney containing an unsigned summary of a private investigator which related what the investigator was told by Kelly. Plaintiffs' answers to interrogatories and Anna's deposition show that Anna has no recollection of the accident.

The supplemental discovery, in the form of a letter by plaintiffs' attorney containing an unsigned summary of a report by a private investigator as to what the investigator was told by Kelly, is not the type of evidence that may be relied on by the trial court in deciding a motion for summary judgment. As stated above, parties are required to set forth facts in affidavits or "as otherwise provided." The form of this supplemental discovery does not meet the requirements of Rule 56 as discussed above, and therefore should not have been considered by the trial court. *See Singleton*, 280 N.C. at 464, 186 S.E.2d at 403; *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829; *G & S Business Services*, 94 N.C. App. at 486, 380 S.E.2d at 794. We recognize that in limited cases, our Court has also allowed the trial court to consider avenues outside the previously cited methods of proof. Oral testimony at a hearing on a motion for summary judgment may be offered; however, the trial court is only to rely on such testimony in a supplementary capacity, to provide a "small link" of required evidence, but not as the main evidentiary body of the hearing. *Insurance Co. v. Chantos*, 21 N.C. App. 129, 132, 203 S.E.2d 421, 424 (1974) (citing N.C.

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Gen. Stat. § 1A-1, Rule 43(e); 6 Moore's Federal Practice 2042 (2d ed.). The trial court may also consider arguments of counsel as long as the arguments are not considered as facts or evidence. *Gebb v. Gebb*, 67 N.C. App. 104, 107, 312 S.E.2d 691, 694 (1984); *see also Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161 (1976) ("Information adduced from counsel during oral arguments cannot be used to support a motion for summary judgment under Rule 56(c)."). However, supplemental discovery, as submitted by plaintiffs, has not been recognized as an accepted method of proof in determining a motion for summary judgment and we decline to do so in this case.

The second problem with the supplemental discovery submitted by plaintiffs, specifically the portion of the letter summarizing the report of the private investigator as to what he was told by Kelly, is that it constitutes inadmissible hearsay and would not satisfy the requirements for admissibility as required under Rule 56. *See Williamson*, 139 N.C. App. at 578, 534 S.E.2d at 258; *Patterson*, 10 N.C. App. at 29, 178 S.E.2d at 6. Plaintiffs argue that the statement of the private investigator falls within an exception to the hearsay rule because Kelly is an unavailable witness. *See* N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2001). However, plaintiffs have made no showing that Kelly is unavailable. Plaintiffs' attorney's single statement that, "Unfortunately, we are unable to locate James Travis Kelly. If you know where he is, I would appreciate your letting us know[.]" does not satisfy this burden.

The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case. For example, in the present case, the declarant is dead. The trial judge's determination of unavailability in such cases must be supported by a finding that the declarant is dead, which finding in turn must be supported by evidence of death. Situations involving out-of-state or ill declarants or declarants invoking their fifth amendment right against self-incrimination may require a greater degree of detail in the findings of fact.

State v. Triplett, 316 N.C. 1, 8, 340 S.E.2d 736, 740-41 (1986) (citations omitted).

Plaintiffs admit in their reply brief that they had not made a sufficient showing at the hearing on the motion for summary judgment as to Kelly's unavailability. However, plaintiffs argue that they should

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not be required to do so at the summary judgment stage of proceedings. While we agree that plaintiffs are not required to establish beyond doubt that declarant is unavailable at the summary judgment stage of the proceedings, plaintiffs must at least put forth some evidence of declarant's unavailability. In the case before us, plaintiffs have simply made a conclusory statement that Kelly is unavailable, without any showing of what plaintiffs did in an effort to locate Kelly.

We do not believe that plaintiffs should be allowed to circumvent the rules of evidence without any evidence of unavailability. We agree with the analysis engaged in by other jurisdictions that have found an inquiry into the availability of a declarant for Rule 404(b) purposes to be appropriate at the summary judgment stage, and that have refused to consider hearsay statements where no evidence of a declarant's unavailability has been presented at that stage. *See Ellis v. Jamerson*, 174 F. Supp. 2d 747, 753 (E.D. Tenn. 2001) (holding that where no evidence of unavailability was presented at the summary judgment stage, hearsay statements could not be considered pursuant to 804(b)(3)); *Overton v. City of Harvey*, 29 F. Supp. 2d 894, 904 (N.D. Ill. 1998) (refusing to consider hearsay statements by a declarant under Rule 804 where no showing as to unavailability of the declarant was made at summary judgment); *Biggers ex rel. Key v. Southern Ry. Co.*, 820 F. Supp. 1409, 1415 (N.D. Ga. 1993) (refusing to consider hearsay statements by a declarant under Rule 804(b)(1) where at summary judgment no evidence had been produced as to declarant's unavailability). Therefore, we hold that plaintiffs must make at least a minimum showing of a declarant's unavailability at summary judgment before a statement can be considered by the trial court pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5).

Plaintiffs also argue that the supplemental discovery should be considered under N.C. Gen. Stat. § 8C-1, Rule 803(24). This exception is almost identical to the exception in N.C.G.S. § 8C-1, Rule 804(b)(5), except that a party may invoke N.C.G.S. § 8C-1, Rule 803(24) even if the declarant is available. *Triplett*, 316 N.C. at 7, 340 S.E.2d at 740. While our inquiry under N.C.G.S. § 8C-1, Rule 804(b)(5) ended when there was no evidence of the declarant's unavailability, under N.C.G.S. § 8C-1, Rule 803(24) we must engage in the six-part inquiry set forth by our Supreme Court in *State v. Smith*, 315 N.C. 76, 92-97, 337 S.E.2d 833, 844-47 (1985). In order to meet the residual hearsay exception found in N.C.G.S. § 8C-1, Rule 803(24), this six-part inquiry must be satisfied. *Smith* at 92-97, 337 S.E.2d at 844-47.

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[F]irst, that proper notice was given of the intent to offer hearsay evidence under, Rules 803(24) or 804(b)(5); second, that the hearsay evidence is not specifically covered by any of the other hearsay exceptions; third, that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; fourth, that the evidence is material to the case at bar; fifth, that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and sixth, that admission of the evidence will best serve the interests of justice.

State v. Agubata, 92 N.C. App. 651, 656, 375 S.E.2d 702, 705 (1989) (setting forth the six-part *Smith* inquiry, 315 N.C. at 92-97, 337 S.E.2d at 844-47). As in the case of the unavailability of a declarant at the summary judgment stage, while a party need not establish beyond doubt that the six-prong test is satisfied, a party must at least put forth some evidence that these six requirements will be met. Otherwise, the requirement under N.C.G.S. § 1A-1, Rule 56(e), that statements not based on personal knowledge or not admissible into evidence shall not be considered by the trial court in ruling on a motion for summary judgment, could be circumvented with minimal effort. In fact, the residual hearsay exception in N.C.G.S. § 8C-1, Rule 803(24) is disfavored and should be invoked “very rarely and only in exceptional circumstances.” *Smith*, 315 N.C. at 91 n.4, 337 S.E.2d at 844 n.4 (citations omitted). In addition, any evidence proffered under this exception “must be carefully scrutinized.” *Id.* at 92, 337 S.E.2d at 844. Although N.C.G.S. § 8C-1, Rule 803(24) is an exception to the hearsay rule where availability of the witness is immaterial, “[t]he availability of a witness to testify at trial is a crucial consideration under [both of] the residual hearsay exception[s]” found at N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(5). *State v. Fearing*, 315 N.C. 167, 171, 337 S.E.2d 551, 554 (1985). As stated above, plaintiffs have offered no evidence of declarant’s unavailability. Further, plaintiffs have offered no evidence that the proffered statement possesses “certain circumstantial guarantees of trustworthiness” that would justify its admission. *Agubata*, 92 N.C. App. at 656, 375 S.E.2d at 705.

We therefore hold that the supplemental discovery containing statements by a private investigator of what Kelly told him about the incident does not meet the requirements of Rule 56(e) and thus could not properly be considered by the trial court in determining the motions for summary judgment by State Farm and Nationwide.

Plaintiffs also offered the affidavit of Officer Nevitt in opposition to State Farm’s and Nationwide’s motions for summary judgment.

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Plaintiffs neither tendered Officer Nevitt as an expert in accident reconstruction nor contended he was such an expert. Our Court has consistently held that a non-expert may not testify as to the speed of a vehicle involved in an accident if that individual did not actually witness the accident. *Coley v. Garris*, 87 N.C. App. 493, 495, 361 S.E.2d 427, 428 (1987), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 859 (1988); *Hicks v. Reavis*, 78 N.C. App. 315, 323, 337 S.E.2d 121, 126 (1985), *cert. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986); *Short v. Short*, 36 N.C. App. 260, 262, 243 S.E.2d 432, 433-34 (1978). Further, while an expert in accident reconstruction may in some situations be able to testify as to the circumstances of an accident from examination of the evidence, *State v. Holland*, 150 N.C. App. 457, 463, 566 S.E.2d 90, 94 (2002), plaintiffs never contended that Officer Nevitt was such an expert, nor was Officer Nevitt ever tendered as an expert. Therefore, as a non-expert witness, any facts or statements in Officer Nevitt's affidavit dealing with any aspect of accident reconstruction would not be entitled to consideration by the trial court on a motion for summary judgment as they would be inadmissible at trial. *See Borden, Inc.*, 284 N.C. at 59, 199 S.E.2d at 418. Further, the trial court could not consider any statements in the affidavit attempting to draw conclusions instead of stating facts otherwise admissible. *Singleton*, 280 N.C. at 467, 186 S.E.2d at 405. As a result, the second misnumbered statement (3), statement (4), and statement (5) in Officer Nevitt's affidavit concerning the circumstances of the accident could not be considered by the trial court. Plaintiffs acknowledge that they know of no person who has personal knowledge of the events in question.

Considering answers to interrogatories and admissible statements in Anna's deposition and in Officer Nevitt's affidavit, and construing these in the light most favorable to plaintiffs, we find plaintiffs have failed to show that they can offer competent evidence of how the accident occurred, and therefore cannot make a prima facie case of negligence against defendant. We affirm the trial court's grant of summary judgment to uninsured motorist carriers State Farm and Nationwide.

Affirmed.

Chief Judge EAGLES and Judge HUDSON concur.

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LANNING YOUNG AND WIFE, CHARLENE YOUNG, PLAINTIFFS v. MICHAEL B. LICA AND WIFE, CHERYL J. LICA, BARRY A. IMLER AND WIFE, DELORES IMLER, DEFENDANTS

No. COA02-652

(Filed 4 March 2003)

1. Appeal and Error— denial of motion for new trial—errors of law alleged—review of underlying judgment

The Court of Appeals reviewed de novo the trial court's denial of plaintiffs' motion for a new trial under N.C.G.S. § 1A-1, Rule 59(a)(7) where the trial had been without a jury and plaintiffs alleged errors of law.

2. Easements— expansion—improvement of road and bridge

The trial court erred by denying plaintiffs' motion for a new trial where plaintiffs had contended that defendants' improvement of a road and bridge had enlarged an easement across plaintiffs' property, but the trial court failed to determine the location and boundaries of the easement and whether the improvements were constructed outside those boundaries.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiffs from order entered 20 November 2001 by Judge James U. Downs in Jackson County Superior Court. Heard in the Court of Appeals 8 January 2003.

Gary E. Kirby for plaintiffs-appellants.

William C. Morris, Jr. for defendants-appellees.

TYSON, Judge.

I. Background

Lanning Young and wife, Charlene, ("plaintiffs") own property located between State Highway 107 ("highway") and Shoal Creek in Jackson County. In 1997, Michael B. Lica and wife, Cheryl, and Barry A. Imler and wife, Delores, ("defendants") acquired property across Shoal Creek adjoining plaintiffs' property and an easement across plaintiffs' land to the highway. Defendant's deed described the easement as:

BEGINNING at the margin of State Highway No. 107, (right side of Highway going towards Sylva, N.C.) and runs near Southeast

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about 90 feet to the middle of the Creek; thence about North West the same distance to the margin of said highway, and wide enough for trucks or other vehicle to travel over, which includes the present site, for use of travel only for [the predecessors-in-interest of defendants] and their heirs and assigns forever.

When defendants purchased their property, only a single lane extended from the highway to a wooden bridge that crossed Shoal Creek between plaintiffs' and defendants' property. The old bridge was approximately five feet high, between twelve and sixteen feet wide, and was "very hazardous . . . even for foot traffic".

Defendants contacted plaintiffs one time prior to construction to inform them that defendants intended to improve the old bridge. Plaintiffs, who resided out of state and visited their property infrequently, stated a desire to shift the location of the path and bridge. No further contact occurred until after defendants removed the wooden bridge and installed two corrugated steel culverts and filled in around them to create a level roadbed. The new bridge was approximately eight feet higher in elevation than the old bridge and approximately sixty feet wide, enough for two lanes. Plaintiffs made no objections while the construction was proceeding. Plaintiffs testified that they are now required to climb up and over the new road to access their property on the other side, that the view of the portion of their property on either side of the new road and bridge is restricted, and that defendants' construction removed vegetation and natural features along the creek behind their cabin.

On 2 October 1998, plaintiffs filed suit against defendants seeking a permanent injunction and damages for trespass to their property and nuisance.

After a bench trial, the trial court, on 8 June 2001, found the following in part:

(4) The description of the aforesaid right of way did not contain any limitations as to width or height, except to express that it be wide enough for trucks or other vehicle(s) [sic] to travel over.

(5) When the plaintiffs acquired their property in 1970, a little wooden bridge, in poor condition, was in place across the creek and was in the same approximate location as the current crossing which is the subject of this lawsuit.

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(6) Subsequent to acquiring their property the defendants took it upon themselves to “improve” the right of way by installing two large culverts in the creek and filling around them with large boulder sized rip-rap and consequently elevating and widening the right of way to the extent that eighteen wheelers can now access the defendants’ property from North Carolina Highway 107 and vehicles can actually pass on a two-way basis on the right of way.

(7) The plaintiffs have a small cabin on their property which has been diminished even more in appearance as a result of the enlargement and immensity of the defendants’ right of way construction by the defendants.

The trial court concluded as follows:

(1) There is no cause of action for trespass or nuisance against the defendant[s] when they have “improved” what they were already entitled to use; to wit; easement for a road right of way.

(2) There is a cause of action for damages for compensation against the defendants for enlarging and widening the easement in question to the extent it imposes an additional burden on the plaintiffs’ land and entitles the plaintiffs to additional compensation.

The trial court denied injunctive relief and ordered a trial on damages. On 2 October 2001, plaintiffs abandoned their claim for damages in order to proceed with claims for injunctive relief. On 12 October 2001, plaintiffs moved for a new trial or an amendment of judgment. The trial court denied plaintiffs’ motion on 20 November 2001 and plaintiffs appealed. We reverse and remand.

II. Issues

Plaintiffs contend the trial court erred in (1) failing to find the improvements to the easement by the defendants were trespass or nuisance and (2) failing to grant injunctive relief.

III. Denial of Motion for New Trial or to Amend Judgment

[1] Although neither raised nor argued by either party, plaintiffs gave notice of appeal only from the denial of plaintiffs’ motion for a new trial or amendment of judgment and not from the 11 June 2001 judg-

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ment. Plaintiffs moved for a new trial under N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) or (7) (2001) and for an amendment of judgment under N.C. Gen. Stat. § 1A-1, Rule 59(e). Rule 59(a) states:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

...

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

...

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

N.C. Gen. Stat. § 1A-1, Rule 59(a). The determination of whether to grant or deny a motion pursuant to either Rule 59(a) or Rule 59(e) is addressed to the sound discretion of the trial court. *Hamlin v. Austin*, 49 N.C. App. 196, 197, 270 S.E.2d 558, 558 (1980). “Where errors of law were committed, . . . , the trial court is required to grant a new trial.” *Eason v. Barber*, 89 N.C. App. 294, 297, 365 S.E.2d 672, 674 (1988) (citing *Jacobs v. Locklear*, 310 N.C. 735, 314 S.E.2d 544 (1984)). While our standard of review under Rule 59(e) is abuse of discretion, under Rule 59(a)(7) our review is *de novo*. *Id.*

In their motion for a new trial or amendment of the judgment, plaintiffs contend that the trial court erred on a matter of law when it “entered a Judgment denying this Plaintiff the injunctive relief requested and declaring this matter instead to be a trial for damages.” The trial court denied plaintiffs’ motion for either a new trial or for an amendment of judgment. Defendants’ timely notice of appeal provides this Court jurisdiction to review the denial of plaintiffs’ motions. As plaintiffs alleged errors of law in the trial court’s underlying judgment, we review the trial court’s denial of the motion for a new trial under Rule 59(a)(7) under a *de novo* standard. We hold the trial court erred on matters of law.

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IV. Injunctive Relief

[2] Plaintiffs complained that defendants trespassed upon their land and maintained a nuisance and sought a mandatory injunction against defendants to remove the new bridge and construct another bridge similar to the old bridge. “The elements of a trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession.” *Jordan v. Foust Oil Company*, 116 N.C. App. 155, 166, 447 S.E.2d 491, 498 (1994) (citing *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952)).

The trial court failed to determine the location and boundary of the easement and whether defendants made an unauthorized entry on plaintiffs’ property. If the culverts and roadway are totally located within the boundaries of the easement, no unauthorized entry occurred. If the culverts and roadway are located outside the boundaries of the easement, defendants made an unauthorized entry onto plaintiffs’ land.

The description sets a general single line for the easement and states that it is “wide enough *for trucks or other vehicle* to travel over, which includes the present site” but fails to establish the location and width of defendants’ easement. (emphasis supplied).

The description of an easement “must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers,” but “[t]here must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.”

King v. King, 146 N.C. App. 442, 444-45, 552 S.E.2d 262, 264 (2001) (quoting *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942)). The original path across plaintiffs’ property when the defendants purchased their property consisted of an old single lane logging road and wooden bridge in the same general location as the new bridge and road built by defendants. The improvements defendants constructed are nearly four times wider and twice as high as the old road and bridge. Since the description of the easement is insufficient to establish its location or boundary, the burden rests on defendants to prove the nature and extent of the easement claimed.

An essential right inuring the ownership of real property is the ability to exclude others from the property. When one builds

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upon another's land without permission or right, a continuing trespass is committed. "[T]he usual remedy for a continuing trespass is a permanent injunction which in this case would be a mandatory injunction for removal of the encroachment." *Williams v. South & South Rentals*, 82 N.C. App. 378, 383, 346 S.E.2d 665, 669 (1986) (citing *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937); *Conrad v. Jones*, 31 N.C. App. 75, 78, 228 S.E. 2d 618, 619 (1976)). The right of the owner to compel the trespasser to cease and desist, or to abate the illegal entry or nuisance is well recognized. Our Supreme Court, in reversing and remanding a grant of summary judgment for a continuing trespass because a genuine issue of material fact existed, recognized a balancing test in determining whether or not to grant or deny a mandatory injunction for a continuing trespass. It stated "we find it worthwhile to repeat the cautionary statement of the Court of Appeals that on remand 'the court must consider the relative convenience-inconvenience and the comparative injuries to the parties. . . . In this case some findings of fact should be made in this regard before ordering the removal of the material.'" *Clark v. Asheville Contracting Co., Inc.*, 316 N.C. 475, 488, 342 S.E.2d 832, 839 (1986). In another case decided the same year as *Clark*, this Court also recognized this balancing test.

We recognize that in today's economic environment with multi-investor ownership of properties having substantial improvements, there may be situations, other than the traditional quasi-public franchise, where sufficient public interest exists to make the right of abatement at the instance of an individual improper, and defendant should be permitted to demand that permanent damages be awarded. Where the encroachment is minimal and the cost of removing the encroachment is most likely substantial, two competing factors must be considered in fashioning a remedy. On the one hand, without court intervention, a defendant may well be forced to buy plaintiff's land at a price many times its worth rather than destroy the building that encroaches. On the other hand, *without the threat of a mandatory injunction, builders may view the legal remedy as a license to engage in private eminent domain.* The process of balancing the hardships and the equities is designed to eliminate either extreme. Factors to be considered are whether the owner acted in good faith or intentionally built on the adjacent land and whether the hardship incurred in removing the structure is disproportionate to the harm caused by the

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encroachment. *Mere inconvenience and expense are not sufficient to withhold injunctive relief.* The relative hardship must be disproportionate.

Williams, 82 N.C. App. at 384, 346 S.E.2d at 669 (citing *Dobbs, Remedies*, § 5.6 (1973)) (emphasis supplied). However, in *Williams*, this Court held:

Notwithstanding the foregoing discussion, we are compelled by this Court's prior holding in *Bishop v. Reinhold*, [66 N.C. App. 379, 311 S.E.2d 298, 310 N.C. 743, 315 S.E.2d 700 (1984),] to hold that since the encroachment and continuing trespass have been established, and since defendant is not a quasi-public entity, plaintiff is entitled as a matter of law to the relief prayed for, namely removal of the encroachment.

Id.

Defendants could have sought consent or mutual agreement from plaintiffs or, failing that, a judicial determination of the location and extent of their easement prior to construction. Instead, after one contact, with an out-of-state owner who visited their property infrequently, defendants undertook improvements significantly greater than upgrading the existing roadway or bridge.

The trial court found that defendants overburdened the easement. However, it failed to determine the location and width of the easement or whether the improvements were constructed outside the boundaries of the easement. The trial court must determine the location and width of the easement granted to defendants in order to determine whether defendants trespassed on plaintiffs' property or committed a nuisance.

V. Conclusion

We hold the trial court erred in denying the motion for a new trial on the ground of errors of law. We reverse and remand for findings of fact and conclusions of law regarding the location and width of the easement. The trial court must also make a factual determination whether defendants' new construction is physically located within the boundaries of the easement and render a judgment based upon law and precedents discussed herein.

Reversed and remanded.

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Judge LEVINSON concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial, and because this Court does not have jurisdiction over the underlying judgment denying injunctive relief, I respectfully dissent from the majority opinion.

Rule 3 of the North Carolina Rules of Appellate Procedure provides that

The notice of appeal required to be filed and served . . . shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C.R. App. P. 3(d) (2003). Absent proper notice of appeal, this Court does not acquire jurisdiction. *See Fenz v. Davis*, 128 N.C. App. 621, 623, 495 S.E.2d 748, 750 (1998); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). The jurisdictional requirements of Rule 3 may not be waived by this Court, even under the "good cause" standard set by Rule 2. *See Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424. It is well established that "[a] notice of appeal from an order denying a motion for a new trial which does not also specifically appeal the underlying judgment does not present the underlying judgment for review." *Fenz*, 128 N.C. App. at 623, 495 S.E.2d at 750; *Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424; *Chaparral Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985).

In the instant case, the notice of appeal filed by plaintiffs recites the following:

NOW COME the Plaintiffs to give notice of appeal to the North Carolina Court of Appeals from the final Order of the Court entered on the 20th day of November, 2001 in the Superior Court of Jackson County, North Carolina.

The order entered 20 November 2001 by the trial court was the order denying plaintiffs' motion for a new trial or amendment of judgment.

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The notice of appeal filed by plaintiffs did not give proper notice from the underlying judgment entered by the trial court on 11 June 2001, and this Court therefore only has jurisdiction to review the trial court's order denying plaintiffs' motion for a new trial or amendment of judgment. *See Fenz*, 128 N.C. App. at 623, 495 S.E.2d at 750. "To the extent the record on appeal purports to assign error to the trial proceedings and to appeal from the judgment entered . . . , such appeal must be dismissed." *Id.* I conclude that any purported assignments of error by plaintiffs regarding the underlying judgment are not properly before us and should not be addressed by this Court.

As to plaintiffs' appeal of the trial court's order denying their motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, our review of such orders is strictly limited to the question of whether the record discloses a manifest abuse of discretion by the trial judge. *See Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). This Court should not disturb a discretionary Rule 59 order unless we are convinced that the ruling by the trial court amounted to a substantial miscarriage of justice. *See Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327, *disc. review denied*, 327 N.C. 632, 399 S.E.2d 324 (1990). Because I conclude that plaintiffs have not met their heavy burden of demonstrating manifest abuse of discretion by the trial court, I would affirm the order of the trial court denying plaintiffs' motion for a new trial.

STATE OF NORTH CAROLINA v. GREGORY LAVON LOVE

No. COA02-271

(Filed 4 March 2003)

1. Evidence— hearsay—recorded recollection

The trial court did not abuse its discretion in a communicating threats case under N.C.G.S. § 14-277.1, involving a domestic disturbance between defendant and his wife, by permitting an officer to read the statement of defendant's wife into evidence even though defendant contends the State failed to lay a proper foundation under N.C.G.S. § 8C-1, Rule 803(5) for a recorded recollection based on the fact that defendant's wife did not sign the statement, because: (1) defendant's wife testified that she

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remembered making a statement describing the events of that night to an officer, she made the statement when the events of the night were fresh in her mind, she no longer had sufficient recollection as to the matter, and the statement was read back to her; and (2) an officer testified that defendant's wife was given an opportunity to edit the statement, but she declined to do so and thereby adopted it.

2. Threats— communicating threats—subjective belief—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of communicating threats under N.C.G.S. § 14-277.1, because there was sufficient evidence that defendant's wife subjectively believed that defendant intended to carry out his threats.

3. Probation and Parole— longer period of probation—specific findings of fact required

The trial court erred in a communicating threats case by extending defendant's probationary period to twenty-four months without making the required specific findings of fact that a longer period of probation was necessary as required by N.C.G.S. § 15A-1343.2(d).

Appeal by defendant from judgment entered 23 May 2001 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 21 January 2003.

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

Isabel Scott Day, Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for the defendant-appellant.

WYNN, Judge.

Following a jury trial, defendant, Gregory Lavon Love, appeals his conviction for communicating threats during a domestic disturbance with his wife, LaQuita Love. After the alleged incident, Ms. Love made a statement to police incriminating her husband. At trial, however, Ms. Love testified that she could not remember any facts tending to incriminate Mr. Love. During direct examination, Ms. Love did recall: (1) making the statement to police; (2) while the events of the night and incident were still fresh in her mind; and that (3) the state-

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ment was read back to her. Moreover, a police officer testified that Ms. Love was given an opportunity to edit the statement, and that Ms. Love did not edit the statement. Accordingly, the trial court allowed the statement to be read into evidence pursuant to North Carolina's hearsay exception for recorded recollections codified at N.C. Gen. Stat. § 8C-1, Rule 803(5) (2002).

On appeal, Mr. Love assigns error to: (1) the admission of Ms. Love's recorded recollection because it was not signed by Ms. Love; (2) the trial court's denial of Mr. Love's motion to dismiss; and (3) the trial court's decision to sentence Mr. Love to a twenty-four month period of supervised probation, where N.C. Gen. Stat. 15A-1343.2(d) only authorizes an eighteen month probationary period without specific findings of fact by the trial court. After carefully reviewing the record, we hold that Mr. Love received a trial free from error during the substantive phase. However, because the trial court violated its statutory mandate during the sentencing phase, we vacate in part and remand for resentencing.

The State's evidence tended to show that Police Officers Larry J. Angle, Jr. and David L. Phillips responded to a domestic disturbance at the defendants residence in the early morning of 15 August 2000. Upon arriving at the scene, Officer Angle noticed a female, later identified as Ms. Love, shaking and crying. Ms. Love explained to the officers that her husband, who had left the scene, had repeatedly threatened to punch her. As Ms. Love was giving her initial statement, Mr. Love drove his vehicle over the grass and onto the driveway of the residence. Upon seeing the vehicle, Ms. Love began to cry. Officer Angle approached Mr. Love and asked him for identification. Mr. Love refused. Officer Angle explained to Mr. Love that he needed to speak with him regarding the events of the night. Mr. Love refused, and attempted to walk into his residence. Officer Angle placed Mr. Love under arrest for communicating threats to Ms. Love.

After calming Ms. Love, Officer Phillips used his laptop computer to record the following statement by Ms. Love:

I am LaQuita Love. I understand Officer D.L. Phillips is taking this statement from me, and everything that I have told him is true to the best of my knowledge.

On 8-15-2000 at about 3:00 a.m., I was asleep in bed when my mother called me on the phone and woke me up. After I spoke with my mother, I was trying to go back to sleep when my hus-

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band, Gregory Lavon Love, walked into the room and jerked the covers off of me and said [] we need[ed] to talk.

We talked for a few minutes and left the room. I started to fall back to sleep when my husband came back into the room, turned on the lights, jerked the covers off of me and said, "stand up." When I stood up out of the bed, he threw the pillows on the floor and began to put his clothes on. He began yelling at me and cursing very loudly.

As he was getting dressed he would stand very close to me and act like he was going to hit me with his fist, and then would stop right before he would hit me. He did this numerous times and each time I would flinch because I didn't know if he was really going to hit me.

When he saw that I was scared he said, "You see, you don't want me to hit you." After this went on for several minutes, he said to me, "I'm getting ready to leave and I'll be back. And when I get back, if I see you sitting or lying down, I'm going to knock the hell out of you."

He drove away from the house, and as soon as he did I called the police and ran next door to my neighbor's house. I stayed at my neighbor's house until the police officers arrived.

Officer D.L. Phillips read this statement back to me and everything is accurate.

Based on this evidence, the State indicted Mr. Love for communicating threats in violation of N.C. Gen. Stat. § 14-277.1. At trial, the State called Ms. Love to testify. Although Ms. Love could recall calling the police, being upset, and running to her neighbor's house, she stated that she could not recall any events tending to incriminate Mr. Love. Accordingly, the following colloquy transpired between the State and Ms. Love:

Q. Do you recall one of the officers talking to you and reading back what you had said to him?

A. Yes, I do.

Q. And when you gave that statement to the police officers that night, everything was fresh in your mind, wasn't it?

A. Yes, it was.

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Q. And you told them what happened at the house that night; right?

A. Yes, I did.

At this point, the State approached Ms. Love with State's Exhibit 1—a computer printout of Ms. Love's statement recorded on a laptop computer by Officer Philips on 15 August 2000. The defense vigorously objected, arguing that "there is no indication . . . that this is [Ms. Love's statement]. There's no hand written note, there's no signature . . . [and, consequently,] there's no indication here that she [is] refreshing her memory from anything that appears to be her statement." After considering the arguments of both parties, the trial court overruled the defendant's objection and the colloquy continued:

Q. Ms. Love, have you taken a look at that statement?

A. Yes, I have.

Q. And does reading that statement that you gave to the officer that night refresh your memory about what you told the officers.

A. My memory is about the same, yes. I mean,—

Q. So you don't remember any better?

A. No, I don't.

Q. But that night when you were talking to the officers about 20 or 30 minutes after this all happened, you remembered everything; correct?

A. Yes.

Thereafter, the State called Officer Phillips. Officer Phillips testified that he took a statement from Ms. Love, and the State asked Officer Phillips to read that statement into evidence pursuant to North Carolina's hearsay exception for "recorded recollections." Again, Mr. Love vigorously objected and argued that the alleged statement of Ms. Love—an unsigned computer printout—did not meet foundational reliability requirements of the aforementioned hearsay exception. The trial court overruled the defendant's objection.

At the close of the State's evidence, the defendant made a motion to dismiss. The trial court denied the defendant's motion. The defendant did not present any evidence. On 23 May 2001, the jury returned a unanimous verdict finding Mr. Love guilty of communicating

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threats. The trial court sentenced Mr. Love to forty-five days in the Mecklenburg County Jail, suspended for two years, and placed Mr. Love on supervised probation for twenty-four months. From the judgment, Mr. Love appeals and makes three arguments through five assignments of error.

[1] By his first argument, and first and second assignments of error, Mr. Love argues the trial court erred by permitting Officer Phillips to read Ms. Love's statement into evidence because the State failed to lay a proper foundation for admission of the document into evidence under N.C. Gen. Stat. § 8C-1, Rule 803(5). After carefully reviewing the record, we disagree.

North Carolina's Rules of Evidence provide that: "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802. Under N.C. Gen. Stat. § 8C-1, Rule 803(5) the following is not excluded by the hearsay rule:

Recorded Recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

In order to admit "recorded recollection" pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5), the party offering the recorded recollection must show that the proffered document meets three foundational requirements:

(1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined [and adopted] . . . when the matters were fresh in [her] memory.

See e.g., State v. Robar, 157 Vt. 387, 390, 601 A.2d 1376, 1377-378 (1991).

At trial, the evidence presented established all the elements necessary to lay a proper foundation for the admission of Ms. Love's statement as recorded recollection pursuant to N.C. Gen.

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Stat. § 8C-1, Rule 803(5).¹ Ms. Love testified: (1) she remembered making a statement describing the events of that night to an officer, (2) she made the statement when the events of the night were “fresh in her mind,” (3) she no longer had sufficient recollection as to the matter; and (4) the statement was read back to her. Moreover, Officer Phillips testified that Ms. Love was given an opportunity to edit the statement, but that Ms. Love declined to edit the statement—thereby adopting it.² Accordingly, we hold the trial court did not abuse its discretion by admitting Ms. Love’s recorded recollection into evidence and, therefore, the corresponding assignments of error are overruled.

[2] By his second argument, and fourth assignment of error, Mr. Love argues that the trial court erred in denying his motion to dismiss. After carefully reviewing the record, we disagree.

“In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence.” *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). “[T]he question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant’s being the perpetrator of such offense.” *State v. Brayboy*, 105 N.C. App. 370, 373-74, 413 S.E.2d 590, 592 (1992). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

1. Mr. Love relies on *State v. Nickerson*, 320 N.C. 603, 608, 359 S.E.2d 760, 762-63 (1987), for the proposition that “a signature” is *sine qua non* to a properly laid foundation for recorded recollections. For Mr. Love, the signature in *Nickerson* created “sufficient indicia of reliability.” Accordingly, Mr. Love contends, “a generic, printed, unsigned document which is readily susceptible to editing without any way to detect it, [does not contain] that indicia of reliability.” Consequently, Mr. Love cautions this Court that a decision upholding the trial court “would be a very dangerous precedent to set.”

The basis of Mr. Love’s argument has elemental appeal: Without independent indicia of reliability for recorded recollections, the police would be free to produce and attribute incriminating documents and statements to the accused. Where Mr. Love’s argument fails, however, is in its assumption that “a signature” is the *sine qua non* to a properly laid foundation. This is not a correct statement of the law. See e.g., *United States v. Payne*, 492 F.2d 449 (4th Cir. 1973). Rather, the test for admissibility is squarely focused on the witness’ adoption of the statement, and the statement’s reliability. Although a signature is certainly evidence of adoption and reliability, it is neither conclusive nor a necessary precondition.

2. This not a case, as in *State v. Hollingsworth*, 78 N.C. App. 578, 337 S.E.2d 674 (1985), where a witness recanted her recorded recollection during trial and testified that recorded recollection was a lie.

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State v. Williams, 133 N.C. App. 326, 328, 515 S.E.2d 80, 82 (1999) (citation omitted).

In North Carolina, a defendant is guilty of communicating threats under N.C. Gen. Stat. § 14-277.1 if, without legal authority:

- (1) [The defendant] willfully threatens to physically injure the person . . . ;
- (2) The threat is communicated to the other person, orally, in writing, or by any other means;
- (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
- (4) The person threatened believes that the threat will be carried out.

On appeal, Mr. Love argues that the trial court should have granted his motion to dismiss because the State did not produce substantial evidence of the fourth element. This element requires the person threatened to “subjectively believe” that the threat will be carried out. Mr. Love contends Ms. Love did not have this subjective belief, and, in support of this notion, Mr. Love points to Ms. Love’s trial testimony that on 15 August 2000: (1) she did not recall Mr. Love threatening her; (2) she was not afraid of Mr. Love; and (3) she was not hiding from Mr. Love when the officers arrived. If this was the only evidence in the record of Ms. Love’s subjective beliefs, Mr. Love’s argument would have merit.

Mr. Love, however, does not mention Ms. Love’s recorded recollection, read into evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(b)(5), where Ms. Love stated:

As he was getting dressed he would stand very close to me and act like he was going to hit me with his fist, and then would stop right before he would hit me. He did this numerous times and each time I would flinch because I didn’t know if he was really going to hit me.

When he saw that I was scared he said, “You see, you don’t want me to hit you.” After this went on for several minutes, he said to me, “I’m getting ready to leave and I’ll be back. And when I get back, if I see you sitting or lying down, I’m going to knock the hell out of you.”

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He drove away from the house, and as soon as he did I called the police and ran next door to my neighbor's house. I stayed at my neighbor's house until the police officers arrived.

This statement contains four pieces of substantial evidence supporting the State's theory that Ms. Love subjectively believed that Mr. Love intended to carry out his threats. Namely, Ms. Love stated: (1) she flinched when Mr. Love swung his fists at her face; (2) she described herself as scared; (3) she called the police; and (4) she ran to her neighbor's house until the police arrived. Moreover, when the police arrived at the scene Ms. Love was shaking and crying. Even after the officers calmed Ms. Love, she instantly starting crying again upon seeing Mr. Love's vehicle approach the scene. In our opinion, this evidence is substantial and adequate to allow a reasonable fact finder to conclude that Ms. Love subjectively believed that Mr. Love was going to carry out his threats. Accordingly, the trial court properly denied Mr. Love's motion to dismiss, and, therefore, the corresponding assignments of error are overruled.

[3] By his third argument, and fifth assignment of error, Mr. Love contends that trial court committed error by extending Mr. Love's probationary period to twenty-four months without making the required specific finding of facts that a longer period of probation was necessary as required by statute. After carefully reviewing the record, we agree.

Pursuant to North Carolina's procedure under the Structured Sentencing Act and N.C. Gen. Stat. § 15A-1343.2(d), the General Assembly has provided trial courts with the following mandate:

Lengths of Probation Terms Under Structured Sentencing.—Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:

(1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months;

In the case *sub judice*, the trial court violated this statutory mandate by sentencing Mr. Love to twenty-four months supervised probation without making specific findings of fact that a longer period of probation was necessary. The State argues, however, that Mr. Love did not object to the trial court's sentence, and, therefore, Mr. Love

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failed to preserve this issue for appellate review pursuant to N.C. R. App. P. 10(b).

Our Supreme Court, as well as this Court, have consistently held that: “When a trial court acts contrary to a statutory mandate, the error ordinarily is not waived by the defendant’s failure to object at trial.” *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988); *see also State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985); *State v. Tucker*, 91 N.C. App. 511, 372 S.E.2d 328 (1988). “Accordingly, we vacate this condition of defendant’s probation and remand this portion of defendant’s case for resentencing. The trial court must reduce defendant’s probation to the statutory period of [six to eighteen months] or enter appropriate findings of fact that a longer period of probation is necessary.” *State v. Lambert*, 146 N.C. App. 360, 366, 553 S.E.2d 71, 76 (2001).

Affirmed in part, vacated in part, and remanded for resentencing.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. MARQUETTE ADAMS

No. COA01-1443

(Filed 4 March 2003)

1. Criminal Law— habitual felon indictment—trial on underlying offense—less than 20 days later

The trial court did not err in a robbery and assault prosecution by denying defendant’s pre-trial motion to continue his trial to a date more than twenty days after his habitual felon indictment where the State dismissed that indictment. There is no statutory language barring trial on the underlying felony charges within twenty days of an habitual felon indictment; moreover, in this case there was no prejudice because defendant was sentenced solely on the substantive charges. N.C.G.S. § 14-7.3.

2. Assault— box cutter—deadly weapon per se

The trial court’s instruction that a box cutter is a deadly weapon was not plain error in an assault and robbery prosecution. The question of whether the weapon is deadly is one of law when the character of the weapon and its manner of use admit

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but one conclusion; here, the victim testified that defendant attempted to cut her face with the box cutter and that she covered her face with her hands, suffering cuts which required eight stitches. Moreover, the box cutter was found, admitted into evidence, and observed by the judge and jury.

3. Sentencing— prior record points—no prejudicial error

There was no prejudicial error in an assault and robbery sentencing where the court concluded that defendant's prior record level was VI based on 21 prior record points; defendant took issue with one of those points on appeal; and level VI requires only 19 points.

4. Constitutional Law— effective assistance of counsel— prior conflicts of interest—no investigation

A robbery and assault defendant did not receive inadequate representation where he alleged that his counsel had not investigated defendant's prior convictions for conflicts of interest in her present representation of defendant, but there was no suggestion as to what the investigation would have revealed or how this would have affected defendant's prior record level or his sentencing.

5. Constitutional Law— effective assistance of counsel—jury selection—defense tactics

A robbery and assault defendant did not receive inadequate representation during jury selection where he contended that his counsel neglected to develop certain grounds to challenge jurors, but the State and defendant asked questions concerning those grounds, jurors were excused, and there was no basis for challenging the remaining jurors for cause.

6. Constitutional Law— effective assistance of counsel—failure to object—evidence of guilt overwhelming

A robbery and assault defendant did not receive inadequate assistance of counsel where his attorney did not object to certain hearsay statements, but there was such overwhelming evidence of guilt that the admission of the statements did not prejudice defendant.

7. Constitutional Law— effective assistance of counsel—not calling witness—not objecting to argument

A robbery and assault defendant did not receive inadequate representation where defense counsel did not call a particular

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witness and did not object to the prosecutor's argument that the evidence was uncontroverted. "Uncontroverted" was a fair characterization of the evidence, and defendant did not show that calling the witness would have affected the verdict.

8. Constitutional Law— effective assistance of counsel—no objection to instruction or sentencing finding

A robbery and assault defendant did not receive inadequate assistance of counsel where defense counsel did not object to the court instructing the jury that a box cutter is a deadly weapon or did not except to the court's finding during sentencing that all of the elements of the present offense were included in prior convictions. The box cutter instruction was proper and defendant had no reason to object, and defendant's prior record level would not have changed had the alleged sentencing error not occurred.

Appeal by defendant from judgment entered 9 May 2001 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 10 September 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General James M. Stanley, Jr., for the State.

Kevin P. Bradley for defendant-appellant.

HUNTER, Judge.

Marquette Adams ("defendant") appeals from a conviction of robbery with a dangerous weapon and a sentence of 120 to 153 months imprisonment.¹ For the reasons stated herein, we find no error.

The State's evidence tended to show that between 10:30 p.m. and 11:00 p.m. on 7 September 2000, Tracey Michelle Long ("Long") was driving in Durham, North Carolina, and had one of her tires blow out. After Long pulled over and retrieved a jack from her trunk, she saw defendant, who asked Long if she needed help changing the tire. Long responded that she could handle it herself, but defendant insisted on helping her. It took about thirty-five to forty minutes for defendant to change Long's tire and according to Long, she was able to see defendant clearly the entire time.

1. Defendant was also convicted of assault with a deadly weapon but is only appealing his conviction of robbery with a dangerous weapon.

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Defendant informed Long that he had missed his bus and asked for a ride down the street to his house. Long agreed to give defendant a ride home but told him that she was on her way somewhere and was in a hurry. After telling Long to turn multiple times, defendant instructed Long to pull over. When Long pulled over, defendant reached for her keys that were in the ignition with his left hand and pulled out a box cutter with his right hand. Long fought back as defendant attempted to cut her face. Long sustained cuts on both of her hands while trying to protect her face. Defendant eventually got out of the car and then reached through the sunroof, grabbed Long's chain and continued to try to cut Long. Long subsequently alighted from the vehicle and began running down the street. Defendant chased Long and stated that he was going to kill her. Thereafter, defendant returned to the car and took Long's cell phone.

Long eventually got back in her car and drove up the street to determine which direction defendant had gone. When Long returned to the crime scene, the police were there. After receiving two calls regarding a suspicious person near the crime scene, Jeffrey Cockerham ("Officer Cockerham"), a police officer with the Durham Police Department, found defendant lying in the back seat of a Nissan Maxima station wagon. When he searched the car, Officer Cockerham found Long's gold necklace and cell phone. Officer Cockerham also found a green jacket with blood on it and a hat. In addition, a box cutter was found inside one of defendant's pockets. Long positively identified defendant as the person who attacked her with a box cutter after defendant put on the coat and hat that were found in the car with him. Defendant sustained approximately six cuts on her hands which required eight stitches.

Defendant was charged on 16 October 2000 in true bills of indictment with robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. Subsequently, on 30 April 2001, defendant was charged in a true bill of indictment with being a habitual felon. Defendant did not present any evidence at trial. The State dismissed the habitual felon indictment prior to sentencing. A jury found defendant guilty of robbery with a dangerous weapon and assault with a deadly weapon, a lesser included offense of assault with a deadly weapon inflicting serious injury. Defendant appeals.

I.

[1] Defendant initially contends the trial court erred in denying his pre-trial motion to continue his trial to a date more than twenty days

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after defendant was charged in a true bill of indictment with habitual felon status. Defendant asserts that the trial court deprived him of a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 19, 23, and 24 of the North Carolina Constitution.

“A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed absent a showing of abuse of discretion.” *State v. Blakeney*, 352 N.C. 287, 301, 531 S.E.2d 799, 811 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). However, when a constitutional question is implicated, the court’s ruling is fully reviewable on appeal. *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). Additionally, regardless of whether defendant’s motion to continue raises a constitutional issue, a denial of such motion “is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.” *Id.* at 33-34, 550 S.E.2d at 146.

Pursuant to N.C. Gen. Stat. § 14-7.3, “[n]o defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial *on said charge* within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period.” N.C. Gen. Stat. § 14-7.3 (2001) (emphasis added). Defendant made a motion for a continuance under this statute since this case was scheduled for trial on 8 May 2001 and defendant was indicted as an habitual felon on 30 April 2001. However, we note that at trial, the State proceeded only on the underlying felony charges, robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The assistant district attorney handling the case, notified the court that the State was not going to proceed with the habitual felon charge until a later date, if at all. After the jury verdict was announced, the State dismissed defendant’s habitual felon indictment and defendant was sentenced solely on the substantive charges against him.

We note that “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995) (quoting *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). The plain meaning of N.C. Gen. Stat. § 14-7.3 is that defendant may not be tried on an habitual felon charge within twenty days of being indicted as an habitual felon. There is no lan-

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guage in the statute which bars trial of the underlying felony charges within twenty days of the habitual felon indictment. Therefore, we conclude the trial court did not err in denying defendant's motion to continue.

Even if the trial court had erred in its denial of defendant's motion, defendant has failed to show any prejudice as a result of the alleged error. The State dismissed the habitual felon indictment and defendant was sentenced solely on the substantive charges against him. Accordingly, this assignment of error is overruled.

II.

[2] Defendant next contends the trial court committed plain error by instructing the jury that “[a] box cutter is a deadly weapon.” Defendant argues the challenged instruction amounted to a mandatory conclusive presumption which unconstitutionally relieved the State of its burden of proving each element of robbery with a dangerous weapon. This assignment of error is subject to plain error review since defendant failed to object to the challenged instruction. *See* N.C.R. App. P. 10(c)(4). “In order to rise to the level of plain error, the error in the trial court’s instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected.” *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997).

It is well settled that “[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring.” *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (1986) (citations omitted). “An instrument which is likely to produce death or great bodily harm under the circumstances of its use is properly denominated a deadly weapon.” *State v. Joyner*, 295 N.C. 55, 64, 243 S.E.2d 367, 373 (1978).

After reviewing the evidence presented in the case *sub judice*, we are convinced that the trial court did not err in instructing the jury that “[a] box cutter is a deadly weapon.” Long testified that defendant attempted to cut her face with a box cutter so she covered her face with her hands. Long sustained approximately six cuts on her hands which required eight stitches. In addition, the box cutter, which was found inside one of defendant’s pockets shortly after the attack, was admitted into evidence and was observed by the trial judge and the

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jury. We hold that the evidence in this case supports the trial judge's instruction that a box cutter is a deadly weapon *per se*. Therefore, we find no error, much less plain error, in the trial court's instruction.

III.

[3] Defendant next assigns plain error to the trial court's sentencing proceeding. The trial court concluded that defendant's prior record level was VI, based upon its finding that defendant had twenty-one prior record points. Level VI is assigned to defendants who have at least nineteen prior record points. N.C. Gen. Stat. § 15A-1340.14(c)(6) (2001). Defendant takes issue with only one of the twenty-one prior record points found by the trial court, based on the trial court's allegedly erroneous finding that all the elements of defendant's present offense were included in a prior offense. *See* N.C. Gen. Stat. § 15A-1340.14(b)(6). However, even assuming that one point was erroneously assessed, this error would be harmless since defendant would still have a prior record level of VI with twenty prior record points. *See State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000). Accordingly, defendant's assignment of error is overruled.

IV.

[4] Defendant finally claims that his trial counsel provided ineffective assistance, entitling him to a new trial. We disagree.

A defendant's ineffective assistance of counsel claims should often be litigated in a motion for appropriate relief. However, we note that "[ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). In the instant case, we will review defendant's ineffective assistance of counsel claims since we are able to determine from the record, without further investigation or an evidentiary hearing, whether these claims have merit.

To successfully assert an ineffective assistance of counsel claim, a defendant must satisfy the following two-prong test:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

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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.*” (Emphasis added.)

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

Defendant specifically alleges that his appointed counsel “neglected to investigate [defendant’s] prior convictions to determine whether her office had any conflict of interest in representing [defendant] in the current case or to determine whether there were any grounds to move for appropriate relief from any of those prior convictions.” However, there is no suggestion in defendant’s brief or the record as to what, if anything, such an investigation would have revealed or how this alleged failure to make such an investigation affected defendant’s prior record level or sentencing.

[5] Defendant next avers that his attorney “neglected to develop any grounds to challenge for cause and neglected to challenge jurors who had been victimized in similar crimes to those being tried and whose long-term employment would likely cause them to view the prosecution’s case more favorably than the defense.” Our review of the record, however, reveals that the State asked the jurors if they previously had their home or car broken into or had been robbed with a weapon. In addition, counsel for defendant asked the jurors if they had a close family member or a close friend who had been the victim of a crime. The only juror who had been robbed with a weapon was excused by the State for cause. Further, we note that defense counsel exercised two peremptory challenges with respect to one police officer and one former police officer. Defense counsel used all six peremptory challenges allowed by N.C. Gen. Stat. § 15A-1217(b)(1) (2001). We find no basis for defense counsel to have challenged any of the remaining jurors for cause pursuant to N.C. Gen. Stat. § 15A-1212 (2001). We acknowledge that trial counsel are necessarily given wide latitude in matters involving strategic and tactical decisions such as which jurors to accept or strike. *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). In addition, ineffective assistance of counsel claims are “not intended to promote

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judicial second-guessing on questions of strategy . . .” *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978). After a thorough review of the record, we conclude defendant has failed to show that his trial counsel’s tactics were deficient during jury selection.

[6] Defendant further asserts that his attorney failed to object to inadmissible hearsay statements. Specifically, defendant contends that his trial counsel should have objected when Officer Cockerham testified that while at the crime scene with Long, he received a call about a “suspicious black male looking inside of vehicles attempting to open the doors” near the crime scene. In addition, Officer Cockerham testified, without objection, that he received another call shortly thereafter, in which the caller directed him to the Nissan Maxima station wagon in which defendant was found. Assuming *arguendo* that these statements were hearsay, there was such overwhelming evidence of defendant’s guilt that the admission of these statements did not prejudice defendant.

[7] Defendant additionally argues that his trial attorney was ineffective by failing to object to the prosecutor arguing that the evidence was uncontroverted and by failing to call defendant’s nephew as a witness. We conclude, however, that “uncontroverted” was a fair characterization of the evidence. Long identified defendant as her assailant, identified the box cutter that defendant used during the robbery and assault, identified the jacket that defendant was wearing, and identified the gold chain and cell phone that defendant had taken from her. Officer Cockerham corroborated Long’s testimony. Defendant presented no evidence. The State is allowed to bring it to the jury’s attention that a defendant has failed to produce exculpatory evidence or has failed to contradict evidence presented by the State. *State v. Mason*, 317 N.C. 283, 345 S.E.2d 195 (1986). Therefore, defense counsel was not ineffective by failing to object to the prosecutor’s accurate statement that the evidence was uncontroverted. In addition, defendant has not shown that calling his nephew as a witness would have affected the jury’s verdict, especially considering the overwhelming evidence of defendant’s guilt. Further, trial counsel are necessarily given wide latitude on their decisions involving what witnesses to call. *See Milano*, 297 N.C. at 495, 256 S.E.2d at 160.

[8] Defendant next contends that his trial counsel was ineffective by failing to object to the trial court’s instruction to the jury that “[a] box cutter is a deadly weapon.” As determined previously in section II, however, this instruction was proper and therefore, defense counsel had no reason to object.

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Defendant finally claims that his trial counsel was ineffective by failing to except to the trial court's finding that all of the elements of the present offense were included in some prior offense for which defendant was convicted. However, as concluded in section III, had this alleged error not occurred, defendant's prior record level would still have been VI. Therefore, defendant was not prejudiced by his counsel failing to object to the alleged error. For the foregoing reasons, we find no merit in defendant's ineffective assistance of counsel claim.

We conclude defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and CALABRIA concur.

UNITED STATES COLD STORAGE, INC., PETITIONER v. CITY OF LUMBERTON,
RESPONDENT

No. COA02-516

(Filed 4 March 2003)

Cities and Towns—annexation ordinance—subdivision test

The trial court erred by concluding that the area to be annexed by respondent city's 2000 annexation ordinance met the subdivision test of N.C.G.S. § 160A-48(c)(3) and this matter is remanded to the trial court for entry of an order remanding the ordinance to the council for further proceedings including amendment of the boundaries to conform to the provisions of N.C.G.S. § 160A-48, because the approximately twenty-nine undeveloped acres of petitioner's property included in the area to be annexed by the 2000 ordinance have previously been adjudicated vacant, not in use for commercial or other designated purposes, and unsubdivided.

Appeal by petitioner from judgment entered 9 January 2002 by Judge E. Lynn Johnson in Robeson County Superior Court. Heard in the Court of Appeals 8 January 2003.

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

Holt, York, McDarris & High, L.L.P., by Charles F. McDarris, and Lumberton City Attorney Albert M. Benshoff, for respondent-appellee.

MARTIN, Judge.

Petitioner United States Cold Storage (“USCS”) appeals from an order and judgment denying its petition challenging an involuntary annexation ordinance adopted by respondent City of Lumberton (“Lumberton”).

The record indicates that USCS owns an unsubdivided 133-acre tract of land in Robeson County, approximately 28.5 acres of which is occupied by a cold storage facility for food products and supporting facilities such as loading docks, a parking area, a railroad spur line, and a pond. This improved portion of the tract is partially surrounded by a fence and the remaining acres of the tract are primarily vacant, containing only power lines and railroad easements and having been leased out continuously for agricultural purposes. The tract is located at the southeast corner of the intersection of Kenny Biggs Road and Starlite Drive, with the improved portion fronting onto Kenny Biggs Road.

In October and November 1998, the Lumberton City Council (“the Council”) passed a resolution of intent and adopted an annexation report to annex a 255-acre area that included USCS’s entire 133-acre tract. This plan was subsequently altered on 22 February 1999 when the Council “re-adopted as amended” a revised annexation report proposing an annexation of an area that would include a smaller portion of USCS’s property, but still all of the 28.5-acre improved area. On the same date, the Council adopted the ordinance to annex the proposed area. USCS filed a petition challenging this ordinance (“the 1999 ordinance”) on 23 March 1999, contending, *inter alia*, that the area to be annexed did not qualify under the pertinent statutes for annexation.

On 20 July 2000, Superior Court Judge Gregory A. Weeks, after hearing evidence, entered an order in which he determined the annexation ordinance did not meet the statutory requirements for involuntary annexation and remanded the ordinance to Lumberton with specific directives. The order provided, *inter alia*:

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the area to be annexed pursuant to the Annexation Ordinance is not “an area developed for urban purposes” as defined in [G.S.] § 160A-48(c)(3), in that 28± acres of [USCS’s] property is used for commercial purposes and the remaining acreage of [USCS’s] property is vacant for the purpose of determining compliance with [G.S.] § 160A-48(c)(3).

Based on this finding, Judge Weeks ordered that as part of amending or reformulating the ordinance:

the area to be annexed be re-defined to meet the definition of an “area developed for urban purposes” as defined in [G.S.] § 160A-48(c)(3) and that only the portion of [USCS’s] property used for commercial purposes may be considered “commercial” in order to determine compliance with [G.S.] § 160A-48(c)(3).

In addition, Judge Weeks ordered Lumberton to conduct another public hearing on any revised ordinance after providing adequate public notice. Finally, the order provided:

that upon the Respondent’s failure to take action in accordance with this Order within three months of Respondent’s receipt of this Order, the Petitioner may submit an Order to show cause as to why the Annexation challenged herein should be deemed null, void, and of no effect.

Lumberton did not appeal from Judge Weeks’ order. On 8 September 2000, Lumberton adopted a document entitled “2000 Annexation Study” and set a public hearing for 9 October 2000 regarding annexation of the area outlined in the study. USCS alleges that it did not receive notice of the new annexation study or the public hearing from Lumberton, although USCS did learn of the hearing and was able to attend. The study proposed annexation of a 61.59-acre area that included about 57 acres of USCS’s property, including the approximately 28-acre improved portion of the property. On 19 October 2000, the Council adopted an ordinance (“the 2000 ordinance”) annexing the area described in the study. USCS filed a petition challenging the new ordinance on various grounds on 17 November 2000.

USCS’s petition challenging the 2000 ordinance was heard on 25 June 2001 by Superior Court Judge E. Lynn Johnson. Each side submitted evidence tending to support its respective assertion that the unimproved approximately 29-acre portion of USCS’s property included in the annexation area either was or was not in

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commercial use so as to qualify the area for annexation under G.S. § 160A-48(c)(3). Judge Johnson determined that the 2000 ordinance did not violate G.S. § 160A-48(c)(3) and denied USCS's petition. In particular, he found:

The commercial property used by Cold Storage encompasses not only the land their building sits on (28± acres, as acknowledged by Judge Weeks) but also the area directly behind the property that includes the power lines and the railroad easement (30± acres) because those areas actively support [USCS's] commercial enterprise.

It is from this order and judgment that USCS now appeals.

On appeal, USCS argues (1) the trial court erred in disregarding Judge Weeks' earlier finding with respect to the portion of USCS's property in use for commercial purposes and allowing re-litigation of the issue of qualification of the annexation area under G.S. § 160A-48(c)(3), (2) that even if it was not error to disregard Judge Weeks' finding, the trial court erred in determining that the annexation area qualified under G.S. § 160A-48(c)(3), and (3) the trial court erred in finding that Lumberton gave USCS adequate notice of the 9 October 2000 hearing.

The provisions of Chapter 160A, Article 4A, Part III, governing annexation of land by cities of 5000 or more, are applicable here. The parties agree that G.S. § 160A-48, as in effect on 21 October 1998, the date the Resolution of Intent for the 1999 ordinance was adopted, controls the analysis of both the 1999 and 2000 ordinances in this case.¹ The statute provides criteria for determining what areas are eligible for annexation:

(a) A municipal governing board may extend the municipal corporate limits to include any area

(1) Which meets the general standards of subsection (b), and

(2) Every part of which meets the requirements of either subsection (c) or subsection (d).

1. Article 4A of Chapter 160A was amended effective 1 November 1998. S.L. 1998, Ch. 150. Because the annexation proceeding at issue commenced prior to the effective date of the amendments, the amendments are inapplicable to this case.

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N.C. Gen. Stat. § 160A-48(a) (1998). Qualification of the annexation areas under both the 1999 and 2000 ordinances under subsection (b) of the statute is not in dispute. Moreover, in its annexation reports, Lumberton did not seek to qualify the areas under subsection (d), but rather only under subdivision (3) of subsection (c), which states:

(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

- (3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional, or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, . . . purposes, consists of lots and tracts five acres or less in size

N.C. Gen. Stat. § 160A-48(c)(3) (1998). The two requirements of G.S. § 160A-48(c)(3) have come to be known as the “use test” and the “subdivision test.” *See, e.g., Food Town Stores, Inc. v. Salisbury*, 300 N.C. 21, 35, 265 S.E.2d 123, 132 (1980).

USCS challenged both the 1999 and 2000 ordinances on the grounds that the annexation areas did not meet the subdivision test because only approximately 28 acres of USCS’s land is in use for commercial purposes and the remaining USCS acres are vacant and unsubdivided. Judge Weeks agreed with USCS in reviewing the 1999 ordinance and made a finding to that effect. USCS argues that in reviewing the 2000 ordinance, Judge Johnson should have applied Judge Weeks’ finding under the doctrine of collateral estoppel.

The doctrine of collateral estoppel “is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.” . . . In order for collateral estoppel to be applicable, certain requirements must be met. The elements of collateral estoppel, as stated by our Supreme Court, are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined.

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McDonald v. Skeen, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, *disc. review denied*, 356 N.C. 437, 571 S.E.2d 221 (2002) (citations omitted). In the context of collateral estoppel, North Carolina follows the rule of mutuality, which requires “not only that issues be identical but that parties be identical or in privity with parties to the prior judgment.” *Tar Landing Villas Owners’ Assoc. v. Town of Atlantic Beach*, 64 N.C. App. 239, 242, 307 S.E.2d 181, 184 (1983), *disc. review denied*, 310 N.C. 156, 311 S.E.2d 296 (1984).

Lumberton contends, and Judge Johnson agreed, that Judge Weeks’ finding that “28±” acres of USCS’s property was used for commercial purposes did not mean that only 28 acres, give or take an acre, was in use for commercial purposes. Rather, Lumberton asserts that Judge Weeks’ use of the “±” symbol denoted a great degree of flexibility. Based on this interpretation, Lumberton argues that the directive to Lumberton to “re-define” the area to be annexed to meet the definition of an “area developed for urban purposes” under G.S. § 160A-48(c)(3), when read together with the following directive stating that “pursuant to [G.S.] § 160A-48(e) [Lumberton] may use natural topographic features or streets or setbacks from topographic features or streets as boundaries of the area to be annexed,” authorized Lumberton on remand to draw new boundary lines that encompassed more of USCS’s property than the approximately 28 improved acres and classify the additional acres as in use for commercial purposes.

Lumberton explains its “re-definition” of the area to be annexed by pointing to the affidavit of its surveyor, George T. Paris. In his affidavit, Mr. Paris states that because there were no natural topographical features within the USCS property, the new boundary lines were based on an 800-foot setback from Starlite Drive and an extension of the already existing city limit of Lumberton that bordered part of USCS’s property. As these new lines encompassed 29 acres of USCS property outside the 28 improved acres, Lumberton then asserts that the 2.2 acres of power line and railroad easements present within the 29 acres support classification of these acres as “in use for commercial purposes.”

In his order with respect to the 2000 ordinance, Judge Johnson expressly “acknowledge[d] that Judge Weeks decided as fact that 28+/- acres of the USCS property was commercial. This Court further notes that Lumberton was directed [by the] Order to determine the exact area that is used by USCS for commercial purposes.” Based on

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this understanding of Judge Weeks' order, Judge Johnson entertained further litigation on the issue of whether the 29 acres of USCS's property outside the improved 28 acres was in use for commercial purposes and made additional findings reflecting acceptance of Lumberton's "re-definition" of the area to be annexed. We believe this interpretation of Judge Weeks' order was in error.

In his order, Judge Weeks found not only that the "28±" improved acres were in use for commercial purposes, but that the "remaining acreage . . . is vacant for the purpose of determining compliance with [G.S.] § 160A-48(c)(3)." It is also important to note that as part of ordering Lumberton to "re-define" the area to be annexed, Judge Weeks ordered that "only the portion of [USCS's] property used for commercial purposes may be considered 'commercial' in order to determine compliance with [G.S.] § 160A-48(c)(3)." We interpret this language as a finding that the 1999 ordinance did not meet the mandatory provisions of G.S. § 160A-48(a) nor (c), and an order of remand, pursuant to G.S. § 160A-50(g)(2), "for amendment of the boundaries to conform to [those] provisions." N.C. Gen. Stat. § 160A-50(g)(2) (1998). The order that "the area to be annexed be re-defined" was an instruction to re-draw the boundaries of the area to exclude the vacant acres that frustrated compliance with G.S. § 160A-48(c)(3). Given the unequivocal nature of Judge Weeks' division of USCS's property into commercial and "vacant" portions and his order that only the commercial portion be used on remand to determine compliance with G.S. § 160A-48(c)(3), the use of a "±" symbol and statement permitting the use of topographical features, streets, or setbacks therefrom as boundaries for the revised annexation area cannot be construed as a license to attempt to re-classify the vacant acres.

We hold Judge Weeks' order was a final determination on the merits regarding the 1999 ordinance, including a final determination of the classification of the unimproved acres of USCS's property as vacant and not in use for commercial purposes. The other elements of collateral estoppel do not appear to be in dispute. The trial court obviously wished to give effect to Judge Weeks' order, but simply misinterpreted it. Because the approximately 29 undeveloped acres of USCS's property included in the area to be annexed by the 2000 ordinance have previously been adjudicated "vacant," not in use for commercial or other designated purposes, and unsubdivided, we hold that the trial court erred in concluding that the area to be annexed by the 2000 ordinance met the subdivision test of G.S. § 160A-48(c)(3)

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and thus upholding the ordinance as valid. Due to our holding on this issue, we need not address USCS's second argument.

Lastly, this Court must determine whether to declare the ordinance null and void or to remand it. USCS argued at trial and on appeal that Lumberton failed to provide USCS with adequate notice of the 9 October 2000 public hearing in violation of G.S. § 160A-49(b)(3), which states in pertinent part:

notice shall be mailed at least four weeks prior to date of the hearing by first class mail, postage prepaid to the owners as shown by the tax records of the county of all freehold interests in real property located within the area to be annexed.

N.C. Gen. Stat. § 160A-49(b)(3) (1998). USCS also contends that Lumberton's failure to give USCS notice of the hearing was a violation of Judge Weeks' order. Based on these alleged violations, USCS asserts that the trial court erred in failing to declare the ordinance null and void.

Under G.S. § 160A-50(g)(1), a trial court reviewing an annexation ordinance may “[r]emand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.” N.C. Gen. Stat. § 160A-50(g)(1) (1998). In addition, “if any municipality shall fail to take action in accordance with [a] court's instructions upon remand within three months from receipt of [the order], the annexation proceeding shall be deemed null and void.” N.C. Gen. Stat. § 160A-50(g) (1998).

Judge Weeks' order contains instructions to comply with G.S. § 160A-49(b)(2) and (c), public notice provisions Judge Weeks found Lumberton to have violated. USCS does not allege that Lumberton failed to comply with these or any other procedural instructions in the order. Assuming, *arguendo*, that any “procedural irregularities” did occur that may have prejudiced USCS's substantive rights, the remedy under G.S. § 160A-50(g)(1) would have been a remand to the Council. Therefore, the trial court did not err in failing to declare the ordinance null and void on these bases.

USCS also argues that this Court should declare the ordinance null and void because it “still” does not comply with G.S. § 160A-48(c)(3) in violation of Judge Weeks' order. In our review, we believe the more appropriate remedy, in light of Lumberton's

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attempt, though based upon a misinterpretation of Judge Weeks' order, to comply with such order within the three month period allowed, would be to remand the matter "for amendment of the boundaries to conform to the provisions of G.S. 160A-48." N.C. Gen. Stat. § 160A-50(g)(2) (1998). The trial court's order and judgment are reversed and this matter is remanded to the superior court for entry of an order remanding the ordinance to the Council for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. CONNIE CLARK MORRIS

No. COA02-438

(Filed 4 March 2003)

1. Larceny— by employee—identity of person giving money to employee—not required

Indictments charging larceny by an employee were sufficient where they alleged that money was delivered to defendant for the use of her employer without alleging who delivered the money.

2. Larceny— by employee—identity of employer—evidence sufficient

The evidence in a prosecution for larceny by employee sufficiently identified the employer where the indictments named the employer as "AAA Gas and Appliance Company, Inc," and witnesses referred to the company as "AAA" and "AAA Gas."

3. Larceny— by employee—sufficiency of evidence—relationship of trust

The evidence in a prosecution for larceny by employee was sufficient to prove a trust relationship between defendant and her employer where defendant was solely responsible for depositing money received on the days she worked. The fact that her position was not managerial did not prohibit a trust relationship.

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4. Larceny— by employee—sufficiency of evidence—fraudulent intent

The evidence in a prosecution for larceny by employee was sufficient to establish fraudulent intent where there were discrepancies in the records for monies received and deposited on fourteen separate days when defendant was working and managing the accounts.

5. Discovery— records not in State's possession

A defendant in a prosecution for larceny by employee was not entitled to discovery of financial records which the State did not possess. The State provided defendant with copies of the accounting and banking records it intended to offer at trial.

6. Constitutional Law— effective assistance of counsel—denial of discovery

A larceny by employee defendant was not denied effective assistance of counsel by the court's denial of discovery requests where defendant did not argue that time constraints impacted her defense and did not demonstrate how the denial of the records in issue would render any attorney unable to provide assistance.

Appeal by defendant from judgments entered 27 September 2001 by Judge W. Douglas Albright in Superior Court, Halifax County. Heard in the Court of Appeals 9 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Edward J. Harper, II; Hall & O'Donnell, L.L.P., by John B. O'Donnell, Jr., for defendant-appellant.

McGEE, Judge.

Connie Clark Morris (defendant) was indicted on fourteen counts of larceny by employee. The evidence presented at trial tended to show the following. Defendant was an office clerk in the Littleton, North Carolina branch office of AAA Gas and Appliance Company, Inc. (employer) from December 1995 to November 1998. Defendant was responsible for receiving payments made to the employer, balancing and reconciling payment summaries, and depositing funds with the bank. The employer maintained a three-part system for recording and depositing payments received from customers. First, a

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daily payment summary listed all customer payments received in cash, check, and money order each day. Second, a bank deposit slip listed each check and money order and the total cash received on that day. Third, a \$150.00 base amount retained in the cash drawer was verified. On fourteen different days between 10 November 1997 and 27 March 1998, there were discrepancies between the payment summaries and the bank deposit slips totaling \$4,145.19. On each of these respective days, defendant was the sole employee responsible for preparing the payment summaries and bank deposit slips, verifying the \$150.00 that was retained in the cash drawer, and depositing the money in the employer's bank account.

Hal Finch (Finch), employer's general manager, testified to the manipulations of the records. He stated that on 27 March 1998, the daily payment summary showed cash receipts of \$570.86 and checks of \$1,466.27 and the total stated on the daily payment summary was \$2,037.13. The payment summary did not list a check for \$118.59 received from Cary McPherson. The bank deposit slip listed this check, but only showed cash receipts of \$452.27. The amount listed on the bank deposit slip and the amount deposited in the bank totaled \$2,037.13. The difference between the amount of cash actually received by employer and the amount deposited in employer's bank account was \$118.59, the same amount as the check that was unlisted in the daily payment summary. Finch's testimony and business records entered into evidence demonstrated the same pattern of manipulation of the employer's records for each day defendant is charged with committing larceny by an employee.

A jury found defendant guilty on all counts. Defendant appeals.

I.

[1] Defendant first argues the indictments charging a violation of N.C. Gen. Stat. § 14-74 failed to allege an offense in conformity with the statute and thereby failed to adequately inform defendant of the actions constituting the charges against her. Defendant contends this violated her rights under the Sixth Amendment of the United States Constitution and article 1, section 23, of the North Carolina Constitution.

A criminal indictment must contain

[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commis-

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sion thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2001).

An indictment is constitutionally sufficient if it identifies the offense with enough certainty 1) to enable the accused to prepare his defense, 2) to protect him from being twice put in jeopardy for the same offense, and 3) to enable the court to know what judgment to announce in the event of conviction.

State v. Moses, 154 N.C. App. 332, 335, 572 S.E.2d 223, 226 (2002). “[A]n indictment charging a violation of G.S. 14-74 must allege that the property was received and held by the defendant in trust, or for the use of the owner, and that being so held, it was feloniously converted or made away with by the servant or agent.” *State v. Brown*, 56 N.C. App. 228, 229, 287 S.E.2d 421, 423 (1982). In the case before us, the indictments alleged that defendant did “go away with, embezzle, and convert to her own use [a certain amount of money] IN U.S. CURRENCY which had been delivered to be kept for employer’s use, with the intent to steal and to defraud her employer.” The indictments sufficiently allege a delivery in trust because the indictments state that the money was delivered to defendant for the use of her employer. It is not necessary for the indictments to allege who delivered the money to defendant. *Brown* at 230, 287 S.E.2d at 423. Additionally, the indictments provided defendant sufficient notice of the charges against her to protect defendant from double jeopardy, to enable her to prepare her defense, and to inform the court of the charges. This assignment of error is without merit.

II.

[2] Defendant next argues the trial court erred in denying defendant’s motion to dismiss all charges because the State presented insufficient evidence to support the offense charged in each of the indictments.

“In ruling on a motion to dismiss, the trial court need only determine whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” Evidence is considered substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” The motion to dismiss should be denied if there is substantial

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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) (citations omitted).

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). "The evidence offered by the State must be taken to be true and any contradictions and discrepancies therein must be resolved in its favor." *State v. Evans and State v. Britton and State v. Hairston*, 279 N.C. 447, 453, 183 S.E.2d 540, 544 (1971). "[A] variance between the indictment and the proof at trial does not require reversal unless the defendant is prejudiced as a result." *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996).

Defendant argues the evidence failed to identify the employer set forth in the indictments. In the indictments, the employer was identified as "AAA Gas and Appliance Company, Inc." Finch testified at trial that he was the general manager for "AAA Gas and Appliance Company." While Finch and other witnesses subsequently referred to the company as "AAA" and "AAA Gas" throughout their testimony, the trial transcript demonstrates that these names were simply shorthand methods for identifying the company during testimony. Defendant also routinely referred to her employer as "AAA Gas" throughout her own testimony. The evidence presented at trial sufficiently identified defendant's employer as the employer alleged in the indictment. Additionally, defendant has failed to demonstrate that she was prejudiced by use of the shorthand references during trial. This argument is overruled.

[3] Defendant next argues the evidence failed to prove a trust relationship existed between her and her employer. N.C.G.S. § 14-74 requires that larceny by employee be committed in violation of a trust relationship between the employee and the employer. *State v. Bullin*, 34 N.C. App. 589, 592, 239 S.E.2d 278, 280 (1977). Finch testified that defendant was an office clerk for employer and was solely responsible for depositing money received into employer's bank account on the days defendant worked. The fact that defendant's position was

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not considered managerial did not prohibit a trust relationship as argued by defendant. Defendant was entrusted with receiving payments for employer, preparing and reconciling daily accounting records, and depositing the payments into the bank for employer. The evidence is sufficient to permit a reasonable mind to conclude that a trust relationship existed between defendant and her employer. The evidence presented conforms to the charges in the indictment. This argument is overruled.

[4] Defendant also argues the evidence failed to establish that defendant possessed fraudulent intent. The fraudulent intent required for embezzlement is defined as the intent to “willfully and corruptly use or misapply” another’s property for purposes other than that for which it was held. *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 701 (1935) (quoting *State v. Lancaster*, 202 N.C. 204, 210, 162 S.E. 367, 371 (1932)). “Such intent may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred.” *McLean*, 209 N.C. at 40, 182 S.E.2d at 702. “Intent is inferred from facts in evidence, and it is rarely shown by direct proof.” *Lancaster*, 202 N.C. at 210, 162 S.E.2d at 370.

Joy Fowler, branch manager for employer, testified that defendant was solely responsible for depositing the money and keeping accounting records on the days defendant worked. The accounting records and deposit slips prepared by defendant were entered into evidence and Finch testified to the discrepancies between the monies received and deposited. The evidence demonstrated that the discrepancies occurred on fourteen separate days when defendant was working and managing the accounts. The repeated discrepancies among the daily payment summaries and the daily bank deposit slips while under defendant’s control provided sufficient evidence to allow a reasonable mind to conclude that defendant intended to manipulate employer’s records and convert employer’s property for her improper use. The evidence of intent to defraud conforms to the charges in the indictments. This argument is overruled.

The State’s evidence conformed to the indictments and there was no fatal variance between the indictments and the evidence presented. This assignment of error is without merit.

III.

[5] Finally, defendant argues the cumulative effect of the trial court’s denial of defendant’s discovery-related requests grossly prejudiced defendant and denied her rights under the United States and North

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Carolina Constitutions. Defendant contends the trial court should have permitted discovery of employer's financial records and its effect on expert testimony.

Statutes governing discovery in criminal cases must be strictly construed. *State v. Alston*, 80 N.C. App. 540, 542, 342 S.E.2d 573, 575, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986); *State v. Williams*, 29 N.C. App. 319, 322, 224 S.E.2d 250, 252 (1976). N.C. Gen. Stat. § 15A-903(d) (2001) states that the State must allow the defendant to inspect records "which are within the possession, custody, or control of the State and which are material to the preparation of his defense."

In *Alston*, our Court held that the defendants were not entitled to pre-trial discovery of business records that included a bill of sale and a vehicle odometer statement. *Alston*, 80 N.C. App. at 542, 342 S.E.2d at 575. The defendants were not permitted to examine these documents because they had no right to obtain prior knowledge concerning who would testify against them at trial. *Id.* The defendants were allowed to view the documents in accordance with the statute once the trial began, because the materials were intended to be used as evidence by the State and the witness intending to testify appeared in court with the materials. *Id.*

In the case before us, the State complied with required discovery procedures and provided defendant with copies of the accounting and banking records that it intended to offer into evidence against defendant. Defendant was permitted to review this evidence in preparing her defense against the charges. Defendant requested copies of employer's bank statements and written bookkeeping procedures, but there is no evidence showing that these materials were in the possession of the State or under the State's control. There is also no evidence that the State ever intended to submit the requested materials as evidence against defendant.

Defendant cites *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), in support of her argument, but *Canady* is distinguishable from the facts before us. In *Canady*, the State possessed exculpatory evidence that linked another individual to the crime and refused to make it available to the defendant. *Id.* at 252, 559 S.E.2d at 767. The State also lost ballistics evidence before the defendant was able to examine it and called an expert to testify to the results. *Id.* at 253-54, 559 S.E.2d at 767-68. In the case before us, the State did not possess the materials requested by defendant and provided defend-

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ant with copies of all evidence it intended to enter into evidence at trial. Accordingly, defendant was not entitled to discovery of the requested materials and the State did not violate defendant's due process rights.

[6] Defendant also argues that denial of her discovery requests resulted in the denial of defendant's right to effective assistance of counsel. "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." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985).

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.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

Defendant argues she is entitled to a presumption of prejudice because " 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance' is remote" on the facts of this case. *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336 (1993) (citing *United States v. Cronin*, 466 U.S. 648, 658, 659-60, 80 L. Ed. 2d 657, 667, 667-68 (1984)). In *Tunstall*, the defendant argued he had been denied effective assistance of counsel because of the brief time period his attorney had for trial preparation and the trial court's refusal to continue the case. *Tunstall* at 330-31, 432 S.E.2d at 337-38. Our Supreme Court denied the defendant's appeal and held that the defendant had failed to demonstrate how his case could have been better prepared had a continuance been granted. *Id.* at 332, 432 S.E.2d at 338-39.

In the case before us, defendant does not argue that time constraints impacted her defense and does not demonstrate how the denial of employer's bank statements and accounting procedures would render any attorney unable to provide assistance. Defendant has failed to demonstrate that her attorney's performance at trial was deficient and that she was prejudiced and deprived of a fair trial as a result. This assignment of error is without merit.

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No error.

Judges HUNTER and CALABRIA concur.

HELEN CROWDER FINCH, PLAINTIFF v. WACHOVIA BANK & TRUST CO., N.A., INDIVIDUALLY AND AS TRUSTEE UNDER A TRUST ESTABLISHED BY HARRY BROWNE FINCH; CHARLES FINCH, AND SHARON FINCH, DEFENDANTS

No. COA02-583

(Filed 4 March 2003)

Trusts—discretionary—reasonable needs—use of trust assets to make gifts

The trial court did not err in a declaratory judgment action by concluding that defendant bank abused its discretion as trustee by asserting that it had no authority to invade the principal of plaintiff lifetime beneficiary's trust to distribute amounts to plaintiff to enable her to make substantial gifts to church, charities, and family members, but the trial court erred by ordering defendant bank to exercise its discretion as trustee to determine a reasonable annual amount as it deems requisite or desirable to meet plaintiff's reasonable needs in her current station in life and to distribute that amount to plaintiff for gifting purposes, because enforcement of the trial court's order would impermissibly invade the discretion established by the trust.

Appeal by defendants from judgment entered 11 December 2001 by Judge Charles C. Lamm, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 29 January 2003.

Brinkley Walser, by Walter F. Brinkley and David E. Inabinett, for plaintiff.

Hill, Evans, Duncan, Jordan & Beatty, P.L.L.C., by R. Thompson Wright and Tommy S. Blalock, for defendant Charles Finch.

Morgan, Herring, Morgan, Green, Rosenblutt & Gill, PLLC, by John Haworth, for defendant Wachovia Bank & Trust Co.

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TYSON, Judge

I. Background

Helen Crowder Finch, (“plaintiff”) is the 83-year-olds widow of Harry Browne Finch, (“testator”). The Finches were married for 46 years and raised three children, Sharon, Charles, and Bruce. Testator died 19 January 1988 and left a will giving (1) 15% of his total estate to charity and (2) a marital trust for the benefit of plaintiff during her lifetime with the remainder to go to the children. Wachovia Bank & Trust Company was named the sole trustee of the marital trust.

Testator’s testamentary intent was incorporated with minor changes into a Family Settlement Agreement, approved by the Davidson County Superior Court on 14 May 1990. This settlement was reached after plaintiff dissented from the will and Bruce filed a caveat. Neither plaintiff nor Bruce wanted their interests under the will to be held in trust.

The final distribution of the estate on 9 June 1991 resulted in the following sums being paid: \$1,663,512.19 to Wachovia Bank & Trust Company, Trustee for Helen Crowder Finch, \$303,084.64 to Charles Finch, \$303,084.63 to Sharon Finch, and \$303,084.63 to Wachovia Bank & Trust Company, Trustee for Bruce Finch. Bruce died in 1991. At Bruce’s death, the assets in his trust were divided between Sharon and Charles as Bruce had no descendants.

Plaintiff’s trust provided that she would receive the entire net income derived from the principal, and further provided as follows:

If, in the judgment of the Trustee, the income payable to Helen in accordance with the provision of paragraph 3) above, supplemented by income (other than corporate gains) from other sources to her, shall not be sufficient to meet the *reasonable needs of Helen in her station in life—as to all of which the judgment of the Trustee shall be conclusive*—then, and in that event, the Trustee will be authorized to pay or apply for the benefit of Helen so much of the principal of this trust as the Trustee, *in its sole discretion*, shall from time to time deem requisite or desirable to meet the *reasonable needs* of Helen—even to the full extent of the entire principal of this Trust.

(Emphasis supplied).

Initially, Wachovia paid plaintiff \$6,782.22 a month. The amount was reduced to \$5,000.00 in June 1992, but the payments increased

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to \$5,500.00 a month in June of 1996. In June 1997, the payments increased to \$6,250.00, and in June 1998, to \$6,750.00 per month. All increases were made upon plaintiff's requests. These payments exceeded the net income from the principal resulting in a continuing decrease in the principal and converted the trust into a wasting trust.

In 1999, plaintiff requested another cost of living increase. In April 2000, Wachovia requested that plaintiff submit a statement of her expenses. She filed a statement of estimated annual living expenses which totaled \$116,400.00 per year, or \$9,700.00 per month. This estimated budget included \$28,000 or 25% of her estimate to be given away each year by plaintiff to her family, church and charities.

At the time Wachovia considered the request, the net income of the trust had decreased to \$31,114.00 per year, and the approximate value of the corpus was \$1.257 million. During deposition testimony, Wachovia representative Lois T. Morris testified that the value of the principal had further decreased to "just under \$1.1 million", a decrease of more than \$500,000 in ten years. Wachovia's trust committee considered plaintiff's new request and concluded that the trust instrument did not allow for an invasion of principal to support substantial gifts by plaintiff, the income beneficiary. Wachovia stated, "[w]e do not believe [the statement] 'meet the reasonable needs of Mrs. Finch' is broad enough to allow us to distribute trust assets to her to make gifts.'" Wachovia reduced plaintiff's request by \$28,000.00 and decided that plaintiff's request for funds to pay taxes and travel would be met by providing direct reimbursements after these expenses were incurred and not lump sum payments in advance. Wachovia considered plaintiff's social security income and interest income from her certificates of deposit and concluded that her additional monthly income requirements were \$3,700.00. Plaintiff's income payments were decreased to that amount in August 2000.

Plaintiff made gifts to her children and grandchildren after Testator died. The gifts spanned the time period from 1990 to 2000 and totaled over \$90,000.00, which plaintiff contends came mostly from her savings and other resources.

On 31 August 2000, plaintiff filed a declaratory judgment action against Wachovia and the remainder beneficiaries, Charles Finch and Sharon Finch, to interpret paragraph 5 of the Family Settlement

Agreement, Trust A, Marital Trust. Plaintiff also alleged that Wachovia had breached its fiduciary duty to plaintiff in its management of the trust, had failed to follow the “prudent investor rule” pursuant to N.C.G.S. § 36A-161, and had failed to provide sufficient income in order for plaintiff to be able to make gifts as she did prior to her husband’s death. Defendant Wachovia answered and defended on the basis that it as trustee had the “sole discretion” to determine plaintiff’s “reasonable needs” and that after having studied plaintiff’s request, had *exercised its discretion* and fiduciary responsibilities in an *objective* manner. Defendant pled the three year statute of limitations defense to all actions prior to 31 August 2000.

Sharon Finch answered the complaint aligning herself with her mother. Charles Finch answered the complaint supporting the actions of Wachovia. Judgment was entered by the trial court on 11 December 2001, finding the making of reasonable gifts to family, church and charities to be a normal practice for persons who had attained plaintiff’s “station in life” and that Wachovia abused its discretion in finding that it had no authority to invade the principal for such purpose. The trial court ordered Wachovia to exercise its discretion and “determine a reasonable annual amount” to give to plaintiff which also provided for her desire to gift. The judgment applied prospectively. Plaintiff received no reimbursement for Wachovia’s prior lack of providing funds for gifts. Costs and attorneys’ fees were taxed against the estate. Defendant Charles Finch brought this appeal. Defendant Wachovia filed a supporting brief and counsel for both defendants orally argued their positions.

II. Issue

The issue is whether the trial court erred in concluding that Wachovia abused its discretion as trustee by asserting that it had no authority to invade the principal to distribute amounts to plaintiff to enable her to make substantial gifts to her church, charities, and family members and ordering Wachovia to “exercise the discretion . . . as Trustee . . . and determine a reasonable annual amount, on a percentage or other reasonable basis, as it deems requisite or desirable to meet Plaintiff’s reasonable needs in her current station in life, to distribute to Plaintiff for ‘gifting’ purposes, be it to her church, charities of her choice or members of her family.”

III. Standard of Review

The standard of review of a judgment rendered under the declaratory judgment act is the same as in other cases. N.C. Gen. Stat.

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§ 1-258. Thus, where a declaratory judgment action is heard without a jury and the trial court resolves issues of fact, the court's findings of fact are conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed.

Miesch v. Ocean Dunes Homeowners Assn., 120 N.C. App. 559, 562, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996) (citing *Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475, *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981)).

IV. Abuse of Discretion

The parties argue the issue quite differently. Plaintiff contends that Wachovia abused its discretion by asserting that it did not have authority to make discretionary payments to plaintiff for gifting purposes. Defendant appeals from the trial court's conclusion that Wachovia abused its discretion as trustee by refusing to invade the principal to provide funds to plaintiff to make gifts. The trial court found that defendant Wachovia abused its discretion as trustee by contending that it had no authority to invade the corpus to allow plaintiff, as lifetime beneficiary, to make gifts. We agree with the trial court's conclusion of law that Wachovia abused its discretion by not considering plaintiff's desire to gift on the basis that the trust does not provide authority for such consideration. We vacate that portion of the order requiring Wachovia, as trustee, to consider plaintiff's gifting desires and "determine a reasonable annual amount . . . to distribute to Plaintiff for 'gifting' purposes. . . ." Enforcement of the trial court's order would impermissibly invade the discretion established by the trust.

The trustee of a discretionary trust must exercise its discretion and its judgment in considering the proper way to administer the trust. Failure to exercise judgment is one way a trustee can abuse its discretion. *Woodard v. Mordecai*, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951) (setting forth other abuses of discretion including acting dishonestly, acting with an improper motive, failing to use judgment, or acting beyond the bounds of a reasonable judgment.) Plaintiff argues and the trial court found that Wachovia failed to exercise any judgment by asserting the position that they lacked the authority to consider plaintiff's gift requests in determining her reasonable needs. We agree.

We hold that the trial court's conclusion of law that Wachovia abused its discretion is based upon the trial court's findings of fact which are supported by competent evidence, particularly Wachovia's letter of 6 July 2000 to plaintiff. The letter states that Wachovia does "not believe [its] discretionary authority is broad enough to permit [it] to invade principal of the trust to enable Mrs. Finch to make gifts." Given the broad discretion allowed by the trust in determining plaintiff's "reasonable needs" and the lack of an express prohibition, we hold that Wachovia failed to exercise judgment and abused its discretion in failing to consider plaintiff's request.

V. Effect of Trial Court's Order

A. Net Income and Invasions into Principal

The only monies that plaintiff is entitled to as a matter of right from the trust are the net income generated from the principal. Any additional sums paid to plaintiff beyond the annual net income are solely and entirely within the trustee's discretion. The trustee's discretion to invade the corpus is further limited to making distributions from the principal only "[i]f in the *judgment of the Trustee*, . . ." the net income payable *plus plaintiff's income from other sources* is insufficient to meet "the reasonable needs of Helen in her station in life—as to all of which the *judgment of the Trustee shall be conclusive*." (Emphasis supplied).

Courts are not inclined to and should not interfere with the discretion of the trustee. *See Woodard*, 234 N.C. at 471, 67 S.E.2d at 644. Here, the trust language gives Wachovia the sole authority to determine plaintiff's "reasonable needs" and then to determine whether an invasion of the corpus is required.

The trial court's order mandates that Wachovia determine a "reasonable annual amount" to give to plaintiff for "gifting" purposes. The order leaves that "amount" to be determined by the trustee. Although the Trustee may determine the amount as it wishes, it *must*, according to the language, "determine a reasonable annual amount . . . to distribute to Plaintiff for 'gifting' purposes . . ." This order conflicts with the trust language which states that the Trustee's decision to determine plaintiff's "reasonable needs" shall be "conclusive". Enforcing the trial court's order would strip discretion from the trustee and replace it with the judgment of the court. Wachovia has the authority, but cannot be forced, to pay over any sums out of the corpus to satisfy the gifting desires of plaintiff.

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B. Intent of Testator

To enforce the trial court's order and substitute the court's discretion for that of the trustee would also undermine the intent of the testator and settlor of the trust. The intent of the testator is the polar star in the interpretation of wills. *Hollowell v. Hollowell*, 333 N.C. 706, 712, 430 S.E.2d 235, 240 (1993) (quoting *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960)), *Pittman v. Thomas*, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983), *Jolley v. Humphries*, 204 N.C. 672, 674, 169 S.E. 417, 418 (1933). This intent is "ascertained from the four corners of the will, considering for the purpose the will and any codicil or codiciles (sic) as constituting but one instrument." *Jolley*, 204 N.C. at 674, 169 S.E. at 418.

The will of testator leaves the majority of testator's assets in marital trust for the benefit of his wife during her lifetime, and then to his children as remaindermen. Testator clearly intended that plaintiff not receive his estate outright. The provisions of the marital trust established by will concerning the discretion of the trustee are identical to the provisions of the trust contained in the family settlement agreement. Enforcing the plain language from the four corners of the trust instrument is essential to upholding testator's intent.

The factual circumstances surrounding testator's intent are even more compelling. Testator was a member of the local Wachovia Board of Directors, and trusted Wachovia's decision-making capabilities. Wachovia, at the time of plaintiff's instant request, was concerned about further invading the trust principal, as the value of the trust corpus was approximately \$1,257,000.00, and the annual net income was \$31,114.00. Wachovia was concerned about plaintiff's increased health care needs and expenses as she aged. Testator's will gave 15% off the top of his estate to various charities, raising an inference that he did not intend for the remaining money in the trust to be gifted.

VI. Conclusion

We affirm that portion of the trial court's order concluding that Wachovia abused its discretion by failing to consider plaintiff's gift requests in determining her reasonable needs. We vacate that portion of the trial court's decree ordering Wachovia to distribute an annual amount to plaintiff for gifting purposes. We remand for entry of an order consistent with this opinion, to include a provision that Wachovia has the sole discretion whether to disburse any funds from the corpus to meet plaintiff's gifting desires.

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Affirmed in part, vacated in part and remanded.

Judges TIMMONS-GOODSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. ANTONE LAMONT BELL

No. COA02-425

(Filed 4 March 2003)

**1. Search and Seizure— traffic stop—motion to suppress—
motion to dismiss—reasonable articulable suspicion**

The trial court did not err in a possession of drug paraphernalia, possession with intent to sell and deliver cocaine, trafficking cocaine by possession, and trafficking cocaine by transport case by denying defendant's motions to dismiss and to suppress evidence seized by officers in a rental vehicle registered in the name of defendant after the vehicle in which defendant was a passenger was stopped for speeding in a work zone, because: (1) both officers testified that defendant voluntarily consented to a search of the vehicle and that consent was never withdrawn; and (2) the officers had reasonable and articulable suspicion of possible criminal activity based on the stories of the two males in the car being directly in conflict, the back seat of the car being filled with personal belongings, defendant's resistance of eye contact, and the specific experience and training of the officers relating to drug cases.

**2. Criminal Law— arraignment—dismissal with leave—proce-
dural calendaring device**

The trial court did not commit plain error in a possession of drug paraphernalia, possession with intent to sell and deliver cocaine, trafficking cocaine by possession, and trafficking cocaine by transport case by permitting defendant to be tried on charges that had been dismissed with leave at the time of defendant's arraignment, because: (1) N.C.G.S. § 15A-932(b) provides that dismissal with leave results in removal of the case from the court's docket, but the criminal proceeding under the indictment is not terminated; (2) defendant was not prejudiced by the procedural calendaring device intended not to suspend or hamper prosecution of a case, but intended to facilitate its con-

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tinuance during a period of time when a defendant is absent; and (3) N.C.G.S. § 15A-932(d) which provides for reinstatement of an indictment after a dismissal with leave is taken is not jurisdictional in nature, nor does failure to strictly comply with its requirements result in the failure of the pleading to charge an offense.

Appeal by defendant from judgments entered 25 October 2001 by Judge D. Jack Hooks, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 9 January 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

William B. Gibson, for defendant-appellant.

CALABRIA, Judge.

On 4 April 1998, at approximately 5:45 a.m., State Trooper Jim Knotts ("Officer Knotts") stopped a white Pontiac Grand Am proceeding southbound on I-95 for traveling 73 mph in a work zone that had a posted speed limit of 55 mph. Two males were in the vehicle, Christopher Bell ("Christopher") in the driver's seat of the Pontiac and his brother, Antone Lamont Bell ("defendant"), in the front passenger's seat. Numerous personal belongings filled the back seat of the vehicle. State Trooper Robert Reeves ("Officer Reeves") drove by, and Officer Knotts asked him for assistance with the stop. When Christopher offered a New York learner's permit along with a rental car agreement for the Pontiac, Officer Knotts asked Christopher to accompany him back to the patrol car to check the tag and permit. Officer Knotts issued Christopher a citation for speeding in a work zone and returned his learner's permit.

Meanwhile, Officer Reeves, at the request of Officer Knotts, questioned defendant, who was alone in the Pontiac. Defendant stated he was moving to Georgia and his brother was coming along to attend a funeral for a male cousin who died of a heart attack. Christopher told Officer Knotts they were going to Georgia for a funeral for an aunt who died of diabetes and that his brother was planning to stay in Georgia for one month. Officer Reeves noted that, as they conversed, defendant's eyes wandered.

Upon considering that the back seat was filled with personal belongings, including stereo equipment, indicating that the trunk was

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full, and that the men told inconsistent stories, Officer Knotts became suspicious of the possible involvement of drugs. His suspicions were based on his past experiences as well as police training in drug intervention. Officer Knotts asked Officer Reeves to request defendant's consent to search the vehicle since defendant's name appeared on the rental agreement for the Pontiac.

Officer Reeves testified that defendant understood what it meant to search the vehicle and freely consented to the search. Defendant testified that he refused to give consent to search the vehicle until Officer Reeves threatened to impound it and get a search warrant.

When Officer Reeves searched the trunk of the vehicle, he found several plastic bags that contained clothes, additional stereo components, and a wooden box resembling a speaker. The wooden box did not match the other speakers and no wires were attached to it. When Officer Reeves noticed the screws on the speaker appeared to have been recently turned, he became increasingly suspicious and removed the panel on the box. Wrapped in a blue towel were 742.8 grams of cocaine. Defendant stated that the drugs belonged to him.

Defendant was indicted by a grand jury in Robeson County on 14 December 1998 for possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22 (2001), possession with intent to sell and deliver cocaine in violation of N.C. Gen. Stat. § 90-95 (2001), trafficking [more than 400 grams of] cocaine by possession in violation of N.C. Gen. Stat. § 90-95(h) (2001), and trafficking [more than 400 grams of] cocaine by transport in violation of N.C. Gen. Stat. § 90-95(h) (2001). Defendant pled not guilty to all charges.

Testimony at both the suppression hearing and trial conflicted as to whether defendant was speeding, whether Officer Reeves threatened to impound the vehicle and get a search warrant, whether the answers given by defendant and Christopher differed, and, whether consent was procured. The trial court denied defendant's motion to suppress the evidence from the search of the vehicle, finding in relevant part: (1) defendant was observed traveling through an area posted 55 mph at a speed registering 73 mph on Officer Knotts' radar; (2) defendant's answers to Officer Reeves' questions differed significantly from those provided by Christopher; (3) Officer Reeves asked defendant for consent to search the vehicle; and (4) defendant did freely and voluntarily consent to a search of the vehicle. This case came to trial in the Superior Court of Robeson County, during the 22

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October 2001 session, the Honorable Judge D. Jack Hooks, Jr. presiding. The jury returned a verdict of guilty on all four charged offenses on 25 October 2001. Defendant appeals.

Defendant asserts the trial court erred by: (I) denying defendant's motion to suppress; (II) denying defendant's motion to dismiss; and (III) permitting defendant to be tried despite the fact that the cases against defendant had been dismissed with leave at the time of the arraignment.

I. Motion to Suppress

[1] Defendant first assigns error to the denial of the motion to suppress evidence seized by law enforcement officers on the grounds that the officers violated defendant's rights to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the North Carolina Constitution.

"[T]he scope of appellate review of an order [concerning suppression of evidence] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted).

[G]reat deference [is given to the trial court] because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.

Cooke, 306 N.C. at 134, 291 S.E.2d at 619-20. "The appellate court is much less favored because it sees only a cold, written record. Hence the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971).

Despite evidentiary conflict on the issues of the vehicle's speed, statements concerning impounding the vehicle, inconsistent information procured during questions, and consent, the trial court found in favor of the State on each of these matters. Specifically, the trial court found as fact that "Mr. Antone Lamont Bell, did freely, volun-

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tarily, consent to a search of the vehicle . . . [and] there were no threats made or coercion, no use of force.”

The trial court’s findings are supported by competent evidence. Both officers testified that defendant voluntarily consented to a search of the Pontiac. Both officers stated that defendant was very cooperative in granting consent and that defendant had not been drinking. Officer Reeves further testified that consent was never withdrawn. Defendant testified that he had not been drinking, had finished high school, and had two or three semesters of college studies. The trial court considered the evidence and found that defendant lawfully consented; this finding is supported by the evidence. Since the trial court determined the search was consensual, the trial court correctly concluded that the motion to suppress should be denied.

Defendant asserts that even if the search was consensual, the consent is ineffective because it was given after the speeding citation was issued. “Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.” *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)). The State asserts that even if, as defendant asserts, the traffic stop had concluded, the detention here was justified because the officers possessed reasonable and articulable suspicion of criminal activity. We agree.

To determine reasonable articulable suspicion, courts “view the facts ‘through the eyes of a reasonable, cautious officer, guided by his experience and training’ at the time he determined to detain defendant.” *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222 (2001) (citations omitted). Recently, our Supreme Court dealt with the issue of detention after a ticket had been issued in a case where the defendant was held for an additional 15-20 minutes until a canine unit arrived. *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999). Reasonable, articulable suspicion justifying the detention was found because the defendant could not produce the registration for the vehicle, provided inconsistent information as to whose vehicle he was driving and where he lived, gave vague travel information and acted nervous. *Id.* In *McClendon*, as in the present case, there were particularized objective factors that caused the officers, based on their experience and training, to suspect illegal activity.

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Officer Reeves had been a State Trooper at the time of this incident for approximately five years. During his career, he had previously found drugs in stereo equipment. Officer Knotts had been a State Trooper for over seven years and testified as to his personal involvement in numerous drug cases arising from vehicle stops. His prior experience prompted him to be suspicious of people with inconsistent stories, back seats full of personal belongings (thereby indicating that the trunk might be full), and indirect eye contact. Here, because the stories were directly in conflict, the back seat was filled with personal belongings, and defendant resisted eye contact, the officers were alerted to possible criminal activity. These factors, coupled with the specific experience and training of the officers at the scene, gave rise to reasonable, articulable suspicion.

Accordingly, this assignment of error is overruled.

II. Motion to Dismiss

Defendant's appeal concerning the Motion to Dismiss is predicated upon our finding that the Motion to Suppress should have been granted. Accordingly, this assignment of error is overruled.

III. Due Process Claim

[2] Finally, defendant assigns plain error to the trial court's decision to permit defendant to be tried on charges that had been dismissed with leave at the time of his arraignment. Defendant failed to object on these grounds at trial. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. App. R. 10(b)(1) (2003).

In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, 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.

N.C. App. R. 10(c)(4) (2003). Plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . grave error which amounts to a denial of a fundamental right . . . a miscarriage of justice or . . . the denial to appellants of a fair trial[.]" *State v. Odom*, 307 N.C. 655, 660, 300

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S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Defendant argues deprivation of statutory rights under N.C. Gen. Stat. §§ 15A-932 and 941 and his constitutional rights to due process of law under the Fifth and Fourteenth Amendments. North Carolina General Statute § 15A-932(b) (2001) provides:

Dismissal with leave for nonappearance or pursuant to a deferred prosecution agreement results in removal of the case from the docket of the court, but all process outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of non-testimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like.

“Under subsection (b) . . . dismissal [with leave] results in removal of the case from the court’s docket, but the criminal proceeding under the indictment is *not* terminated.” *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (emphasis in original). This procedure is used by a prosecutor when a defendant “[f]ails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found.” N.C. Gen. Stat. § 15A-932(a)(2) (2001). “[A] prosecutor may reinstate the proceedings by filing written notice with the clerk.” N.C. Gen. Stat. § 15A-932(d) (2001). Our Supreme Court has characterized dismissal with leave as a “procedural calendaring device.” *State v. Patterson*, 332 N.C. 409, 421, 420 S.E.2d 98, 105 (1992). Moreover, our Supreme Court held that failure to conduct a formal arraignment altogether, where the defendant was fully aware of the charges against him, was not reversible error. *State v. Smith*, 300 N.C. 761, 265 S.E.2d 164 (1980) (citing *State v. McCotter*, 288 N.C. 227, 217 S.E.2d 525 (1975)).

Defendant was not prejudiced by this “procedural calendaring device” intended not to suspend or hamper prosecution of a case, but rather to facilitate its continuance during a period of time when a defendant is absent. Accordingly, we hold that arraigning defendant, who was fully aware of the charges against him, though the charges had been dismissed with leave and had not yet been reinstated, does not amount to the denial of a fair trial; therefore, we find no plain error.

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Defendant argues, alternatively, that a defective arraignment gives rise to a jurisdictional defect challengeable at any time under N.C. Gen. Stat. § 15A-952(d) (2001). “N.C.G.S. § 15A-932(d), which provides for reinstatement of an indictment after a dismissal with leave is taken, is not ‘jurisdictional’ in nature, nor does failure to strictly comply with its requirements result in the ‘failure of the pleading to charge an offense’ within the meaning of N.C.G.S. § 15A-952(d).” *Patterson*, 332 N.C. at 421-22, 420 S.E.2d at 105. Accordingly, this assignment of error is overruled.

No error.

Judges McGEE and HUNTER concur.

DONALD F. SWAIN, AND WIFE, ANN W. SWAIN, PLAINTIFFS v. PRESTON FALLS EAST, L.L.C.; FOGLEMAN & WILLIAMS DEVELOPMENTS, INC.; JOHN D. REYNOLDS, INDIVIDUALLY AND D/B/A REYNOLDS CONSTRUCTION OF CHAPEL HILL, LLC; AND STO CORP.; DEFENDANTS

No. COA02-266

(Filed 4 March 2003)

Construction Claims— synthetic stucco—contributory negligence

The trial court did not err by granting summary judgment in favor of defendants dismissing with prejudice plaintiffs’ claims for negligence, breach of implied warranty of merchantability, negligent misrepresentation, gross negligence, unfair and deceptive practices, negligence per se, and breach of implied warranty of fitness for a particular purpose arising out of the purchase of a townhouse finished with synthetic stucco based on plaintiffs’ contributory negligence, because: (1) an inspector stated in his report to plaintiffs that the stucco siding was beyond his expertise and thus it was not inspected for moisture intrusion; and (2) considering the indications plaintiffs received that synthetic stucco was problematic, their failure to engage the services of a qualified inspector to inspect the stucco before plaintiffs purchased the townhouse constitutes contributory negligence as a matter of law regardless of the assurances plaintiffs received from their realtor and the seller.

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Appeal by plaintiffs from order entered 16 October 2001 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 22 January 2003.

Lewis & Roberts, PLLC, by Daniel K. Bryson and Kurt F. Hausler, for plaintiff-appellants.

Young Moore and Henderson, P.A., by Brian E. Clemmons and Robert C. deRosset, for defendant-appellee Fogleman & Williams Developments, Inc.

Bailey & Dixon, L.L.P., by David Coats, for defendant-appellee John D. Reynolds, individually and d/b/a Reynolds Construction of Chapel Hill, LLC.

McCULLOUGH, Judge.

Plaintiffs appeal from an order of summary judgment entered by the trial court dismissing with prejudice their claims against defendants Fogleman & Williams Developments, Inc. ("Fogleman") and John D. Reynolds, individually and d/b/a Reynolds Construction of Chapel Hill, L.L.C. ("Reynolds").

On 31 March 1999, plaintiffs purchased a townhouse in Cary, N.C., from its original owner, Marshall Lyle Gurley, Sr. ("Mr. Gurley"). The townhouse, built in 1994, had been finished externally with Exterior Insulation and Finish System ("EIFS"), a synthetic stucco product. Plaintiffs lived in New York City prior to moving to Cary. A few months after moving into the townhouse, plaintiffs learned from television advertisements that there had been litigation in North Carolina regarding homes finished with synthetic stucco due to moisture intrusion through the product and resulting structural damage. On 2 June 2000, plaintiffs filed this suit against defendant Preston Falls East, L.L.C., ("Preston Falls"), the developer from which Mr. Gurley had originally purchased the home; defendant Fogleman, the general contractor; defendant Reynolds, the subcontractor that applied the EIFS; and defendant Sto Corp., the manufacturer of EIFS.

In their depositions, both plaintiffs claimed that, prior to purchasing their townhouse, they were not aware of the problems experienced with EIFS and, had they known, they would not have purchased their townhouse. Mr. Swain stated that both their real estate agent, Jim Jones, prior to closing, and Mr. Gurley, at closing,

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had told them that the EIFS would not be problematic as long as it was properly maintained. Several of the documents plaintiffs received prior to either contracting to purchase the townhouse or closing on the sale referred to the EIFS used on their townhouse. In particular, at the signing of the offer to purchase the townhouse on 12 February 1999, plaintiffs signed a Residential Property Disclosure Statement that encouraged purchasers to obtain their own inspection of the property. As an addendum to the purchase contract, they also signed a Synthetic Stucco System Disclosure stating that:

[t]his home has been constructed with a synthetic stucco system. Other homes featuring the same or similar stucco system have experienced structural problems due to moisture absorption and rotting wood beneath the stucco facade. Any questions regarding the stucco on this home or warranty coverage for stucco-related problems should be directed to the builder and/or seller.

Prior to closing, plaintiffs received a copy of an inspection report and memorandum from 1998 that disclosed at least one area of high moisture intrusion and two areas of medium moisture intrusion on the townhouse. This report, issued by defendant Reynolds, had been commissioned by the property manager of the townhouse complex and the memorandum from the property manager stated that the EIFS was the homeowner's responsibility, that high moisture readings should be addressed quickly, and that owners might consider replacing their EIFS completely. Mr. Swain stated in his deposition that Jim Jones advised him the problems discovered in their unit had been corrected. Plaintiffs did have the house inspected prior to closing, but the inspector expressly stated in the inspection report that he was not qualified to evaluate the EIFS and thus did not inspect it.

After filing suit against defendants, plaintiffs had the EIFS on their townhouse inspected on 1 March 2001. The inspection revealed numerous installation defects and areas of moisture intrusion, and the inspection firm recommended that plaintiffs have the EIFS removed and replaced. The inspection firm also stated in its report that EIFS was defectively designed and manufactured and that poor installation could aggravate the problems and damage that would naturally result from the defective product. Plaintiffs' expert witness, engineer Ronald Wright, stated in his deposition that Sto Corp.'s specifications for installation of EIFS required a level of perfection beyond that of standard construction workmanship and that, in his opinion, even homes with near perfect application of EIFS would

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eventually require removal and replacement with a different exterior cladding system. Mr. Wright also noted that although EIFS-related problems and damage were detected as early as 1989 to 1993, they were not widely understood by the construction industry until late 1995. According to Mr. Wright, the N.C. State Building Code first prohibited the use of EIFS (without a 20-year express warranty) in new construction in June 1996.

Plaintiffs apparently agreed to a voluntary dismissal of claims against Preston Falls. In addition, due to settlement of a 1996 EIFS class action suit against it, Sto Corp. moved for and was granted summary judgment based on the doctrine of *res judicata*. See *Ruff v. Porex, Inc.*, 131 N.C. App. 534, 508 S.E.2d 524 (1998), *writs dismissed*, 352 N.C. 149, 543 S.E.2d 894 (2000) (manufacturers subsequently settled). Plaintiffs have not appealed from the order of summary judgment for Sto Corp., nor have they filed suit against Jim Jones or Mr. Gurley.

Plaintiffs' complaint alleged claims against defendants Fogleman and Reynolds for (1) negligence, (2) breach of implied warranty of merchantability, (3) negligent misrepresentation, (4) gross negligence, (5) unfair and deceptive practices, and (6) negligence *per se*. Plaintiffs made an additional claim of breach of implied warranty of fitness for a particular purpose against defendant Fogleman. Briefly summarized, these claims are based on the negligent selection of EIFS for use in constructing plaintiffs' home, the negligent application or supervision of application of EIFS to plaintiffs' home, and the sale of the home without remedying or disclosing the defects associated with the EIFS and its negligent application. Both Fogleman and Reynolds filed motions for summary judgment in August 2001. The trial court granted the motions, holding that there were no genuine issues of material fact to be decided.

On appeal, plaintiffs argue that the trial court erred in granting summary judgment for defendants Fogleman and Reynolds because there are genuine issues of material fact (1) as to whether plaintiffs were contributorily negligent and (2) as to whether Fogleman and Reynolds were negligent in constructing and applying the EIFS to plaintiffs' townhouse. Although plaintiffs assigned error to other aspects of the trial court's order of summary judgment, they did not address them in their brief. Those assignments of error not addressed in plaintiffs' brief are deemed abandoned. N.C.R. App. P. 28(a), (b)(6) (2002).

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Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, the entry of summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2002).

The party moving for summary judgment has the burden of showing that there is no triable issue of material fact. On a motion for summary judgment, “the forecast of evidence and all reasonable inferences must be taken in the light most favorable to the non-moving party.”

Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment. Only where the evidence establishes the plaintiff’s own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted.

Nicholson v. American Safety Util. Corp., 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997) (citations omitted).

“Actionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions, or where such a defendant of ordinary prudence would have foreseen that the plaintiff’s injury was probable under the circumstances.” *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (citations omitted). Where a “person having the capacity to exercise ordinary care . . . fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under . . . similar circumstances to avoid injury.” *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965). In North Carolina, a finding of contributory negligence poses a complete bar to a plaintiff’s negligence claim. See *Love v. Singleton*, 145 N.C. App. 488, 550 S.E.2d 549 (2001).

Plaintiffs first argue that the trial court erred in granting summary judgment for Fogleman and Reynolds because there were material issues of fact with regard to plaintiffs’ alleged contributory negligence. Plaintiffs rely primarily on their asserted ignorance of the

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widespread problems with synthetic stucco construction in North Carolina and of the defects in the EIFS in their townhouse, as well as the assurances they received from their real estate agent and the seller of the home. They assert that Jim Jones had a duty to disclose to them all material information concerning the townhouse property and, therefore, their reliance on his assurances regarding the EIFS was reasonable. They also contend that their failure to make further inspections after receiving a copy of the 1998 stucco inspection report and memorandum did not constitute contributory negligence as a matter of law. Specifically, they argue that they did not own the house in 1998 and thus the report and memorandum were not directed to them. Because they received assurances from Jim Jones that any defects mentioned in the report had been addressed, their failure to follow up independently should not bar recovery from defendants. We disagree.

In *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988), this Court held that the plaintiffs' claim of negligence against a termite inspection company was barred due to contributory negligence. The plaintiffs in *Robertson* discovered substantial termite damage under their house after purchasing it. As a condition to purchasing the house, they had requested a termite inspection report from the sellers. This report noted some obvious damage, but also expressly stated that large portions of the house were not inspected due to inaccessibility and recommended further inspection. The *Robertson* Court held that the "plaintiffs' failure to make further inspections when such inspections were actually recommended by defendant constituted contributory negligence as a matter of law." *Id.* at 444, 363 S.E.2d at 677.

Plaintiffs argue that *Robertson* differs from the present case because plaintiffs never noticed any obvious damage to the stucco as the plaintiffs did in *Robertson*. More importantly, they argue that they "were never advised by anyone to obtain an inspection of their synthetic stucco." To the contrary, at the same time they signed the Synthetic Stucco System Disclosure, plaintiffs signed the Residential Property Disclosure Statement which stated (directly above their signatures) "[p]urchaser(s) are encouraged to obtain their own inspection." They then received the 1998 memorandum and report indicating known areas of moisture intrusion on the townhouse they were about to purchase. Plaintiffs did obtain an inspection of the home, but the inspector expressly stated in his report to plaintiffs that the stucco siding was beyond his expertise and thus it was

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not inspected for moisture intrusion. That the inspector did not go on to recommend further inspections is immaterial where the inspection report made clear that a complete inspection of the townhouse had not been performed. Considering the indications plaintiffs received that synthetic stucco, and the EIFS on Mr. Gurley's townhouse in particular, was problematic, their failure to engage the services of a qualified inspector to inspect the EIFS system before they purchased the townhouse constitutes contributory negligence as a matter of law.

Furthermore, neither the assurances plaintiffs received from their realtor and the seller, nor plaintiffs' claimed reliance on those assurances, change this analysis. The record on appeal indicates that plaintiffs received adequate notice of problems with EIFS generally and on their townhouse to give rise to a duty to obtain an inspection of the EIFS to protect themselves from an unwise real property purchase. Assuming, *arguendo*, that plaintiffs were entitled to rely on the statements made by Jim Jones or Mr. Gurley, plaintiffs' testimony that they would not have bought the townhouse but for the reassuring statements shows, if anything, that the statements, and not any acts by Fogleman or Reynolds, were the proximate cause of plaintiffs' injury. *See Tise v. Yates Constr. Co.*, 345 N.C. 456, 480 S.E.2d 677 (1997) (intervening or superseding acts by criminal or negligent third party may preclude liability of initial negligent actor where intervening act was not reasonably foreseeable to initial negligent actor). Because we hold that the trial court did not err in entering summary judgment for defendants Fogleman and Reynolds based on the evidence of plaintiffs' contributory negligence, we need not address plaintiffs' second argument.

Affirmed.

Judges HUDSON and STEELMAN concur.

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[156 N.C. App. 364 (2003)]

IN RE: HENDREN, A MINOR CHILD, JENNIFER MICHELLE WHITTINGTON, PETITIONER
v. MICKEY ALAN HENDREN, RESPONDENT

No. COA02-683

(Filed 4 March 2003)

**Termination of Parental Rights— neglect—abandonment—
best interests of child**

The trial court did not abuse its discretion by terminating respondent father's parental rights under N.C.G.S. § 7B-1111, because clear, cogent, and convincing evidence revealed that: (1) although respondent was incarcerated and was prevented from having frequent contact with his son, he still neglected his child when respondent had the opportunity to request transferral to the hearing so that he could be present but he did not do so and he also sent a letter to his attorney asking that no action be taken to secure his presence based on respondent's fear of losing certain privileges he had worked to gain in the federal prison system; (2) respondent neglected and abandoned the minor child on the basis that there was no meaningful contact between respondent and the child for five years preceding the motion, respondent failed to even attempt to appear for the hearing, and respondent had filed a custody order mainly for the purpose of allowing his mother to continue visitation rights; and (3) it was in the child's best interest to terminate respondent's parental rights given the ideal situation which the child currently enjoys with petitioner mother and her husband, and considering respondent's long incarceration.

Appeal by respondent from order entered 20 December 2001 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 21 January 2003.

Maitri Klinkosum for petitioner-appellee.

Sofie W. Hosford for respondent-appellant.

Brendan C. Edge as Guardian ad Litem for Justin Alan Hendren, a minor child.

ELMORE, Judge.

Respondent Mickey Hendren appeals an order terminating his parental rights as the father of Justin Alan Hendren.

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Justin Alan Hendren was born to Mickey Alan Hendren and Jennifer Michelle Whittington on 7 September 1992 in Wilkes County, North Carolina. When Justin was born, Ms. Whittington (petitioner) was sixteen years old, and Mr. Hendren (respondent) was eighteen years old. The biological parents were never married but remained together on and off for about six years. Petitioner alleged that the relationship was abusive, and she finally sought a permanent restraining order against the respondent. Respondent, according to petitioner's testimony, was charged federally with kidnaping, interstate domestic violence, car jacking, and using and carrying a firearm during and in relation to a crime of violence, as a result of an incident in which the petitioner was the victim. The respondent was sentenced to nineteen years in the federal correctional system. His incarceration began 27 August 1996 and he was in custody as of the time of the hearing concerning his parental rights.

Respondent's mother, Patty Hendren (Ms. Hendren), testified that before his incarceration, respondent was a caring and involved father who spent time with his son, provided for him financially, changed his diapers, and cared for him. Since his incarceration, Ms. Hendren testified that she had received from the respondent cards and letters addressed to the minor child Justin. Those cards and letters were not entered into evidence, however, as Ms. Hendren testified at trial that she had forgotten to bring them. Justin testified to receiving one or two cards for birthdays and a letter which he testified that he later told his mother to discard while they were cleaning.

Respondent has become a tutor while incarcerated, earning twelve cents per day. The fine in his judgment amounted to several thousands of dollars according to his mother's testimony. Respondent has not sent any financial aid to his child since his incarceration.

Respondent's last visit with the child was in August of 1999. At that time the respondent's mother picked Justin up for a weekend visit, and without the knowledge or permission of the petitioner, took Justin to West Virginia to visit the respondent in prison. Petitioner obtained a "no contact" order, captioned *98 CVD 1265, Wilkes County District Court*. At the expiration of that order, another "no contact" order was entered premised on the timely filing of a Petition to Terminate Parental Rights, which was properly and timely filed by petitioner's counsel. The trial court found that the respondent has had no meaningful contact with the child in the five years preceding the date of the order terminating his parental rights.

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Respondent did not appear at the hearing to permanently end his parental rights. Counsel for the respondent brought to court a letter written by the respondent expressing his desire not to appear because he feared he would forfeit certain privileges which he had earned while in prison. He requested that no steps be taken to request or secure his transferral and appearance in court.

Four years before filing the petition for termination of respondent's parental rights, the petitioner married Mark Whittington. Since their marriage, Mr. Whittington has acted as Justin's father, playing sports with him, providing for his needs, and spending time with him. Justin calls Mr. Whittington "Dad." Mr. Whittington and the petitioner have a daughter together, and have bought a house together. Justin is covered on Mr. Whittington's insurance policy. Mr. Whittington has two jobs and works to provide for the family. Mr. Whittington, the petitioner, and Justin each testified to Justin's desire to be adopted and have the same last name as the rest of the family. Mr. Whittington testified that he wishes to adopt Justin and raise him as his son.

Justin testified in court that he does not wish to have any further contact with the respondent. He testified that the idea of being forced to visit with the respondent makes him "sort of mad" and that he wants Mark Whittington to be his father. The evidence showed that Justin is comfortable in his present familial relationship and that the petitioner and her husband offer him stability with regard to residence, material support, and emotional support.

Respondent appealed the order terminating his parental rights, citing error in the findings that he neglected his son, that he fails to show the love and concern that would be expected from a father, and asserting that he has maintained as much contact as his incarceration allows. Respondent also assigns error to the finding that termination of his parental rights is in the child's best interest.

I.

In a termination of parental rights case, the standard of review is a two-part process: (1) the adjudication phase, governed by section 7B-1109 of our General Statutes, and (2) the disposition phase, governed by section 7B-1110. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001).

During the adjudication phase, the burden of proof rests on petitioner to prove by clear, cogent, and convincing evidence that one

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or more of the statutory grounds set forth in section 7B-1111 for termination exists. N.C. Gen. Stat. § 7B-1109(e)-(f) (2001); *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. The standard of appellate review is whether the trial court's findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996).

If petitioner meets the burden of proof that grounds for termination exist, the trial enters the disposition phase and the court must consider whether termination is in the best interest of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. It is within the trial court's discretion to terminate parental rights upon a finding that it would be in the best interests of the child. *Id.* at 613, 543 S.E.2d at 910. The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

II.

Looking first at the adjudication phase, a court's finding of one of the statutory grounds for termination, if supported by competent evidence, will support an order terminating parental rights. *In re Frasher*, 147 N.C. App. 513, 515, 555 S.E.2d 379, 381 (2001). Section 7B-1111 provides nine separate grounds upon which an order terminating parental rights may be based. N.C. Gen. Stat. § 7B-1111 (2001).

In order to terminate parental rights, the court must find one or more of the listed statutory factors in section 7B-1111. In support of its conclusion that respondent's parental rights should be terminated as to Justin Hendren, the trial court found that the respondent had neglected and abandoned the child pursuant to sections 7B-1111(a)(1) and (7). Respondent's first assignment of error addresses the court's finding that he neglected Justin within the meaning of 7B-1111.

A "neglected juvenile" is defined in section 7B-101(15) of the General Statutes as:

[A] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an envi-

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ronment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2001).

This Court has further construed the definition of neglect: "An individual's 'lack of parental concern for his child' is simply an alternate way of stating that the individual has failed to exercise proper care, supervision, and discipline as to that child." *In re Williamson*, 91 N.C. App. 668, 675, 373 S.E.2d 317, 320 (1988). Further, in determining whether neglect has occurred, the trial judge may consider the parent's failure to provide the personal contact, love, and affection that inheres in the parental relationship. *In re Mills*, 152 N.C. App. 1, 7, 567 S.E.2d 166, 170 (2002).

Respondent contends that his incarceration prevented him from having frequent contact with his son. Incarceration alone, however, does not negate a father's neglect of his child. *In Re Williams*, 149 N.C. App. 951, 563 S.E.2d 202 (2002) (father was incarcerated and his parental rights were terminated because he failed to show filial affection for his child). *Compare In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245 (2002) (termination of parental rights reversed where father was incarcerated and evidence was insufficient to find that he was unable to care for his child), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002).

Although his options for showing affection are greatly limited, the respondent will not be excused from showing interest in the child's welfare by whatever means available. The sacrifices which parenthood often requires are not forfeited when the parent is in custody. In the case at bar, the respondent had the opportunity to request transferal to the hearing, so that he could be present. Not only did he fail to request to be present, he sent a letter to his attorney asking that no action be taken to secure his presence, because he feared losing certain privileges he had worked to gain in the federal prison system. As Judge Byrd noted in his order, in findings of fact numbered 9-11:

9. [T]he counsel for the Respondent informed the Court that Respondent had communicated with his counsel and informed his counsel that he did not wish to avail himself of the procedures which could have brought him before this Court.

10. The Court specifically finds that Respondent was able to avail himself of the procedure to bring him before this Court, but

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chose to decline to avail himself of such procedure. The Court also notes and specifically finds that, prior to the hearing in this matter, counsel for the Respondent read into the record a letter, written by Respondent to counsel, indicating that Respondent did not want his counsel to attempt to have Respondent writted to court.

11. The Court further finds that if the Respondent was required to sacrifice any privileges in the federal prison system in order to be present at a hearing to so permanently effected [sic] his parental rights, the Respondent should have initiated the process to be present at said hearing. However, he made a voluntary and reasoned choice to forgo his presence at the hearing.

We therefore hold that the court's conclusion that the respondent neglected Justin is supported by the findings of fact, and that those findings are supported by competent evidence.

III.

Respondent's second assignment of error addresses the finding that Justin was abandoned by the respondent.

Section 7B-1111(7) of the General Statutes provides that termination of parental rights may be ordered if:

The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 [juvenile being taken into custody upon parent voluntarily delivering the infant not expressing intent to return] for at least 60 consecutive days immediately preceding the filing of the petition or motion.

N.C. Gen. Stat. § 7B-1111(a)(7) (2001).

The court found that respondent neglected and abandoned Justin on the basis that there was no meaningful contact between the respondent and the child for five years preceding the motion, and that the respondent failed to even attempt to appear for the hearing. Although the respondent had filed a custody order, the court found that this was mainly for the purpose of allowing the grandmother to continue visitation rights.

Respondent again argues that the respondent's incarceration prevented him from having more contact with the child. Even though

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the respondent was incarcerated, he could have made more of an effort to maintain contact with his child. The fact that he requested that no effort be made to bring him to court so that he might appear at the hearing shows that Justin is somewhere below his personal privileges in the respondent's priorities.

We conclude therefore that the petitioner did carry the burden to show by clear, cogent, and convincing evidence that the respondent neglected and abandoned his child. The trial court's findings thus support its conclusions of law.

IV.

The court must also find, in the dispositional phase, that termination of the respondent's parental rights is in the best interest of the child. Considering the ideal situation which the child currently enjoys with petitioner and her husband, and considering respondent's long incarceration, the court agreed with the arguments of the Guardian ad Litem and found that it was in Justin's best interest to terminate respondent's parental rights. We hold that the court did not abuse its discretion.

Assignment of error number three was not argued in respondent's brief and is therefore deemed waived under the North Carolina Rules of Appellate Procedure, Rule 28(a).

Although these cases are emotionally difficult for the parties involved, the lower court made very careful findings and thoroughly considered all the evidence. We affirm the order of the trial court terminating respondent's parental rights.

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

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ROBERT EUGENE CAMPBELL, JR., PLAINTIFF v. TIM ANDERSON, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS A RANLO CITY POLICE OFFICER, AND
THE CITY OF RANLO, DEFENDANTS

No. COA02-574

(Filed 4 March 2003)

1. Appeal and Error— appealability—denial of summary judgment—immunity

The denial of summary judgment was interlocutory but appealable as affecting a substantial right where the grounds for the summary judgment involved immunity to a 42 U.S.C. § 1983 claim. The inclusion of an affidavit in the record on appeal and the granting of a motion to amend an answer did not affect a substantial right.

2. Immunity— qualified—42 U.S.C. § 1983 claim—officer's conduct—factual dispute

Qualified immunity did not bar an action for damages under 42 U.S.C. § 1983 where allegations involving the officer's conduct were factually disputed and there were genuine issues of material fact as to whether a reasonable person in the officer's position would have known that his actions violated plaintiff's rights.

3. Immunity; Police Officers— claims for false arrest, trespass, malicious prosecution—no maliciousness or corruption—public official immunity

The trial court erred by denying summary judgment for a police officer on state claims for trespass, malicious prosecution, and false arrest where there was no evidence of maliciousness or corruption and the officer was thus entitled to public official immunity.

Appeal by defendants from an order entered 17 January 2002 by Judge Forrest Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 29 January 2003.

Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, P.A., by William E. Moore, Jr., J. Thomas Hunn and Richard B. Schultz, for plaintiff-appellee.

Russell & King, by Sandra M. King, for defendants-appellants.

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TYSON, Judge.

I. Background

On 23 August 1999, a vehicle owned by Robert Eugene Campbell, Jr., (“plaintiff”) was involved in a hit-and-run accident at Lowell Pope’s Mini Mart. The victim of the hit-and-run provided police a description of the driver, vehicle, and license number. The victim thought the vehicle might be heading toward Carolina Mills, a local factory. The police checked the license number and found the vehicle was registered in plaintiff’s name. The police left the accident scene and followed the suspect vehicle into the Carolina Mills’ parking lot.

Ranlo Police Officer Tim Anderson (“defendant”) arrived at Carolina Mills after Lowell Police Officer Bates and Ranlo Police Sergeant Moore held a suspect in custody. Captain Melton and Chief Hunt of the Ranlo Police arrived shortly at the factory after defendant. One of plaintiff’s fellow workers told him that police officers were gathered around his vehicle in the parking lot.

Plaintiff ventured toward his vehicle and Officer Bates specifically identified plaintiff as the owner of the vehicle. Plaintiff alleged that defendant approached him, questioned him about drugs and weapons, and proceeded to pat him down. Defendant contends that he noticed a bulge in plaintiff’s pant pocket and feared that plaintiff was in possession of a weapon, such as a small boxcutter that factory workers used. Plaintiff alleges that defendant felt a bag in the pocket during the patdown and removed the bag, but defendant states that plaintiff took the bag out of his pant pocket during the patdown. The bag contained Xanax pills and a bottle of nitroglycerine tablets. Plaintiff alleges that he told defendant that he had a prescription for the Xanax. Defendant handcuffed plaintiff and placed him into a patrol car.

Plaintiff remained handcuffed in the patrol car for no longer than ten minutes. During this time, he experienced some chest tightness and requested defendant to change the handcuffs to allow his hands to be in front of him. Defendant refused, but did increase the air conditioning and offered to call an ambulance. Plaintiff told the officers that his vehicle was used without his permission.

Defendant issued a citation to plaintiff for unlawfully possessing Xanax, a controlled substance under N.C.G.S. § 90-95. Defendant informed Berry Cauble, the Human Resources Administrator for

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Carolina Mills, that plaintiff had been found in illegal possession of controlled substances on the company's premises. Cauble immediately terminated plaintiff's employment and asked defendant to escort plaintiff off of the company's premises.

Plaintiff later took his prescription bottle of Xanax to his employer's office. The prescription bottle was then delivered to the Ranlo Police Department. The criminal charges against plaintiff were dismissed on 12 October 1999 on the grounds that plaintiff had a valid prescription and was in lawful possession of the drugs.

Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 against defendants Tim Anderson and the City of Ranlo alleging: (1) violation of his federal constitutional rights under the 4th, 5th, and 14th Amendments, (2) trespass by a public officer, (3) malicious prosecution, and (4) false arrest. Defendants answered and moved to dismiss. Defendants moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (2001). Plaintiff provided various documentation and an affidavit in opposition to defendants' motion. The trial court entered an order (1) allowing defendants' motion for leave to amend their first amended answer, (2) denying defendants' motion for summary judgment, (3) denying defendants' motion for partial summary judgment on the issue of plaintiff's claimed wage loss, (4) denying defendants' motion for partial summary judgment on the issue of plaintiff's claimed damages for mental and emotional distress, (5) deferred ruling on defendants' motion to dismiss plaintiff's punitive damage claim, and (6) deferred ruling on defendants' motion for continuance based upon their objection to plaintiff's designation of Johnny Mims as an expert witness to the 22 January 2002 trial date. Defendants appeal. We affirm in part and reverse in part.

II. Issues

Defendants assign error to the trial court's denial of summary judgment on immunity grounds. Defendants contend that the trial court erred by not granting summary judgment for (1) qualified immunity as to plaintiff's federal claim and (2) public official immunity as to plaintiff's state claims. Defendants also claim the trial court erred by overruling its objection to the inclusion of the affidavit of Johnny Mims in the record on appeal. Plaintiff cross-assigns error to the trial court's granting of the motion to amend the answer for defendants to assert the affirmative defenses of qualified immunity and public official immunity.

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III. Interlocutory Appeal

[1] The denial of summary judgment is an interlocutory order and generally not appealable. *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991). “Where the appeal from an interlocutory order raises issues of sovereign immunity . . . [it] affect[s] a substantial right sufficient to warrant immediate appellate review.” *Peveall v. County of Alamance*, 154 N.C. App. 426, 429, 573 S.E.2d 517, 519 (2002). Where the grounds for summary judgment involve an immunity defense to a § 1983 claim, a substantial right is affected. See *Corum v. University of North Carolina*, 97 N.C. App. 527, 531, 389 S.E.2d 596, 598 (1990), *aff’d in part, rev’d in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

Defendants’ additional argument concerning the Mims affidavit and plaintiff’s cross-assignment of error involving the motion to amend are interlocutory and do not affect a substantial right. See *Hubbard v. Cty. of Cumberland*, 143 N.C. App. 149, 155, 544 S.E.2d 587, 591, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 40 (2001). We do not address those issues.

IV. Standard of Review

The trial court must view all evidence in the light most favorable to the non-movant and draw all reasonable inferences in his favor in ruling on a motion for summary judgment. *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 611, 538 S.E.2d 601, 607 (2000) (citing *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994)), *appeal dismissed, disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001).

V. Qualified Immunity

[2] Defendants affirmatively asserted qualified immunity as their defense against plaintiff’s federal constitutional claims, the alleged violations of plaintiff’s rights under the Fourth, Fifth, and Fourteenth Amendments and 42 U.S.C. § 1983. Government officials performing discretionary functions generally are shielded from liability for civil damages so long as their “ ‘conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ ” *Roberts v. Swain*, 126 N.C. App. 712, 718, 487 S.E.2d 760, 765 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410, (1982)), *cert. denied*, 347 N.C. 270, 493 S.E.2d 746 (1997).

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To determine whether a legitimate defense of qualified immunity exists, this Court has summarized the analysis as follows:

“Ruling on a defense of qualified immunity requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer’s position would have known that his actions violated that right. While the first two requirements involve purely matters of law, the third may require factual determinations respecting disputed aspects of the officer’s conduct. . . . Thus, if there are genuine issues of historical fact respecting the officer’s conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial.”

Id. at 718-19, 487 S.E.2d at 765 (quoting *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994)) (internal quotations omitted).

Plaintiff’s complaint alleged the specific right defendants violated as his right to be free of unlawful searches and seizures and to receive due process of law under the United States Constitution. The statutory vehicle for damages, 42 U.S.C. § 1983, states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes 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

Plaintiff has sufficiently alleged 4th, 5th, and 14th amendment violations under § 1983.

Plaintiff sufficiently identified specific rights clearly established at the time of the violation and has met the first two prongs. The third prong of the test may require a factual analysis. *See Roberts v. Swain*, 126 N.C. App. 712, 718, 487 S.E.2d 760, 765 (1997). The allegations involving Defendant Anderson’s conduct are factually disputed, including whether Defendant Anderson was authorized in stopping and searching plaintiff and seizing the Xanax, and whether

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plaintiff was placed in custody. Resolution of these issues requires a factual analysis.

“If there are genuine issues of historical fact respecting the officer’s conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial.” *Roberts*, 126 N.C. App. at 718, 487 S.E.2d at 765. We find that genuine issues of fact exist, including but not limited to (1) whether Defendant Anderson knew or should have known plaintiff was not involved in the hit-and-run and was thus not a suspect, (2) whether a reasonable officer would have believed plaintiff could be detained and subject to a patdown, and (3) whether a reasonable officer would have believed there was probable cause to seize the cellophane bag and whether Defendant Anderson seized the bag. We cannot objectively determine from this record that Defendant Anderson is entitled to qualified immunity, viewing the evidence in the light most favorable to the non-movant, plaintiff.

The alleged violations of plaintiff’s constitutional rights provide a basis for his recovery under § 1983. As a result, we do not find this action for damages barred by qualified immunity. This Court has held that “ ‘a municipal entity has no claim to immunity in a section 1983 suit.’ ” *Clayton v. Branson*, 153 N.C. App. 488, 494, 570 S.E.2d 253, 257 (2002) (quoting *Moore v. City of Creedmoor*, 345 N.C. 356, 366, 481 S.E.2d 14, 21 (1997)). Likewise, Officer Anderson does not have immunity in his official or individual capacity against the § 1983 claim. This assignment of error by defendants is overruled.

VI. Public Official Immunity

[3] Defendant Anderson argues that the trial court erred by denying summary judgment on the state tort claims due to the doctrine of public official immunity.

The public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties. *Harwood v. Johnson*, 326 N.C. 231, 241, 388 S.E.2d 439, 445, *reh’g denied*, 326 N.C. 488, 392 S.E.2d 90 (1990). Defendant Anderson as a police officer is a public official who enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice. *Schlossberg v. Goins*, 141 N.C. App. 436, 445-46, 540 S.E.2d 49, 56 (2000) (citing *Jones v. Kearns*, 120 N.C. App. 301, 305-06, 462 S.E.2d 245, 247-48 (1995)), *disc. review denied*, 355 N.C. 215, 560 S.E.2d 136-37 (2002).

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Plaintiff's state tort claims are for trespass, malicious prosecution, and false arrest. The trial court had to find that a genuine issue of material fact existed as to whether defendant acted with corruption or malice to deny the protection of public official immunity.

The record is devoid of any evidence showing maliciousness or corruption by the defendant. Where a complaint offers no allegations from which corruption or malice might be inferred, the plaintiff has failed to show an essential of his claim, and summary judgment is appropriate. *See Price v. Davis*, 132 N.C. App. 556, 562, 512 S.E.2d 783, 788 (1999). The questions of reasonableness concerning the search, seizure, and arrest address issues of whether defendant was negligent in performing his official duties. Defendant Anderson offered reasonable explanations, not rebutted by plaintiff, for his actions to exclude willful or wanton conduct.

VII. Conclusion

We find that genuine issues of fact exist concerning whether Defendant Anderson violated plaintiff's constitutional rights. We affirm the denial of summary judgment as to those claims. We reverse the denial of summary judgment as to Defendant Anderson on plaintiff's state tort claims due to insufficient allegations of maliciousness or corruption. Plaintiff's negligence tort claims against Defendant City of Ranlo are reserved for trial pending a determination of liability insurance coverage. We affirm in part and reverse in part.

Affirmed in part, reversed in part.

Judges TIMMONS-GOODSON and LEVINSON concur.

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FIRST-CITIZENS BANK & TRUST COMPANY, PLAINTIFF v. FOUR OAKS BANK &
TRUST COMPANY, DEFENDANT

No. COA02-506

(Filed 4 March 2003)

1. Bankruptcy— collateral attack—sale of collateral—lack of notice

Plaintiff was entitled to collaterally attack a bankruptcy consent order through a state lawsuit claiming that defendant had sold collateral in which plaintiff had a superior security interest and appropriated the funds to its own use. Federal judgments must be accorded full faith and credit but may be collaterally attacked through allegations of extrinsic fraud. Depriving the unsuccessful party of an opportunity to present its case is extrinsic fraud; here, plaintiff asserted that it had no knowledge of defendant's agreement for the sale of the collateral and no opportunity to be heard prior to the entry of the bankruptcy consent order authorizing the sale.

2. Uniform Commercial Code— secured property—priorities

The trial court erred by granting summary judgment for defendant in an action to recover the outstanding debt secured by a drill rig engine which plaintiff contended had been sold in bankruptcy without plaintiff's knowledge. Defendant made no arguments regarding the priority of plaintiff's interest and there was no genuine issue of material fact as to plaintiff's interest in the engine.

Appeal by plaintiff from order entered 14 February 2002 by Judge Jacquelyn L. Lee in Johnston County District Court. Heard in the Court of Appeals 29 January 2003.

Ward and Smith, P.A., by J. Michael Fields, Lance P. Martin and Katherine E. Lewis, for plaintiff-appellant.

Gordon C. Woodruff for defendant-appellee.

MARTIN, Judge.

Plaintiff, First-Citizens Bank & Trust Company, brought this action alleging that defendant, Four Oaks Bank & Trust Company, sold collateral, a drill rig engine, in which plaintiff had a superior

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security interest and appropriated the proceeds to its own use. Plaintiff further alleged that defendant had knowledge of plaintiff's interest in the engine at the time of the sale, and that defendant sold it without notice to, or knowledge of, plaintiff. Plaintiff sought to recover the amount of the outstanding debt secured by the engine, together with costs and attorneys fees. Defendant answered, denying it was obligated to pay plaintiff any amount. Plaintiff subsequently moved for summary judgment.

The materials submitted to the district court in support of, and in opposition to, the motion for summary judgment establish that on 17 October 1996, Jimmie and Valerie Beaty borrowed \$92,000 from defendant for which they gave defendant a security interest in a drill machine, consisting of a ten-wheeled truck with its own engine, as well as a drill rig with its own engine on the back of the truck frame. In February 1997, plaintiff loaned the Beatys \$13,466 for the purchase of a replacement engine for the drill rig. The loan was secured by a security agreement giving plaintiff a security interest in the drill engine, which plaintiff duly perfected. Mr. Beaty thereafter installed the drill engine on the drill rig on the back of the truck.

On 9 August 1999, the Beatys filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Eastern District of North Carolina. Both plaintiff and defendant were listed on the bankruptcy court's schedule of creditors as having an interest in the drill rig. Thereafter, on 1 November 1999, defendant filed a motion in bankruptcy court seeking relief from the automatic stay, or in the alternative, other adequate protection of its interest in the drill machine. Although the record indicates a hearing on the motion was scheduled in bankruptcy court on 1 December 1999, the record is silent as to whether the hearing was held, and the outcome thereof, if any. Apparently, plaintiff received no notice of the hearing. However, on 14 January 2000, upon the Beaty's motion, the bankruptcy court entered an order, consented to by the Beatys and the Chapter 13 trustee, authorizing the Beatys to sell the entire drill machine to Ingle Brothers Drilling for \$50,000 and directing that all proceeds of the sale be given to defendant.

The district court entered an order concluding there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law. Plaintiff's motion for summary judgment was denied and summary judgment was entered in favor of defendant. Plaintiff appeals.

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Plaintiff assigns error to the entry of summary judgment in defendant's favor, arguing that (1) plaintiff had a properly-perfected purchase money security interest in the drill rig engine which took priority over any interest of defendant's in the engine; (2) plaintiff had a properly-perfected security interest in the drill rig engine which took priority over defendant's security interest in the drill machine; (3) the new drill rig engine did not accede to the drill machine and was thus not subject to defendant's security interest in the drill machine; and (4) public policy dictates plaintiff should prevail because it did everything according to law to perfect its interest in the drill rig engine, and defendant should not be permitted to circumvent plaintiff's rights.

[1] In essence, plaintiff seeks to collaterally attack the order of the bankruptcy court, for if this Court were to agree with plaintiff's arguments and render a ruling to that effect, the bankruptcy court's order authorizing defendant to retain all proceeds from the sale of the drill machine would be negated. In general, the courts of this State must accord a federal judgment the same full faith and credit accorded judgments rendered in other states. *See Hampton v. North Carolina Pulp Co.*, 223 N.C. 535, 27 S.E.2d 538 (1943); *Van Kempen v. Latham*, 195 N.C. 389, 142 S.E. 322 (1928). As with all foreign judgments, a party may collaterally attack a judgment by establishing one of three grounds: (1) the court which entered the judgment was without jurisdiction; (2) the judgment was procured through fraud; or (3) the judgment is against public policy. *Lang v. Lang*, 108 N.C. App. 440, 450, 424 S.E.2d 190, 195, *disc. review denied*, 333 N.C. 575, 429 S.E.2d 570 (1993).

"It is a well-settled general rule that whenever the rights of third persons are affected they may collaterally attack a judgment for fraud committed by one party, or for collusion of both parties." *Strickland v. Hughes*, 273 N.C. 481, 488, 160 S.E.2d 313, 318 (1968). "However, to make a successful attack upon a foreign judgment on the basis of fraud, it is necessary that extrinsic fraud be alleged." *Lang*, 108 N.C. App. at 450, 424 S.E.2d at 195 (citation omitted). Extrinsic fraud is that "which is collateral to the foreign proceeding, and not that which arises within the proceeding itself and concerns some matter necessarily under the consideration of the foreign court upon the merits." *Id.* (citation omitted). Our Supreme Court has noted that fraud is extrinsic "when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there

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has been no true adversary proceeding, and the judgment is open to attack at any time.' " *Smith v. Smith*, 334 N.C. 81, 86, 431 S.E.2d 196, 199 (1993) (citation omitted).

In the present case, plaintiff asserted it had no knowledge of the Beaty's agreement with defendant for the sale of the drill machine with all proceeds going to defendant, and that it had no notice or opportunity to be heard on the matter prior to entry of the bankruptcy consent order authorizing the sale. Defendant made no showing, in the record before the district court, to refute plaintiff's assertion that it had no notice of the consent order prior to its entry. The consent order states it was entered upon the Beatys' motion to sell the drill machine, with all proceeds of the sale to go to defendant, and makes no mention of plaintiff having been informed of the sale. Indeed, the fact the consent order was entered at all is evidence of plaintiff's lack of notice and opportunity to be heard, for had plaintiff had such notice, common sense dictates plaintiff would not have consented to its entry, which resulted in plaintiff foregoing its substantial interest in the drill rig engine. Moreover, the record contains the affidavit of Michael Creech, plaintiff's Vice-President who handled the matter of the drill rig engine on behalf of plaintiff, who testified the bankruptcy court did not give him notice of the proposed sale or consent order prior to its entry.

We hold the record sufficiently establishes that plaintiff did not have proper notice of the pending sale of the drill machine, nor an opportunity to be heard on the matter prior to entry of the bankruptcy consent order. See *First Union Nat'l Bank v. Naylor*, 102 N.C. App. 719, 404 S.E.2d 161 (1991) (where wife not listed as creditor and record contains no evidence she had notice or actual knowledge of husband's bankruptcy petition, wife was unable to protect her interests in bankruptcy court, and thus her breach of contract action outside bankruptcy court survived husband's bankruptcy discharge). The absence of such notice and opportunity to be heard prior to entry of an order affecting one's rights or interests constitutes extrinsic fraud for which the affected party may attack a foreign order. Thus, we believe plaintiff is entitled to collaterally attack the bankruptcy consent order, and we proceed to an analysis of the merits of plaintiff's claims.

[2] That analysis leads us to agree with plaintiff that it maintains an interest superior to that of defendant in the drill rig engine, and that it is entitled to recoup from defendant the remaining amount owing on its agreement with the Beaty's. First, we agree with plaintiff that it

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maintains a purchase money security interest in the drill rig engine. Under Article IX of the Uniform Commercial Code as it was in effect prior to 1 July 2002 and at all times relevant to this appeal, an interest is a purchase money security interest to the extent it is “taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.” N.C. Gen. Stat. § 25-9-107 (2000). Moreover, a purchase money security interest in collateral other than inventory “has priority over a conflicting security interest in the same collateral *or its proceeds* if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within 20 days thereafter.” N.C. Gen. Stat. § 25-9-312(4) (2000) (emphasis added).

The record in this case establishes the Beatys borrowed money from plaintiff for the purchase of a new drill rig engine for their drill machine; that plaintiff’s check was made out to Covington Diesel, the seller of the engine; that in exchange, the Beatys executed a security agreement in favor of plaintiff on 7 February 1997; and that its interest in the drill rig engine was perfected on 12 February 1997, within 20 days of the Beaty’s receipt of the engine. Moreover, defendant admitted in its answer that plaintiff maintained a “first priority perfected security interest” in the drill rig engine as reflected by financing statements filed with the Johnston County Register of Deeds and the Secretary of State.

Additionally, the record shows plaintiff’s security interest in the drill rig engine had priority over defendant’s security interest in the drill machine, for under G.S. § 25-9-314, “[a] security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed . . . over the claims of all persons to the whole.” N.C. Gen. Stat. § 25-9-314(1) (2000). Although that statute provides some exceptions to the general rule, none of the exceptions applies here. Further, the record shows that the drill rig engine did not accede to the drill machine, nor was it otherwise commingled and processed with the drill machine as a whole such that plaintiff would lose the priority of its interest.

In *Goodrich Silvertown Stores v. Caesar*, 214 N.C. 85, 197 S.E. 698 (1938), our Supreme Court held that the seller of automobile tires and tubes who possessed a chattel mortgage on the parts at the time of sale was entitled to recover those parts or the value of them even though the parts had been placed on a truck later repossessed by the seller of the truck under a conditional sales contract containing an

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after-acquired property clause. In so holding, the court addressed the doctrine of accession, stating “[t]he doctrine of accession is inapplicable in cases where personal property is placed upon other personal property if the property so placed had not become an integral part of the property to which it was attached and could be conveniently detached.” *Id.* at 87, 197 S.E. at 700. Noting that tires are easily identified and removed without damage to the whole, the court concluded the doctrine of accession was inapplicable. *Id.*

Moreover, the court dismissed the argument that the conditional sales agreement between the seller and buyer of the truck which purported to extend the seller’s interest over any replacements or accessories later placed upon the truck defeated the interest of the seller of the tubes and tires. In support, the court cited this general principle:

“A mortgage given to cover after-acquired property covers such property only in the condition in which it comes into the hands of the mortgagor. If that property is already subject to mortgages or other liens at that time, the general mortgage does not displace them although they may be junior to it in point of time. It attaches only to such interest as the mortgagor acquires.”

Id. at 88, 197 S.E. at 700 (citation omitted).

In the present case, Jimmie Beaty testified that he purchased the drill rig engine separately from the drill machine, that he removed the old engine himself, and replaced it with the new engine subject to plaintiff’s interest, and that this process in no way caused any damage to the drill machine or its existing parts. Mr. Beaty further stated he could have removed the new engine from the drill machine without harm to the machine as a whole. The record demonstrates, without contradiction, that the drill rig engine was a detachable component of the drill machine and therefore had not become a commingled, integral part of the machine. Furthermore, any after-acquired property clause in the Beaty’s agreement with defendant does not defeat plaintiff’s superior interest in the drill rig engine, for defendant only acquired an interest in the engine to the extent of the Beaty’s interest, which interest was always subject to plaintiff’s.

Defendant has made no arguments on appeal regarding the priority of plaintiff’s interest in the drill rig engine over its own interest. The record demonstrates no genuine issue of material fact as to plaintiff’s interest in the drill rig engine, and accordingly, it was entitled to

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judgment as a matter of law. For the reasons stated herein, the trial court's entry of summary judgment for defendant is reversed and this case is remanded to the trial court for entry of summary judgment in favor of plaintiff.

Reversed and remanded.

Judges HUDSON and STEELMAN concur.



KARAN ANN HICKS, PLAINTIFF v. ANDREW SCOTT ALFORD, DEFENDANT

No. COA02-617

(Filed 4 March 2003)

1. Appeal and Error— hearing after remand for new findings—new evidence not required

It is within a trial court's discretion to receive new evidence or to rely on previous evidence after a remand for additional findings, and the trial court in this case did not abuse its discretion by not requiring additional testimony after the case was remanded for a determination of whether a substantial change in circumstances affected the welfare of the child.

2. Appeal and Error— record—duty of appellant to complete

It is the duty of the appellant to ensure that the record on appeal is complete, and this plaintiff's argument that the court's findings were not supported by the evidence was not considered where plaintiff did not include in the record a transcript of the evidence.

3. Child Support, Custody, and Visitation— change of custody—findings—sufficient

The trial court's findings were sufficient to support a modification of child custody where the court made numerous findings of fact detailing plaintiff's pervasive and harmful interference with defendant's visitation rights, as well as violent actions by plaintiff and her family directed at defendant in the presence of the minor child.

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Appeal by plaintiff from order entered 12 February 2002 by Judge Roland H. Hayes in Forsyth County District Court. Heard in the Court of Appeals 8 January 2003.

Jerry D. Jordan for plaintiff appellant.

Metcalf & Beal, L.L.P., by Christopher L. Beal, for defendant appellee.

TIMMONS-GOODSON, Judge.

Karan Ann Hicks (“plaintiff”) appeals from an order of the trial court granting Andrew Scott Alford (“defendant”) custody of the minor child of plaintiff and defendant. For the reasons stated herein, we affirm the order of the trial court.

Plaintiff and defendant are the natural parents of Jenny Lynne Hicks (“the minor child”), who was born 2 October 1998. Plaintiff and defendant never married. On 2 July 1999, a consent order was filed in Forsyth County District Court awarding joint legal custody of the minor child to both parents. The order granted plaintiff primary physical custody and provided defendant visitation rights.

On 10 July 2000, defendant filed a motion for change of custody, alleging that plaintiff and certain members of her family had interfered with defendant’s visitation rights to such extent that a change in custody was warranted. On 12 September 2000, the trial court concluded that plaintiff’s actions in denying defendant visitation constituted a substantial change in circumstances and entered an order granting sole custody of the minor child to defendant. Plaintiff appealed to this Court, which vacated the order of the trial court on the grounds that the order did not contain the requisite findings of fact as to how the change of circumstances affected the welfare of the minor child. On remand, after hearing arguments of counsel and reviewing the evidence presented at the previous hearing, the trial court made the following pertinent findings of fact:

6. On June 27, 1999, the Defendant, with his parents and fiancée, attempted to exercise visitation and went to the Plaintiff’s residence to pick up the said minor child. That the Plaintiff and her family surrounded the Defendant’s car shouting obscenities and threats to the Defendant and his family.

7. That the Defendant attempted to exercise visitation on July 24, 1999, and on July 31, 1999, which was arbitrarily denied by the Plaintiff herein.

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8. On August 6, 1999 and August 7, 1999, Defendant attempted to exercise visitation with the minor child, which was unsuccessful.

9. On or about August 13, 1999, the Defendant returned a phone call from Plaintiff. Plaintiff's father answered the phone and commenced at least a thirty minute diatribe against the Defendant. Said diatribe contained at least three hundred and fifty expletives, including threats against the Defendant, and statements that the Defendant should give up his parental rights. Further, Plaintiff's father informed the Defendant that he, "hated your 'f— a.'" Further, Plaintiff's father told the Defendant, "I'll fight you to hell and back, you g— d— back stabbing m— f—" and statements, "this kid is going to hate your a—," and informed the Defendant he was not the child's father. Defendant never responded to Plaintiff's father during this conversation.

10. In July 1999, Defendant filed a Motion for Contempt against the Plaintiff for his failure to have visitation. In an Order dated November 11, 1999, the Honorable Laurie Hutchens found the Plaintiff in contempt and ordered that maternal grandfather "Buddy Hicks" not to be present at the exchanges. Judge Hutchens found that the Plaintiff could purge herself of contempt by allowing the specified visitation.

11. The Defendant attempted visitation on October 16, 1999, and was refused by the Plaintiff. Plaintiff's father was present, in violation of the Court Order. On October 29, 1999, the Defendant attempted to talk with the Plaintiff in a telephone conversation and was verbally abused in language similar to that used by the maternal grandfather on August 13, 1999.

12. The Defendant attempted visitation on January 15, 2000. On January 13, 2000, the Defendant attempted to call the Plaintiff and the Plaintiff would not cooperate and would not return the Defendant's phone calls. That said phone calls were made in an attempt to exercise visitation.

13. Plaintiff, Plaintiff's mother and Plaintiff's father have all made demands on the Defendant for him to give up his parental rights with respect to said minor child.

14. On May 19, 2000, Defendant met the Plaintiff at the minor child's orthopedic doctor's office located in Winston-Salem. Plaintiff did invite the Defendant to attend said doctor's appointment, and gave the Defendant the time of the appointment.

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However, while the Defendant was at the doctor's office, the Plaintiff refused to cooperate with the Defendant in filling out medical records regarding the minor child.

15. On June 4, 2000, the Defendant attempted to return the minor child after visitation and went to a church parking lot next to Plaintiff's residence. Plaintiff's father was present, and Plaintiff assaulted Defendant's fiancée and Plaintiff's father assaulted the Defendant in the presence of the minor child.

16. On June 5, 2000, the Defendant attempted to call the Plaintiff at her employment and ask how the minor daughter was after the previous day's incident. Plaintiff slammed the phone down without responding. Defendant was not belligerent in his conversation with the Plaintiff.

17. The Plaintiff filed a 50B Domestic Violence action in Stokes County and obtained an *Ex Parte* Order not allowing the Defendant to come near her residence. As a result, the Defendant lost his one-week vacation period with the minor child beginning on July 1, 2000 and ending on July 9, 2000. The *Ex Parte* Order was dissolved and the 50B Domestic Violence Order was not allowed.

18. The Plaintiff testified that if Defendant was late for visitation, she would not wait for him. Defendant lives approximately two hours from the Plaintiff and has to travel Interstate 85 North from Charlotte to Highway 52 North near Davidson County. He encounters traffic delays and sometimes does not get out of work until 5:00 or 6:00 p.m. The Plaintiff refused to cooperate with Defendant in his attempts to exercise his visitation.

19. The Defendant requested the Plaintiff's new telephone number. Plaintiff admitted on the stand that she would not give her new telephone number to the Defendant, thus denying him any contact with her.

20. The Plaintiff has had the means and ability to comply with [the consent order] and Judge Hutchens' Order, but she has failed to do so, and that said failure is willful.

21. Since the last Order, there have been serious acts of hostility and animosity on a consistent basis by Plaintiff and her family directed to the Defendant. That it is not in the best interest of the minor child for her custody to remain with the Plaintiff.

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22. That it is in the best interest of the minor child to develop a relationship with both parents. That the actions of the mother and her parents have interfered with the father developing a relationship with the child which is not in the best interest of the minor child and will continue to adversely affect the welfare of said minor child, if allowed to continue.

Based on the foregoing findings of fact, the trial court concluded, *inter alia*,

4. That there has been a substantial and material change of circumstances by virtue of the hostility and animosity by Plaintiff and her family to the Defendant herein, and it is in the best interest of the minor child that the custody be changed and the Defendant granted custody of the minor child subject to visitation as allowed hereinafter.

5. That it is in the best interest of the minor child to develop a relationship with both parents. That the actions of the mother and her parents have interfered with the father developing a relationship with the child which is not in the best interest of the minor child and will continue to adversely affect the welfare of said minor child, if allowed to continue.

Having so concluded, the trial court entered an order awarding defendant sole legal custody and control of the minor child, and granting visitation rights to plaintiff. From this order, plaintiff appeals.

[1] Plaintiff argues that the trial court erred in failing to require additional testimony on remand as to how the substantial change of circumstances affected the minor child, and further contends that, as there was no additional evidence submitted on remand, there was no evidence to support the trial court's findings of fact and conclusions of law in its order granting custody to defendant. For the reasons stated hereafter, we affirm the order of the trial court.

Plaintiff asserts that, by failing to require additional evidence on remand as to what effect, if any, the substantial change in circumstances had on the minor child, the trial court disregarded this Court's previous opinion and entered a custody order *sua sponte*. We disagree.

In this Court's previous opinion, we remanded the case to the trial court "for a determination of whether the substantial change in

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circumstances affected the welfare of the minor child.” Contrary to plaintiff’s assertions, the opinion did not specifically order the trial court to hold a new hearing or receive new evidence. Nor did the Court conclude that the record was devoid of evidence regarding the effect of the change of circumstances on the minor child. Rather, the order was vacated and the matter remanded because the order “lack[ed] the requisite findings of fact as to how the change in circumstances affected the welfare of the minor child.” Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court. *See Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001) (stating that, on remand, “[i]t is left in the trial court’s discretion whether the taking of additional evidence is necessary”); *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999) (noting that, on remand, the trial court must rely upon the existing record, but may also in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with this Court’s opinion). Plaintiff cites no authority to the contrary, and we have discovered none. It was therefore within the trial court’s discretion to determine whether additional evidence was necessary regarding what effect the substantial change in circumstances had on the minor child. On remand, the trial court heard additional arguments by counsel and reviewed the evidence presented at the previous hearing, but determined that new evidence was unnecessary. We detect no abuse of discretion by the trial court in its determination, and we therefore overrule plaintiff’s assignment of error.

[2] Plaintiff further argues that there was insufficient evidence to support the trial court’s findings concerning the effect of the substantial change in circumstances on the minor child. Plaintiff failed to include in her appeal a transcript of the evidence presented to the trial court. Nor was a transcript of the evidence included in plaintiff’s previous appeal of this matter to the Court. “If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion.” N.C.R. App. P. 7(a)(1) (2003). Similarly, Rule 9 of the North Carolina Rules of Appellate Procedure requires the appellant to include in the record on appeal “so much of the evidence . . . as is necessary for an understanding of all errors assigned.” N.C.R. App. P. 9(a)(1)(e) (2003). It is the duty of the appellant to ensure that the record is complete. *See State v.*

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Alston, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). “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.” *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Without the transcript, we are unable to review plaintiff’s argument that the trial court erred in making findings of fact that are unsupported by the evidence. See *Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997) (concluding that, where the appellant failed to include relevant portions of the transcript on appeal, the Court would not engage in speculation as to potential error by the trial court). We therefore overrule this assignment of error.

[3] By her final argument, plaintiff asserts that the trial court’s findings are insufficient to support a modification of custody. We disagree.

Where interference by one parent with the visitation privileges of the other parent “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.” *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986); see also *Shipman v. Shipman*, 155 N.C. App. 523, 573 S.E.2d 755, 758 (2002) (concluding that change of custody was warranted where denial of visitation rights was one of the factors constituting a substantial change of circumstances affecting the child).

In the instant case, the trial court made numerous findings of fact detailing plaintiff’s pervasive and harmful interference with defendant’s visitation rights, as well as violent actions by plaintiff and her family directed at defendant in the presence of the minor child. The trial court found that plaintiff’s consistent and willful refusal to allow defendant to exercise his visitation rights had “interfered with the father developing a relationship with the child which is not in the best interest of the minor child and will continue to adversely affect the welfare of said minor child, if allowed to continue.” In *Woncik*, the Court affirmed a change of custody where there was pervasive interference with the father’s visitation rights, as well as “conduct undertaken deliberately to belittle the [father] in the mind of his child.” *Woncik*, 82 N.C. App. at 249, 346 S.E.2d at 280. Here, plaintiff’s actions have prevented defendant from developing a relationship with his daughter, resulting in an adverse effect on the welfare of the minor child. We conclude that the trial court’s findings properly sup-

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port its conclusion that a change of custody was warranted, and we therefore overrule this assignment of error.

The order of the trial court is hereby

Affirmed.

Judges TYSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. EDDIE HATCHER

No. COA02-270

(Filed 4 March 2003)

**1. Jury— voir dire—past dealings with district attorney—
criminal record**

The trial court did not abuse its discretion in a first-degree murder case by failing to make further inquiry into a juror's past dealings with the district attorney and to find out whether that juror failed to honestly answer a material question on voir dire regarding whether she had come to court about anything else, because: (1) the juror knew the district attorney from a prior murder trial in which she testified, and the juror stated there was nothing about that case that would keep her from being a fair and impartial juror in the present case; (2) defendant's assertion that there may have been a deal between the juror and the State to induce the juror to testify in the previous murder trial which could have led to favoritism for the State in this case was never explored by defendant during voir dire; and (3) it was not shown that the juror's answer about not coming to court was not truthful even though she had been charged with previous misdemeanors, and defendant did not question the juror about her criminal record or dealings with the State.

**2. Constitutional Law— right to confrontation—witness pled
Fifth Amendment**

The trial court did not violate defendant's constitutional right to confrontation in a first-degree murder case by allowing a witness for the State to plead the Fifth Amendment during cross-examination regarding the witness's alleged murder of another

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victim in an unrelated matter, because: (1) the question did not ask about the charge against the witness, but sought to elicit specific and possibly incriminating facts about a murder for which the witness had yet to be tried and which was completely unrelated to this case; and (2) defendant was not prevented from exploring the issues of bias and motive to fabricate based on the witness's agreement with the State since defendant cross-examined the witness and the witness testified extensively regarding the agreement he had reached with the State.

3. Discovery— exculpatory evidence—handwritten notes

The trial court in a first-degree murder case did not allow the State to improperly withhold exculpatory evidence including certain handwritten notes in the record that a detective allegedly made following an interview with the girlfriend of the victim indicating the victim had been threatened by two other individuals shortly before his death, because: (1) the notes do not indicate who wrote them and when or even which particular witness made the statement regarding the threats; and (2) there is nothing in the record that would show when the notes were turned over to defendant.

Appeal by defendant from judgment dated 23 May 2001 by Judge Jerry Cash Martin in Robeson County Superior Court. Heard in the Court of Appeals 21 January 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Ellen B. Scouten, for the State.

Eddie Hatcher defendant appellant pro se.

BRYANT, Judge.

Eddie Hatcher (defendant) appeals a judgment dated 23 May 2001 entered consistent with a jury verdict finding him guilty of first-degree murder for a drive-by shooting into an occupied residence that killed one person and injured another. Although defendant's brief to this Court includes several appellate rule violations, we invoke Rule 2 of the North Carolina Appellate Rules to reach the merits of defendant's appeal. *See* N.C.R. App. P. 2 (allowing for suspension of rules). The facts pertinent to our analysis are set out below.

The issues we address in this appeal are whether: (I) the trial court abused its discretion by not making further inquiry into a

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juror's past dealings with the district attorney and whether that juror failed to honestly answer a material question on voir dire; (II) the trial court erred in allowing a witness for the State to plead the Fifth Amendment during cross-examination; and (III) the State improperly withheld exculpatory evidence.

I

[1] Defendant takes issue with juror Yolanda Barnwell's (Barnwell) voir dire testimony. During voir dire, the trial court asked Barnwell if she knew or had any previous contact with the district attorney in this case or any member of his staff. Barnwell answered "I know him" and explained it was "[f]rom a while ago [when she] had to testify [i]n a murder case of [her] best friend" approximately a year before defendant's trial. When the trial court inquired whether anything about that case would keep her from being a fair and impartial juror, Barnwell said "no." During the State's voir dire of Barnwell, the following exchange took place:

THE STATE: You and I are acquainted because you testified as a witness in a murder trial about a year ago.

BARNWELL: Uh-huh.

....

THE STATE: Is there anything about that experience that you believe would prevent you from being fair in this case?

BARNWELL: No, sir.

....

THE STATE: Other than when you testified in that other case, have you ever had to come to court about anything else?

BARNWELL: No.

The record in this case includes a criminal record check on Barnwell. That document indicates Barnwell pled guilty to several traffic misdemeanors and infractions. It also shows she had been charged with possession with intent to sell and deliver cocaine, a felony, on 7 July 1999, but the charge had been dismissed by the State on 19 August 1999.

Defendant argues in his brief to this Court that:

when the trial judge was made aware by Juror Barnwell that she had served as a State's witness[,] his experience would surely

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[have told] him that it is customary practice for district attorney[s] to grant favors and deals to persons testifying on behalf of the State and his experience should have led him to make further inquiry in that area.

We disagree.

“Due process requires that a defendant have ‘a panel of impartial, indifferent jurors.’” *State v. Williams*, 330 N.C. 579, 583, 411 S.E.2d 814, 817 (1992) (citation omitted). “The nature and extent of the inquiry made of prospective jurors on voir dire ordinarily rests within the sound discretion of the trial court.” *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992). Thus, “in order to establish reversible error, a defendant must show prejudice in addition to a clear abuse of discretion on the part of the trial court.” *State v. Meyer*, 353 N.C. 92, 109, 540 S.E.2d 1, 11 (2000) (citation omitted).

In this case, Barnwell admitted to knowing the district attorney from a prior murder trial in which she testified. Barnwell also stated there was nothing about that case that would keep her from being a fair and impartial juror in the present proceeding. As such, this testimony raised absolutely no red flags the trial court should have acted upon. Moreover, defendant’s assertion that there may have been a deal between Barnwell and the State to induce her to testify in the previous murder trial, which could have led to favoritism for the State in this case, was never explored by defendant during voir dire. Thus, based on the exchange above, we conclude the trial court did not abuse its discretion in failing to make further inquiry into Barnwell’s contact with the district attorney.

Defendant also contends Barnwell failed to honestly answer a material question, thereby concealing her criminal record and raising issues of her possible bias in favor of the State. The statement on which defendant bases his argument is Barnwell’s denial of ever having had to “come to court about anything else.” Defendant claims this statement must be false because Barnwell had pled guilty to several traffic misdemeanors and infractions and had been charged with possession with intent to sell and deliver cocaine. Defendant further argues that because the State dismissed the 1999 felony charge against Barnwell, “there was surely a sense of allegiance and debt felt by [Barnwell] for the district attorney.”

A new trial based upon a misrepresentation by a juror during voir dire will not be granted unless the defendant shows the following:

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“(1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a matter of law¹ that prejudiced the moving party.”

State v. Chavis, 134 N.C. App. 546, 552, 518 S.E.2d 241, 246 (1999) (quoting *Buckom*, 126 N.C. App. at 380-81, 485 S.E.2d at 327).

In this case, defendant has not demonstrated any of these three factors. Because Barnwell's infractions and traffic misdemeanors could have been settled by an attorney or by payment of a fine, they did not necessarily require her physical presence in court. In addition, the cocaine charge was dismissed a month after Barnwell had been charged, and there is no indication from the record on appeal that she was arrested or had to appear in court at any time on that charge. Thus, it has not been shown that Barnwell's answer was not truthful. Moreover, defendant did not question Barnwell about her record or dealings with the State. The only questions posed by defendant to Barnwell related to her knowledge of someone acquainted with the defense attorneys. As such, defendant did not exercise due diligence to uncover the information he now presents to this Court. *See id.* Finally, defendant's allegations of Barnwell's bias based on her record and alleged dealings with the district attorney are completely hypothetical. Because defendant has failed to present a sufficient showing of juror bias, this assignment of error is overruled.

II

[2] Defendant next argues the trial court denied him the right of confrontation by allowing a witness for the State to plead the Fifth Amendment during cross-examination.

At trial, the State called Phillip Quinn Smith (Smith) to testify about his contact with defendant on the day of the shooting. On cross-examination, Smith testified he had been charged but not

1. The presence of bias implied as a matter of law may be determined from examination of the totality of the circumstances. This would incorporate, but not necessarily be limited to, (1) the nature of the juror's misrepresentation, including whether a reasonable juror in the same or similar circumstance could or might reasonably have responded as did the juror in question, (2) the conduct of the juror, including whether the misrepresentation was intentional or inadvertent, and (3) whether the defendant would have been entitled to a challenge for cause had the misrepresentation not been made.

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yet tried in unrelated and separate matters for the first-degree murder of a Kenneth Bell and for firing into occupied property. The murder indictment stated Smith had “unlawfully, willfully, and feloniously . . . , with malice [a]forethought, kill[ed] and murder[ed] Kenneth [] Bell.” When questioned by defendant, “And it[is] true, is it not, that you were charged with killing Mr. Bell, shooting him to death, a single gunshot wound to his head with a high-caliber weapon,” Smith invoked his Fifth Amendment right to silence. Defendant objected and moved for a mistrial. The trial court denied the motion and granted Smith’s request to invoke his Fifth Amendment right. Defendant then asked Smith if he had reached any agreement with the State with respect to the charges pending against him. Smith replied the State had agreed not to try him capitally and to stipulate to a statutory mitigating factor in the event he was convicted of any offense other than first-degree murder.

The privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments “applies to both civil and criminal proceedings ‘wherever the answer might tend to subject to criminal responsibility him who gives it,’ and ‘should be liberally construed.’” *In re Jones*, 116 N.C. App. 695, 698-99, 449 S.E.2d 221, 223 (1994) (quoting *McCarthy v. Arndstein*, 266 U.S. 34, 40, 69 L. Ed. 158, 161 (1924) and *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 189 (1964)). “The privilege against self-incrimination extends ‘not only to answers that would in themselves support’ a criminal conviction, but also ‘embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant’ for a crime.” *Id.* at 699, 449 S.E.2d at 223 (quoting *Hoffman v. United States*, 341 U.S. 479, 486, 95 L. Ed. 1118, 1124 (1951)). This protection further covers “evidence which an individual reasonably believes could be used against him in a criminal prosecution.” *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502 (1979). The privilege is available to everyone, defendants and witnesses alike. *See Jones*, 116 N.C. App. at 699, 449 S.E.2d at 223.

In this case, Smith refused to answer defendant’s question whether he had been “charged with killing Mr. Bell, shooting him to death, a single gunshot wound to his head with a high-caliber weapon.” As posed, this question does not ask about the *charge* against Smith, a question Smith would have been required to and did in fact answer earlier, but seeks to elicit specific and possibly incriminating facts about a murder for which Smith was yet to be tried and which was completely unrelated to this case. As such, Smith was en-

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titled to invoke his Fifth Amendment privilege. *See id.*; *State v. Eason*, 328 N.C. 409, 419, 402 S.E.2d 809, 813 (1991) (witness had a valid claim of privilege and the trial court did not err in denying the defendant's motion to compel her to testify where the witness was being asked to testify about the very incident which led to her conviction and for which she still faced trial de novo). Defendant nevertheless contends he was prejudiced because the invocation of the privilege prevented him from exploring the issue of bias and motive to fabricate based on Smith's agreement with the State. This argument is without merit as the trial transcript clearly indicates that defendant cross-examined and Smith testified extensively regarding the agreement he had reached with the State. Accordingly, this assignment of error is overruled.

III

[3] Defendant also contends the State improperly withheld exculpatory evidence. Defendant refers to certain handwritten notes in the record he contends Detective Donald Britt made following an interview with the girlfriend of the deceased, which indicate the deceased had been threatened by two other individuals shortly before his death and which defendant claims he never received before or during the trial. Having reviewed the notes at issue, we observe that they do not indicate who wrote them and when or even which particular witness made the statement regarding the threats. Furthermore, there is nothing in the record that would show at which time (before, during, or after trial) the notes were turned over to defendant. Without such information, we have no basis to review this assignment of error. Accordingly, it is also overruled.

We have thoroughly reviewed defendant's remaining contentions in his brief to this Court and find them to be without merit.

No error.

Judges WYNN and STEELMAN concur.

IN RE IVEY

[156 N.C. App. 398 (2003)]

IN THE MATTER OF: ALEXANDRIA IVEY, AMBER IVEY, JOSHUA IVEY

No. COA02-439

(Filed 4 March 2003)

1. Child Abuse and Neglect— nonsecure custody—no petition alleging neglect or abuse

The trial court erred by ordering DSS to assume nonsecure custody of an infant where three older siblings were being placed in a guardianship but DSS had not filed a petition alleging that the infant was an abused or neglected child. The narrow exception of N.C.G.S. § 7B-500(a) did not apply because there was no evidence or findings that the child would be injured or could not be taken into custody if DSS were required to first file a petition and obtain an order.

2. Child Abuse and Neglect— DSS and guardian ad litem reports—not admitted during hearing—considered by court

The trial court did not err when making a permanency planning determination by considering DSS and guardian ad litem reports which complied with local rules for submitting reports even though those reports were not admitted into evidence during the hearing. Respondents were given prior notice of the reports and the opportunity to present evidence against them.

3. Appeal and Error— hearsay—no objection—appellate review waived

Respondents waived their right to assign error to the admission of hearsay at a permanency placement hearing by failing to object either to the initial question or to further questions.

4. Child Abuse and Neglect— homelessness and joblessness—not abuse or neglect per se

Neither homelessness nor joblessness will per se support a finding of child abuse or neglect.

Appeal by respondents from an order filed 13 September 2001 by Judge Julia Gullett in Iredell County District Court. Heard in the Court of Appeals 22 January 2003.

Thomas R. Young, for the Petitioner-Appellee, Iredell County Department of Social Services.

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[156 N.C. App. 398 (2003)]

*Womble Carlyle Sandridge & Rice, PLLC, by Garth A. Gersten,
for Appellee Guardian Ad Litem.*

Robert W. Ewing, for Respondent-Appellant father.

David Childers, for Respondent-Appellant mother.

TYSON, Judge.

Leah Wilkins (“respondent-mother”) and Jerry Wilkins (“respondent-father”) jointly appeal from a permanency planning review order. The trial court ordered that their three children, Alexandria, Amber, and Joshua, be placed in guardianship with relatives. The trial court relieved the Iredell County Department of Social Services (DSS) of further efforts toward reunification. The trial court also ordered DSS to assume non-secure custody of Joriah, the infant child residing with respondents, who was not a subject of the juvenile petition.

I. Background

Leah Wilkins is the mother of Alexandria, Amber, Joshua, and Joriah. Jerry Wilkins is the step-father of Alexandria and the father of Amber, Joshua, and Joriah. DSS became involved with the family in September of 1998 due to allegations of lack of care of the children and concerns that the home environment was injurious to the welfare of the children. There were claims of instability of housing, domestic and substance abuse. Since DSS became involved, both respondents have been in and out of jail, lived in multiple homes or have been homeless, and have been unemployed or engaged in short-term temporary work.

On 18 February 2000, DSS filed juvenile petitions to adjudicate Alexandria, Amber and Joshua as neglected. The hearing was held on 12 May 2000. On 9 June 2000, the trial court adjudicated the three children neglected. DSS assumed legal custody for the children while physical custody remained with respondents. On 3 August 2000, DSS received non-secure physical custody and the children were placed with the children’s maternal uncle and aunt, Isaac and Candance Ivey. Amber and Joshua have remained in the Ivey’s physical custody since that time. Alexandria was placed in foster care and ultimately in the physical custody of Larry and Rebecca Harrison, another maternal uncle and aunt, where she has remained.

After DSS received non-secure physical custody of the children, it established a concurrent plan of reunification with the parents and

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placement with relatives. The trial court held review hearings and continued to allow DSS to retain physical custody of the three children. During this time, Jorjah was born and remained in the custody of the respondents.

In July of 2001, respondent mother signed a voluntary support agreement with the IV-D agency. On 12 July 2001, a permanency planning review was held. DSS and the guardian ad litem submitted summaries and reports dated 7 June 2001. At the hearing, respondents stated that they were now employed and were in the process of buying a “nice” home “in a nice neighborhood.” The hearing was continued from July until 31 August 2001 “so as to allow substantiation of the Respondent mother’s statements and to allow the Respondent Parents to supplement said statements with appropriate financial affidavits.”

On 29 August 2001 DSS filed a “Juvenile Court Summary” and the guardian ad litem filed a “Guardian Ad Litem Court Report.” The permanency planning hearing was held on 31 August 2001. Along with the testimony presented at the hearing, the trial court reviewed the DSS summary and guardian ad litem court report.

The trial court found:

f. The Court, in reviewing the file and in hearing the testimony provided in court would find a protracted history of instability and chaos. The Respondent Parents have never admitted that they played any role in their children’s placement in custody, nor due [sic] they take any responsibility for their actions presently which has seen them in a consistent cycle of incarceration, unemployment, and homelessness. The Court would further find that such an environment has been in place for too long for reunification to be a reasonable goal and that no child, including the infant who presently resides with the Mrs. Wilkins, should be forced to endure such circumstances.

...

h. The Court would further find that non-secure custody should be taken of the infant presently living in the Wilkins home, to be followed as reasonably soon as possible with a Juvenile Petition.

The trial court concluded:

5. Reunification in the home would be contrary to the safety, health and welfare of the child and would be futile under the

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circumstances. Guardianship is in the best interest of the minor children.

The trial court ordered that permanent guardianship of Alexandria be placed with the Harrisons and guardianship of Amber and Joshua be placed with the Iveys. It further ordered “[t]he Department of Social Services shall assume non-secure custody of the infant child presently residing with the Respondent Parents.” Respondents appeal.

II. Issues

Respondents contend the trial court erred (1) in ordering DSS to assume nonsecure custody of the infant child; (2) in relying on a report from DSS and a report from the guardian ad litem in making its permanency planning determination; and (3) in admitting hearsay evidence.

III. Nonsecure custody of the infant child

[1] Respondents assert that the trial court erred in ordering DSS to assume nonsecure custody of an infant child where no petition had been filed and the trial court did not have jurisdiction over the child. We agree.

N.C. Gen. Stat. § 7B-502 (2001) gives the district court authority to issue an order placing a child in nonsecure custody “[i]n the case of any juvenile alleged to be within the jurisdiction of the court.” N.C. Gen. Stat. § 7B-503(a) sets forth the criteria for nonsecure custody and states: “An order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true” At the time of the hearing, DSS had not filed any petition alleging that Jorjah was an abused or neglected child. Without such petition, the trial court did not have the jurisdiction to order DSS to assume nonsecure custody of him.

DSS contends that it had authority to take the child into custody under N.C. Gen. Stat. § 7B-500 which states:

Temporary custody means the taking of physical custody and providing personal care and supervision until a court order for nonsecure custody can be obtained. A juvenile may be taken into temporary custody without a court order by a law enforcement officer or a department of social services worker *if there are reasonable grounds to believe that the juvenile is abused, neglected, or dependent and that the juvenile would be injured or could*

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not be taken into custody if it were first necessary to obtain a court order.

N.C. Gen. Stat. § 7B-500(a) (emphasis supplied). A juvenile may not be taken into custody without a valid court order just because the juvenile is “believed” to be abused, neglected, or dependent. There must also be “reasonable grounds to believe” that “the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order.” N.C. Gen. Stat. § 7B-500(a). This statute is a narrow exception to the requirement that a petition must be filed prior to the issuance of a court order for non-secure custody. DSS presented no evidence and there are no findings of fact in the order that Joriah “would be injured or could not be taken into custody” if DSS were required to first file a petition and obtain an order.

We hold that the trial court erred in ordering DSS to assume non-secure custody of Joriah and vacate that part of the order. Our vacating the order to assume nonsecure custody of the infant does not affect any petition, hearing, or order for nonsecure custody filed, heard or rendered subsequent to the order appealed.

IV. Reports of DSS and Guardian Ad Litem

[2] Respondents contend that the trial court erred in basing its decision on facts in a DSS court summary and a guardian ad litem report which were not admitted into evidence during the planning review hearing. Respondents admit that N.C. Gen. Stat. § 7B-901 allows the trial court to consider written reports concerning the needs of the children. They contend that the trial court erred in considering the reports when they did not have the opportunity to cross-examine the reports because of lack of notice and lack of admission. We disagree.

N.C. Gen. Stat. § 7B-907(b) states, “At any permanency planning review, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid it in the court’s review.” N.C. Gen. Stat. § 7B-901 states, “The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile.” “The statutes lead to but one conclusion: In juvenile proceedings, trial courts may properly consider all written reports and materials submitted in connection with said proceedings.” *In re Shue*, 63 N.C. App.

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76, 79, 303 S.E.2d 636, 638 (1983), *modified and aff'd*, 311 N.C. 586, 319 S.E.2d 567 (1984). Rule 20 of the Local Rules of Juvenile Court for Iredell County requires DSS and the guardian ad litem to submit reports to counsel for all parties "at least 2 working days prior to each disposition and review hearing." Rule 20(b) and (c) of the Local Rules of Juvenile Court for Iredell County (1999).

The original permanency planning hearing took place on 12 July 2001. Prior to that hearing, both DSS and the guardian ad litem submitted written reports which respondents admittedly received. Respondents presented information regarding their employment and housing to rebut the allegation of instability and homelessness. The trial court continued the hearing until 31 August 2001. On 29 August 2001, two days prior to the scheduled hearing, both DSS and the Guardian ad Litem submitted another set of reports to the trial court. Respondents do not contend that DSS or the guardian ad litem failed to follow the Local Rules of Juvenile Court or failed to provide the documents to their counsel at this time.

Shauna Heavner, a Foster Care Worker with DSS who submitted the report for DSS, testified at trial without questioning by counsel for either respondent. Only respondent-mother elected to present evidence at the hearing although both respondents were given the opportunity. Neither respondent requested a continuance due to lack of notice regarding the documents.

We hold the trial court did not err in considering the DSS and guardian ad litem reports which complied with the local rules for submitting reports. Respondents were given prior notice of the reports and the opportunity to present evidence against them. This assignment of error is overruled.

V. Hearsay Evidence

[3] Respondents contend the trial court erred in admitting the hearsay testimony of Ms. Heavner regarding respondents' living situation, characterization of the home they were considering purchasing, credit worthiness of respondents, respondent-mother's employment information and respondent-father's criminal record. At the hearing, the only hearsay objection came to Ms. Heavner's statement "From what we gathered from Mallard Creek, Mr. and Mrs. Wilkins were able to go to Mallard Creek to pick up possessions and would unlock windows." Respondents did not object to any other testimony nor did they place a continuing objection in the record regard-

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ing hearsay answers. Further questions were asked regarding the living conditions at Mallard Creek to which respondents did not object. By failing to object to further questions, respondents have waived their right to assign and appeal error as to those questions. N.C. R. App. P. 10(b)(1) (2002).

VI. Conclusion

[4] While the trial court made references to respondents' intermittent homelessness and joblessness, neither homelessness nor joblessness will *per se* support a finding of abuse or neglect. *In re Evans*, 81 N.C. App. 449, 452-53, 344 S.E.2d 327-28 (1986). We hold that the trial court erred in ordering DSS to assume nonsecure custody of the infant child and vacate that portion of the order. We also hold that there was no error in admitting the reports from DSS and the guardian ad litem and the testimony of Ms. Heavner.

Affirmed in part, vacated in part.

Judges TIMMONS-GOODSON and LEVINSON concur.

PATRICIA M. HODGES, PLAINTIFF V. WILSON FRANKLIN HODGES, JR., DEFENDANT

No. COA02-61

(Filed 4 March 2003)

1. Contempt— violation of domestic violence protective order—criminal

An action holding defendant in contempt for violating a domestic violence protective order was criminal rather than civil because defendant was being punished for a violation of a court order.

2. Trials— continuance denied—incarcerated in Tennessee

The trial court erred by dismissing a motion to continue an appeal to superior court from a district court contempt finding under a domestic violence protective order where defendant was incarcerated in Tennessee and did not appear. While some willful act may have been committed which resulted in defendant's incarceration, it is unlikely that he was abusing the system, and there were no findings that defense counsel had advance

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notice. The error was prejudicial because the appeal was dismissed with prejudice.

3. Contempt— appeal to superior court—dismissed with prejudice—incarceration out of state

The superior court erred by dismissing with prejudice defendant's appeal from a district court finding of contempt for violation of a domestic violence protective order where defendant was incarcerated in Tennessee and did not appear for trial.

Appeal by defendant from an order entered 13 September 2001 by Judge Zoro J. Guice, Jr. in Watauga County Superior Court denying defendant's motion for continuance and dismissing his appeal with prejudice from the district court's finding of criminal contempt. Heard in the Court of Appeals 21 January 2003.

Michael Vetro for plaintiff-appellee.

Steven M. Carlson for defendant-appellant.

ELMORE, Judge.

A domestic violence protective order (*Memorandum of Judgment* signed on 13 December 2000) restricted defendant's contact with his wife, the plaintiff, and required disclosure of certain information about the marital assets. After the defendant contacted the plaintiff and allegedly withdrew assets from the marital account, on 26 February 2001 the plaintiff filed a motion for the defendant to appear and show cause as to why he should not be held in contempt for failure to comply with the judgment. The motion to show cause also moved the court to sentence the defendant to thirty days in the county jail pursuant to sections 5A-11(3) and 5A-12 of the North Carolina General Statutes. Plaintiff filed another motion to show cause on 20 April 2001, and a magistrate signed the order requiring the defendant to appear on 1 May 2001. On 2 May 2001, the defendant was held in criminal contempt for willful failure to comply with the domestic violence protective order, and was sentenced to thirty days in jail and a \$500.00 fine. He was present at the trial.

Defendant appealed the judgment and requested a trial de novo, to which he was entitled by section 5A-17 of our General Statutes. The appeal was scheduled to be heard in superior court in Boone on 4 September 2001. On 4 September 2001, defendant's counsel moved to continue the case, stating in his motion that the defendant was

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unable to appear as he was at that time incarcerated in Tennessee until on or about 7 September 2001. After holding the matter open for the afternoon session, the trial court found that the defendant was “in custody in Tennessee of his own volition and made himself unavailable and failed to pursue the appeal of this court” and therefore denied defendant’s motion to continue and dismissed his appeal with prejudice. The trial court ordered that the previous order remain in full force and the defendant surrender himself to the Watauga County Sheriff immediately following his incarceration in Tennessee to serve his thirty day sentence minus one day of credit for being in custody overnight on 2 May 2001.

Defendant now appeals on the grounds that his constitutional rights were violated when the motion to continue was denied and that his constitutional and statutory rights were violated when his appeal was dismissed.

I.

[1] For purposes of this appeal, we must first determine whether the sentence was for civil or criminal contempt.

Our Supreme Court has observed that a major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised:

[C]riminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way . . . Civil contempt, on the other hand, is employed to coerce disobedient defendants into complying with orders of [the] court. . . .

Brower v. Brower, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984).

In the case at bar, the defendant was being punished for a violation of the order of the court, namely for threatening the plaintiff and moving assets. It follows that the contempt is criminal, as the district court correctly held.

II.

[2] The second issue before this Court is whether the defendant’s constitutional rights were violated by dismissal of the motion to continue.

A motion to continue is ordinarily addressed to the sound discretion of the trial court, and will not be disturbed absent a show-

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ing of abuse of discretion. *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002), *cert. denied*, — U.S.—, 123 S. Ct. 894 (2003). The standard is slightly different when there are constitutional rights implicated:

When a motion to continue raises a constitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that the denial was erroneous and also that [defendant] was prejudiced as a result of the error.

State v. Branch, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). This case raises a constitutional issue, namely whether the denial of the motion to continue effectively deprived the defendant of his right to confront witnesses against him, as guaranteed by section 23 of Article I of the North Carolina Constitution.

The North Carolina General Statutes outline the criteria which guide the trial court's discretion in a pre-trial motion:

(g) In superior or district court, the judge shall consider at least the following factors in determining whether to grant a continuance:

- (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice. . . .

N.C. Gen. Stat. § 15A-952(g) (2001).

Accordingly, the motion to continue should be granted if the denial of the motion would result in a miscarriage of justice. In this case, the defendant was not able to appear in court on the hearing date because he was incarcerated in Tennessee. On these facts, we disagree with the finding that defendant failed to appear willfully. Although some willful act may have been committed which resulted in the defendant's incarceration, once in custody the defendant had no option to appear and no freedom to request appearance in another state's court. A superior court judge may request the extradition of such a defendant, but the defendant himself may not. *See e.g.* N.C. Gen. Stat. § 15A-723 (2001). It seems unlikely that the defendant was abusing the system by intentionally earning a jail sentence in another state for the sole purpose of avoiding prosecution of his own appeal here. There were no findings in the superior court that defendant's

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counsel had advance notice or that either he or the defendant were intentionally manipulating the system to harass the court or the plaintiff. Neither were there findings that defendant's counsel had adequate notice and could have taken steps to request his extradition in advance of the hearing date. Therefore, on these facts, we hold that the ruling is in error.

Error on a pre-trial ruling must be prejudicial to warrant reversal. Because the defendant in this case could not physically be in trial on the hearing date, counsel would have had to proceed without him. The actual result, however, was that the appeal was dismissed with prejudice, apparently because of the defendant's failure to appear. So the actual result in this case was that the defendant's appeal was prejudiced by his failure to appear as a result of the denial of the continuance.

We agree with the trial court's advice to counsel that the court does not operate for the convenience of the defendant. The court does, however, operate for the purpose of rendering justice in all cases, and in the interest of avoiding a miscarriage of justice, the denial of the motion to continue here constitutes prejudicial error.

We therefore reverse the lower court's ruling on the motion to continue.

III.

[3] The third issue in this appeal is whether defendant's constitutional and statutory rights were violated by dismissal of the appeal with prejudice.

Defendant was convicted of criminal contempt in the district court, and pursuant to section 5A-17 of our General Statutes, had the right to appeal and be granted a hearing de novo in the superior court. Defendant did appeal, and was granted a hearing but did not appear due to his incarceration in Tennessee.

The standard of review for a dismissal with prejudice in a non-jury trial is:

[W]hether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary.

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Pineda-Lopez v. N.C. Growers Ass'n, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002) (citations omitted).

We hold that the conclusion of law to dismiss the case with prejudice is not supported by the findings of fact that the defendant failed to appear, and that, for the reasons stated above, the finding that the defendant willfully failed to appear is not supported by the competent evidence that he was in fact incarcerated. These findings and conclusions effectively deprived defendant of his statutory right to appeal the contempt finding for a trial de novo in superior court.

Because the statutory issue is dispositive, we will not address the constitutional rights of the defendant concerning this claim. The appeal is reversed and remanded to the superior court for a new trial pursuant to section 5A-17 of the General Statutes.

Reversed and Remanded.

Chief Judge EAGLES and Judge McCULLOUGH concur.

CINDY FOLEY, PLAINTIFF V. PAUL FOLEY, DEFENDANT

No. COA02-347

(Filed 4 March 2003)

1. Jurisdiction— subject matter—consent, waiver, estoppel— not sufficient

The signing of a child custody consent order did not waive any challenge to subject matter jurisdiction; the UCCJEA is a jurisdictional statute and its requirements must be met for a court to have power to adjudicate child custody disputes. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel.

2. Child Support, Custody, and Visitation— custody—subject matter jurisdiction

A child custody order was vacated and remanded for a determination of whether the court has subject matter jurisdiction under any of the four bases of the UCCJEA in N.C.G.S. § 50A-201 where there was no direct evidence of the minor's

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place of birth, of how long the minor resided in North Carolina and West Virginia, or of whether the minor resided in North Carolina for the six months before this action; there were no court records from West Virginia; and the consent order and temporary custody orders relied on by plaintiff contained no home state determination.

Appeal by defendant from order filed 18 December 2001 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 28 January 2003.

Brewer & Brewer, by Gregory J. Brewer, for plaintiff appellee.

Dennis G. Martin, P.C., by Dennis G. Martin, for defendant appellant.

BRYANT, Judge.

Paul Arnold Foley (defendant) appeals from an order filed 18 December 2001 concluding the district court had subject matter jurisdiction over the child custody dispute at issue in this case.

On 27 August 2001, Cindy Foley (plaintiff) filed a complaint seeking temporary and permanent custody of the parties' minor child, Taylor Whitelaw Foley (the minor). The complaint alleged defendant had fled with the minor to West Virginia. On the same day, the trial court entered an *ex parte* order granting plaintiff temporary custody and finding the trial court had jurisdiction because North Carolina was the home state of the minor and that no other state would have jurisdiction.

On 6 September 2001, the parties filed a consent order (the Consent Order) granting primary legal and physical custody of the minor to plaintiff and allowing defendant visitation under specified terms. In the Consent Order, the parties consented to North Carolina having jurisdiction over the minor child and subject matter jurisdiction over the case. On 8 October 2001, plaintiff filed a motion in the cause alleging defendant had failed to return the child from West Virginia following visitation and seeking temporary custody as well as having defendant held in contempt of court. On the same day, the trial court filed an *ex parte* order granting plaintiff temporary custody and calendared the matter for a subsequent hearing.

A hearing was held on 16 October 2001, at which plaintiff was represented by counsel and defendant appeared *pro se*. Plaintiff tes-

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tified that following the execution of the Consent Order, defendant was permitted to take the minor to West Virginia for visitation but had refused to return the minor to plaintiff. Plaintiff took the 8 October 2001 temporary custody order to West Virginia, where a West Virginia judge ordered defendant to return the minor to plaintiff. No evidence was presented as to where the plaintiff resided nor where the minor was born or resided.

At the conclusion of the hearing, the trial court, in an order filed 26 October 2001, concluded it had subject matter jurisdiction and that defendant had willfully violated the Consent Order. The trial court then held defendant in civil contempt. The matter was set for another hearing on 4 December 2001 for the trial court to review defendant's visitation privileges. On 13 November 2001, defendant, through an attorney, filed motions seeking to have the Consent Order stricken and the action dismissed for lack of jurisdiction. Following a 4 December 2001 hearing, the trial court, after arguments of counsel and a review of the record, entered an order concluding the trial court had jurisdiction over the parties, minor child, and subject matter of the case and denied defendant's motions. The trial court based its ruling solely on its determination that defendant had waived any objection to subject matter jurisdiction by consenting to the jurisdiction of the trial court in the Consent Order.

The issues are whether: (I) under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA) a state may obtain subject matter jurisdiction through the consent of the parties; and (II) this case should be dismissed for lack of subject matter jurisdiction.

I

[1] Defendant argues, and plaintiff concedes, the signing of the Consent Order did not waive any challenge to subject matter jurisdiction. The UCCJEA is a jurisdictional statute, and the jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child custody disputes. *In re Brode*, 151 N.C. App. 690, 692, 566 S.E.2d 858, 860 (2002); see N.C.G.S. §§ 50A-101 to -317 (2001). The PKPA is a federal statute also governing jurisdiction over child custody actions and is designed to bring uniformity to the application of the UCCJEA among the states. *Brode*, 151 N.C. App. at 694, 566 S.E.2d at 861; see 28 U.S.C.A. § 1738A (2002). Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. *In re Davis*,

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114 N.C. App. 253, 256, 441 S.E.2d 696, 698 (1994).¹ Accordingly, the trial court erred in ruling the signing of the Consent Order by defendant waived any challenge to the subject matter jurisdiction of the trial court.

II

[2] Because the trial court's sole basis for exercising subject matter jurisdiction is erroneous, we may review the record to determine if subject matter jurisdiction exists in this case. *See Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000) ("a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking").

Under the UCCJEA, there are four bases for exercising subject matter jurisdiction over an initial child custody determination:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

1. The official comment 2 to N.C. Gen. Stat. § 50A-201 governing initial child custody jurisdiction recognizes: "It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction under this Act is ineffective." N.C.G.S. § 50A-201, official commentary (2001).

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(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C.G.S. § 50A-201 (2001).

In this case, defendant asserts that West Virginia, not North Carolina, was the home state of the minor “at the time of the signing of the [C]onsent [O]rder.”² Plaintiff, on the other hand, contends that “there is nothing in the record to suggest that North Carolina is not the home state of the [minor].” Although acknowledging that a home state determination is the primary basis for determining subject matter jurisdiction, plaintiff urges this Court to base a finding of subject matter jurisdiction on the trial court’s 27 August 2001 grant of temporary custody, the Consent Order, and the second temporary order of 8 October 2001.

We are troubled, however, by what is not affirmatively in the record. There is no direct evidence of the minor’s place of birth, the length of time the minor resided in West Virginia or North Carolina, or whether the minor resided in North Carolina during the six months prior to the commencement of this proceeding.³ Further, there is no evidence the West Virginia court was a court having subject matter jurisdiction but declining to exercise it on the grounds North Carolina was the more appropriate forum. The record contains no court records from West Virginia, and plaintiff’s testimony reveals only that the West Virginia court ordered enforcement of the North Carolina temporary custody order and was not requested to enter a custody order or to modify the existing order. Furthermore, the Consent Order and temporary custody orders relied on by plaintiff contain no home state determination on which to base the finding the trial court had subject matter jurisdiction and simply exercise jurisdiction in a conclusory manner without making specific findings of fact.

Accordingly, because the record is devoid of evidence from which it may be ascertained whether or not the trial court had subject matter jurisdiction, we must vacate the order filed 18 December 2001 and remand this case to the trial court to determine whether it had subject matter jurisdiction under any one of the four bases of the UCCJEA outlined in N.C. Gen. Stat. § 50A-201, and to make the appro-

2. We note under Section 50A-201(1), the appropriate date for home state determination is the date of the commencement of the proceeding, not the date the order is entered. *See* N.C.G.S. § 50A-201(1) (2001).

3. There is also no evidence of any connection with any other state.

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priate findings of fact to support the conclusions of law. *See Brewington v. Serrato*, 77 N.C. App. 726, 729, 336 S.E.2d 444, 447 (1985) (a trial court assuming jurisdiction over a child custody matter must make specific findings of fact to support its action).

Vacated and remanded.

Judges WYNN and GEER concur.

IN THE MATTER OF: M.G., JUVENILE

No. COA02-487

(Filed 4 March 2003)

Juveniles; Schools— disorderly conduct—interference with operation of school—sufficiency of evidence

The trial court did not err by denying respondent juvenile's motion to dismiss the charge of disorderly conduct under N.C.G.S. § 14-288.4(a)(6) where the evidence showed that respondent yelled an expletive to a group of students in the hallway approximately thirty yards away at school and a teacher left his cafeteria duties to escort respondent to the detention center to relate what happened to the proper personnel, because the evidence was sufficient to establish that the juvenile's conduct substantially interfered with the operation of that school.

Appeal by juvenile from order entered 11 December 2001 by Judge John J. Carroll, III in New Hanover County District Court. Heard in the Court of Appeals 8 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Richard H. Bradford, for the State.

Benjamin M. Turnage, for juvenile-appellant.

HUDSON, Judge.

Respondent, M.G., who was fourteen years old at the time of the hearing, was adjudicated delinquent on 11 December 2001 in the district court in New Hanover County upon a violation of N.C. Gen. Stat.

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§ 14-288.4(a)(6), which prohibits, *inter alia*, disorderly conduct on or around school grounds. We affirm.

Evidence at the hearing tended to show that on 11 October 2001, at approximately 11:00 a.m. at the Williston Middle School, Scott Slocum, a physical education teacher, heard respondent yell “shut the f—k up” to a group of students in the hallway, approximately thirty yards away. Mr. Slocum was assigned to lunch duty in the cafeteria and was on his way to the cafeteria at the time this incident occurred.

The hallway in question is long and narrow and contiguous with a lobby area. At the time of this incident, classes were in session in the four classrooms on the hallway. Mr. Slocum noted that the hallway should have been empty at this time.

Mr. Slocum left his position in the cafeteria and escorted Respondent to the school detention center. New Hanover Sheriff's Deputy Greg Johnson, the school's resource officer, and Clint Hardy, the dean of students, were present in the detention center. Mr. Slocum described the incident to Deputy Johnson and Mr. Hardy, then returned to the cafeteria and resumed his assigned duties.

The matter was heard on 5 December 2000 by Judge Carroll in the district court in New Hanover County. At the close of the evidence, Respondent moved to dismiss the disorderly conduct charge, which motion was denied. The court ordered that Respondent receive a Level 3 Disposition, committing him to the Department of Juvenile Justice and Delinquency Prevention for training school placement for a minimum period of six months, and on an indefinite commitment.

On appeal, Respondent argues that the trial court erred by failing to dismiss the disorderly conduct charge based on the insufficiency of the evidence. For the following reasons, we affirm the district court.

“[I]n order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged.” *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). “The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence.” *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002) (citing *State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 807 (1980)).

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

(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

(6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4(a)(6) (2001). Our Supreme Court has held that the conduct must cause “a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled.” *State v. Wiggins*, 272 N.C. 147, 154, 158 S.E.2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285 (1968); *see also In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992).

Previous decisions of this Court and the Supreme Court shed light on the level of interference necessary to sustain a conviction of disorderly conduct. In *Wiggins*, the students were picketing the high school to protest alleged racial discrimination in the local jury pool. Classes were interrupted because students were leaving their seats and classrooms to see the demonstration outside. The Supreme Court sustained the convictions because the picketing created disorder in the entire school. *Wiggins*, 272 N.C. at 150-52, 158 S.E.2d at 39-41.

In *State v. Midgett*, the defendants took over the school office by force, telling the school's secretary that “they were going to interrupt [the school] that day.” *State v. Midgett*, 8 N.C. App. 230, 231, 174 S.E.2d 124, 126 (1970). Defendants barricaded themselves in the office, overturned cabinets, and operated the school's bell system. *Id.* This disruption was so great that it necessitated early dismissal. *Id.* at 233, 174 S.E.2d at 127. This court held that such evidence “amply” satisfied the statute and upheld the convictions. *Id.* at 234, 174 S.E.2d at 128.

To the contrary, the Supreme Court reversed a disorderly conduct conviction where a teacher saw one defendant swing something at another student. When first asked, that defendant gave the teacher a carpenter's nail that he had in his hand. Later, that same defendant and another student banged the classroom's radiator while class was in session. The two students did so a couple of times, distracting a class of fifteen students each time. The Supreme Court

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held that the evidence did not show substantial interference within the meaning of *Wiggins. In re Eller*, 331 N.C. 714, 718, 417 S.E.2d 479, 482 (1992).

Most recently, this Court affirmed the disorderly conduct conviction of a juvenile where the evidence showed that while teaching mapping skills to her class, the teacher heard defendant state in a loud, angry voice, “[f]—k you.” *In re Pineault*, 152 N.C. App. 196, 197, 566 S.E.2d 854, 856 (2002), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 728 (2002). This required the teacher to stop teaching the class and escort the defendant to the principal’s office. This Court noted that “[w]hile the record does not indicate how long [the teacher] was away from the classroom, it does establish that she escorted respondent to the principal’s office and explained to office staff what had happened, thereby indicating she was away from the classroom for more than several minutes.” *Id.* at 199, 566 S.E.2d at 857. We went on to hold that “given the severity and nature of respondent’s language, coupled with the fact that [the teacher] was required to stop teaching her class for at least several minutes, that respondent’s actions substantially interfered with the operation of [the teacher’s] classroom in the manner contemplated in *Wiggins.*” *Id.*

Here, Mr. Slocum was on his way to his assigned cafeteria duty when he heard Respondent yell “shut the f—k up” to a group of students. Mr. Slocum then escorted Respondent to the detention center, where he explained to Deputy Johnson and Mr. Hardy what had transpired. After that, Mr. Slocum returned to the cafeteria to carry out his assigned duties.

This evidence is very similar to that presented in *Pineault*, in both the nature and the duration of the disruption. Although the record before us does not reflect how long Mr. Slocum was kept from his cafeteria duties, it does establish that he escorted Respondent to the detention center and related what had happened to the proper personnel. As in *Pineault*, this evidence indicates that Mr. Slocum was away from his assigned duties for at least several minutes. Thus, we conclude that the evidence, viewed in the light most favorable to the State, was sufficient to establish that Respondent’s conduct substantially interfered with the operation of the school.

Affirmed.

Judges MARTIN and STEELMAN concur.

HOOVER v. STATE FARM MUT. INS. CO.

[156 N.C. App. 418 (2003)]

LLOYD L. HOOVER, JR. AND JOAN HOOVER, PLAINTIFFS v. STATE FARM MUTUAL INSURANCE COMPANY, DEFENDANT/THIRD PARTY PLAINTIFF v. SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, THIRD PARTY DEFENDANT

No. COA02-435

(Filed 4 March 2003)

**Insurance— motor vehicles—uninsured motorist coverage—
anti-stacking provision**

The provision of N.C.G.S. § 20-279.21(b)(3) that prohibits an “owner” from stacking uninsured motorist (UM) coverages prohibits an insured who was a joint owner of an automobile covered by each owner’s UM policy from stacking UM coverage with that of his co-owner.

Appeal by plaintiffs from judgment entered 7 January 2002 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2003.

Chandler Workman & Hart, by W. James Chandler and W. Michael Workman, for plaintiffs.

Broughton, Wilkins, Sugg, Hall & Thompson, P.L.L.C., by Jonathan E. Hall for defendant/third party plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Robert H. Griffin, for third party defendant.

LEVINSON, Judge.

In 1993, plaintiff Lloyd Hoover’s employer (“Employer”) leased a vehicle with financing through First Union Bank. In 1998, that lease expired, and on 23 September 1998, First Union Bank executed a bill of sale and assignment of title for the vehicle jointly to Employer and plaintiff Lloyd Hoover.

On 3 February 1999, while driving the jointly owned vehicle, plaintiff Lloyd Hoover was involved in a motor vehicle accident caused by the negligence of an uninsured motorist. As a result he sustained personal injury damages in excess of \$1,250,000.

Prior to the date of the accident, Employer obtained an insurance policy from defendant Selective Insurance Company (“Selective”) that provided \$1,000,000 in uninsured motorist (“UM”) coverage, and

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plaintiffs purchased an insurance policy from defendant State Farm that provided \$250,000 in UM coverage.

Plaintiffs then filed this action requesting a declaratory judgment allowing them to aggregate or “stack” their claims for coverage against both insurers. Upon motion by plaintiffs and following a hearing, the trial court entered summary judgment for defendants concluding, “N.C. Gen. Stat. §20-279.21(b)(3) prohibits interpolicy stacking of uninsured motorist insurance coverage.”

Total compensation for UM coverage was capped at \$1,000,000 by the trial court because both policies provided that in the event more than one policy applied to a claim, a claimant could only recover the highest amount allowed by any one of the applicable policies. Here, the highest amount recoverable under either of the applicable policies was \$1,000,000. Additionally, the trial court found that both UM policies were primary and provided for a *pro rata* sharing of liability for UM benefits. Thus, Selective was liable to plaintiffs for \$800,000 and State Farm was liable for \$200,000.

Plaintiffs now appeal contending the trial court erred in not allowing them to stack the Selective and State Farm UM coverage. They allege: (1) the UM anti-stacking provision is inapplicable to the present circumstances, (2) the applicable UM statute nullifies the insurance provisions that capped his recovery at \$1,000,000, and (3) both applicable insurance provisions are void because they are ambiguous. *See* N.C.G.S. § 20-279.21(b)(3) (2001). Defendants argue G.S. § 20-279.21(b)(3) specifically bars plaintiffs from stacking the UM benefits, and as we find this dispositive, we address only this issue.

N.C.G.S. § 20-279 governs UM coverage and was amended in 1991 to provide:

Where coverage is provided on more than one vehicle insured on the same policy or *where the owner or the named insured has more than one policy with coverage under this subdivision*, there shall not be permitted any combination of coverage within a policy or where more than one policy may apply to determine the total amount of coverage available.

N.C.G.S. § 20-279.21(b)(3) (emphasis added). While obviously the present case involves more than one policy, at issue is whether the “owner . . . has more than one policy with coverage.” Plaintiff argues the “owner” is the UM policy owner. Under this interpretation,

because each of the policies are held individually, the Selective policy by Employer and the State Farm policy by plaintiff, this case would not involve an “owner” with “more than one policy,” and the anti-stacking provision would not apply. Conversely, defendants claim “owner” refers to the owner of the motor vehicle, and thus, as both plaintiffs and Employer were owners of the motor vehicle here, the provision applies and bars plaintiffs from stacking.

Although “owner” is not defined within the provision relating to UM coverage, N.C.G.S. § 20-4.01 (2001) provides, “[u]nless the context requires otherwise, the following definitions apply throughout this Chapter to the defined words and phrases and their cognates: (26) Owner.—A person holding title to a vehicle. . . .” We are unpersuaded the context of G.S. § 20-279.21(b)(3) requires “owner” to mean anything other than the owner of a motor vehicle.

Plaintiffs complain defendants would receive an “undeserved windfall” if they were not required to pay the full amount delineated by each UM policy. However, this argument is unpersuasive as it applies equally to plaintiffs. They would receive an additional \$1,000,000 in coverage for which they have paid no premiums were stacking permitted. Even applying the anti-stacking provision, plaintiffs receive \$750,000 more in coverage than they bargained for when obtaining their own insurance through State Farm.

Moreover, our reasoning demonstrates the intended meaning of the statute. It is undisputed that interpolicy stacking by a single individual holding multiple policies is prohibited by the same provision at issue. *See* G.S. § 20-279.21(b)(3). It is illogical that an individual who has purchased multiple UM policies and who pays multiple insurance premiums for those policies would not be allowed to stack coverage from those policies but that an individual who has only one UM policy and is injured while driving another’s vehicle for which the individual may have third party UM coverage could stack coverage.

Additionally, plaintiffs argue that even if “owner” refers to a vehicle owner the provision nonetheless is inapplicable here because plaintiff Lloyd Hoover is not the owner who “has” the Selective policy. However, a full reading of the provision reveals the owner need not own more than one policy but only be an owner who has coverage under more than one of the owners’ policies. G.S. § 20-279.21(b)(3). Here, plaintiff Lloyd Hoover was a joint owner of the vehicle and was covered under the State Farm policy, and Employer, owner of the Selective policy under which plaintiff Lloyd

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Hoover was covered, was also a joint owner of the vehicle. Therefore, G.S. § 20-279.21(b)(3) must apply.

As we find the legislature unambiguously prohibited plaintiffs from stacking the Selective and State Farm policies, we need not address plaintiffs' remaining assignments of error.

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

RUTH BELL JONES, EXECUTRIX OF THE ESTATE OF GLADYS BELL GERMAN, PLAINTIFF-APPELLEE v. JOHN W. GERMAN AND ANITA GERMAN DENIUS, INDIVIDUALLY; AND JOHN W. GERMAN AND ANITA GERMAN DENIUS AS CO-EXECUTORS OF THE ESTATE OF FINLEY L. GERMAN; AND JOHN W. GERMAN AND M. HAROLD WITHERSPOON, CO-TRUSTEES OF THE QTIP TRUST UNDER THE WILL OF FINLEY L. GERMAN, DEFENDANTS-APPELLANTS

No. COA02-466

(Filed 4 March 2003)

Taxes—estate—QTIP trust distribution—directive in will

The trial court correctly directed defendants to pay the N.C. estate taxes on the remaining assets in a QTIP trust established in testator's will for the benefit of his wife where the testator had directed that all of his estate taxes be paid entirely from his residuary estate and defendants were the co-executors and sole remaining beneficiaries of his estate.

Appeal by defendants from judgment entered 8 February 2002 by Judge Beverly T. Beal, Superior Court, Caldwell County. Heard in the Court of Appeals 28 January 2003.

Patrick, Harper & Dixon, L.L.P., by Stephen M. Thomas, for defendants.

Todd, Vanderbloemen, Brady & LeClair, P.A., by Bruce W. Vanderbloemen, for plaintiff.

WYNN, Judge.

In this appeal, plaintiff Ruth Bell Jones is the daughter of Gladys Bell German who received a benefit (until her death) from a Qualified Terminal Interest Property (QTIP) Trust established by her

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husband, Finley L. German; Ruth Bell Jones served as the executor for the Estate of Gladys Bell German. Defendants John W. German and Anita German Denius received (upon Gladys Bell German's death) the remaining assets from the QTIP Trust; they served as the co-executors of the Estate of Finley L. German. Defendants John W. German and M. Harold Witherspoon are the co-trustees of the QTIP Trust. Defendants appeal from a declaratory judgment holding that upon the death of Gladys Bell German, defendants must pay the North Carolina Estate Tax on the remaining assets they received from the QTIP Trust.

We summarize our holding in this case as follows: Under North Carolina law, a devisee has an obligation to pay the tax assessed on the property transferred to him by Will, unless otherwise directed by a contrary testamentary provision. *Pulliam v. Thrash*, 245 N.C. 636, 639, 97 S.E.2d 253, 255 (1957); *Cornwell v. Huffman*, 258 N.C. 363, 369, 128 S.E.2d 798, 802 (1963).¹ Defendants received the residuary assets of the QTIP Trust as beneficiaries under the Estate of Finley L. German; moreover, Finley L. German directed under his Will that the taxes be paid from the residuary of his estate. Because defendants are the co-executors and sole beneficiaries under the Estate of Finley L. German, we uphold the trial court's judgment directing the defendants to pay the estate taxes on the QTIP Trust.

The underlying facts in this matter show that Finley L. German died testate establishing by his Will a QTIP Trust in which his estate ultimately placed \$946,775.00 for the benefit of his wife, Gladys Bell German, until her death. At her death, the property remaining in the trust was to be distributed to Mr. German's children from another marriage, John W. German and Anita German Denius. Gladys Bell German died on 19 April 1999; thereafter, Ruth Bell Jones (as executor for her estate) brought this declaratory judgment action to determine whether defendants or the Estate of Gladys Bell German must pay the North Carolina Estate Tax on the residuary assets of the QTIP Trust. From the trial court's judgment in favor of the Estate of Gladys Bell German, defendants appeal.

On appellate review of a declaratory judgment, this Court must uphold a trial court's findings of fact in a trial without a jury if sup-

1. Effective January 1, 1999, and applicable to the estates of decedents dying on or after that date, N.C. Gen. Stat. § 105-32.3(a) states: "A person who receives property from an estate is liable for the amount of estate tax attributable to that property." Because Finley L. German died before 1999, that statute does not apply to the resolution of the issue in this case.

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ported by any competent evidence. *See Am. Mfrs. Mut. Ins. Co. v. Morgan*, 147 N.C. App. 438, 440, 556 S.E.2d 25, 27 (2001). In our review, we determine whether the record contains competent evidence to support the findings; and, whether the findings support the conclusions. *Id.* If the trial court's findings are supported by competent evidence and, in turn, support its conclusions, the declaratory judgment must be affirmed on appeal. *Id.* However, if the conclusions from the facts found involve legal questions, they are subject to review on appeal. *Id.*

Initially, we note that the parties in this case agreed on a statement of facts and that the trial court's findings of fact are essentially a recital of the procedural history of this case. Accordingly, we find the trial court's findings of fact are supported by competent evidence. Thus, the issue on appeal is whether these findings of fact support the conclusion that the defendants should pay the estate taxes on the assets of the QTIP Trust.

In general, under North Carolina case law (now codified by N.C. Gen. Stat. § 105-32.3(a)) devisees have an obligation to pay the tax assessed on the property transferred to them by Will. *Pulliam v. Thrash*, 245 N.C. 636, 639, 97 S.E.2d 253 (1957); *see also* N.C. Gen. Stat. § 105-15, 105-18, 105-20 (1995). In this case, John W. German and Anita German Denius received the remaining assets from a QTIP Trust through a devise made by Finley L. German in his Will. Thus, since they received their assets from the QTIP Trust from a transference under Finley L. German's Will, under the general rule, they are responsible for the estate taxes assessed against the property they received.

Moreover, our case law also allows a testator to change the party responsible for any estate tax liability. *See Cornwell v. Huffman*, 258 N.C. 363, 369, 128 S.E.2d 798, 802 (1963); *see also Buffalo v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946); *Craig v. Craig*, 232 N.C. 729; 62 S.E.2d 336 (1950). In the case *sub judice*, Finley L. German's Will directed,

all transfer, estate, inheritance, succession and other taxes in the nature thereof becoming payable because of my death, with respect to properties constituting my gross estate for death tax purposes, whether or not such property passes under this Will, shall be paid entirely out of my residuary estate and that no part of said taxes shall be apportioned or prorated to any legatee or

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devisee under this Will or any person owning or receiving any property not passing under this Will.

Thus, by the terms of his Will, Finley L. German directed all of his estate taxes to be paid entirely out of his residuary estate. Since the defendants are the co-executors and sole remaining beneficiaries under the Estate of Finley L. German, we find no error in the trial court's judgment directing them to pay the estate taxes arising from the remaining QTIP Trust assets.

Affirmed.

Judges BRYANT and GEER concur.

REGINALD SIMPSON, PLAINTIFF V. KEVIN McCONNELL, IN HIS CAPACITY AS
ADMINISTRATOR FOR THE ESTATE OF JEREMY NASON AND NATIONWIDE MUTUAL
INSURANCE COMPANY, DEFENDANTS

No. COA01-115-2

(Filed 4 March 2003)

Statutes of Limitation and Repose— appointment of administrator delayed—statute suspended

An order dismissing plaintiff's complaint for violation of the statute of limitations was reversed where the claim was made about four years after the accident that gave rise to the claim and the alleged tortfeasor's death, but less than a month after the appointment of the administrator of the estate. The statute of limitations is extended indefinitely if no administrator of the estate has been appointed within the time frame of the statute of limitations and there exists insurance coverage that would extend to the plaintiff's claim.

On remand on order of Supreme Court in *Simpson v. McConnell*, 356 N.C. 615, — S.E.2d — (2002) vacating and remanding the unanimous decision of the Court of Appeals in *Simpson v. McConnell*, 150 N.C. App. 713, 564 S.E.2d 320 (2002) for reconsideration in light of the Supreme Court's opinion in *Shaw v. Mintz*, 356 N.C. 603, 572 S.E.2d 782 (2002). Originally appealed by plaintiff from orders filed 22

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November 2000 and 11 December 2000 by Judge Benjamin G. Alford in Onslow County Superior Court, and heard in the Court of Appeals 29 November 2001.

Vaiden P. Kendrick, Tracie H. Brisson, and Erma Johnson for plaintiff appellant.

Hedrick, Blackwell & Criner, L.L.P., by Jeffrey H. Blackwell, for defendant-appellee Kevin McConnell in his capacity as administrator for the estate of Jeremy Nason.

Marshall, Williams & Gorham, L.L.P., by William Robert Cherry, Jr., for defendant-appellee Nationwide Mutual Insurance Company.

BRYANT, Judge.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration of our decision in light of the Supreme Court's holding in *Shaw v. Mintz*, 356 N.C. 603, 572 S.E.2d 782 (2002) (per curiam). The factual and statutory background for purposes of this review remains the same as in *Simpson v. McConnell*, 150 N.C. App. 713, 564 S.E.2d 320 (2002) (unpublished) (*Simpson I*).

In *Simpson I*, we held plaintiff's claim was barred because N.C. Gen. Stat. § 1-22 did not operate to suspend the three-year statute of limitations where no administrator of the estate had been appointed following the death of the alleged tortfeasor. *Id.* The Supreme Court has since adopted the dissent in *Shaw v. Mintz*, 151 N.C. App. 82, 564 S.E.2d 593 (2002) (*Shaw D*), in which Judge Greene wrote: "If no representative or collector is appointed and thus no notice given for the presentation of claims against the estate, the time for the filing of the claim against the estate of the negligent decedent remains suspended." *Id.* at 86, 564 S.E.2d at 596 (Greene, J., dissenting). The dissent further explained: "The statute of limitations is not suspended indefinitely because it cannot extend beyond three years after the death of the decedent, N.C.G.S. § 28A-19-3(f) (2001), unless the claim falls within the scope of section 28A-19-3(i), in which event there is no limit on the length of the suspension." *Id.* at 87 n.2, 564 S.E.2d at 596 n.2.

Section 28A-19-3(i) provides:

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Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent

. . . .

to the extent that the decedent . . . is protected by insurance coverage with respect to such claim . . . or where there is underinsured or uninsured motorist coverage that might extend to such claim

N.C.G.S. § 28A-19-3(i) (2001). Thus, according to the dissent in *Shaw I* adopted by our Supreme Court if no administrator of the estate has been appointed within the time frame of the statute of limitations and there exists insurance coverage that would extend to the plaintiff's claim, the statute of limitations remains suspended indefinitely. As underinsured motorist coverage existed in *Simpson I*, we must therefore reverse our earlier decision and hold that plaintiff's claim, made approximately four years after the alleged tortfeasor's death, and the accident that gave rise to the claim, but less than a month after the appointment of the administrator of the estate, is not barred by the statute of limitations. Accordingly, the trial court's order dismissing plaintiff's complaint is reversed. At trial, plaintiff's recovery will, however, be limited "to the amount of insurance coverage available for [the] deceased defendant's alleged negligence." *Pierce v. Johnson*, 154 N.C. App. 34, 43, 571 S.E.2d 661, 667 (2002) (interpreting section 28A-19-3(i)).

Reversed and remanded.

Judges McGEE and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 MARCH 2003

APPLE MOUNTAIN HOMEOWNERS' ASS'N v. SCOTT No. 02-308	Macon (99CVS471)	Affirmed
IN RE DAVIS No. 01-1588	Davidson (01J68) (01J69)	Affirmed
IN RE SOUTHER No. 02-316	Wilkes (00J14) (00J33)	Affirmed
IN RE STOVALL No. 02-807	Onslow (01J206)	Affirmed
JOHNSON v. COUNTY OF AVERY No. 02-163	Avery (00CVS382)	Affirmed
NORTHFIELD DEV. CO. v. CITY OF BURLINGTON No. 02-53	Alamance (01CVS753)	Affirmed
NUDELMAN v. J.A. BOOE BLDG. CONTR'R, INC. No. 02-267	Guilford (00CVS6363)	Affirmed
OWEN OFFICE PARK, INC. v. D.L. ROGERS CORP. No. 02-456	Cumberland (00CVS9545)	Affirmed
RAYMOND v. MARKHAM No. 02-878	Wake (01CVS5176)	Dismissed
STATE v. CRAWFORD No. 02-478	Mecklenburg (00CRS33147) (00CRS33148)	Affirmed
STATE v. GIBBS No. 02-979	Carteret (01CRS4437) (01CRS50306)	Dismissed
STATE v. HALL No. 02-460	Forsyth (00CRS60004) (01CRS3846)	No prejudicial error
STATE v. HILL No. 02-431	Mecklenburg (00CRS56427)	No error
STATE v. HOLLOWAY No. 02-527	Wake (00CRS21041) (00CRS16804)	No error

STATE v. HOWELL No. 02-919	Guilford (00CRS45369)	No error
STATE v. MALLWITZ No. 02-664	Transylvania (01CRS1013) (01CRS1029)	No error
STATE v. MOORE No. 02-622	Gaston (01CRS61260) (01CRS61261)	No error
STATE v. REDDIX No. 02-806	Durham (01CRS21422)	Affirmed
STATE v. REID No. 02-546	Durham (01CRS13647) (01CRS13648)	No error
STATE v. ROBINSON No. 02-679	Union (01CRS53844) (01CRS53896)	No error
STATE v. SIMPSON No. 02-845	Martin (00CRS2206) (00CRS2207) (01CRS2012)	No error
VIERA v. VIERA No. 02-674	Wake (00CVD10183)	Dismissed
WHISNANT v. NEWTON TRANSP. CO. No. 02-27	Ind. Comm. (I.C. 694601)	Affirmed

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CAROLYN AVERITT LANCASTER, CHARLES S. FOX, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CORNELIA AVERITT FOX, DECEASED, JANE GREGG DERBY, SABRA GREGG CAMPBELL AND MARY MAC GREGG WILKINSON, PLAINTIFFS V. MAPLE STREET HOMEOWNERS ASSOCIATION, INC., A NONPROFIT NORTH CAROLINA CORPORATION, DEFENDANT

No. COA02-666

(Filed 18 March 2003)

1. Appeal and Error— extension of time to file record on appeal—failure to object—death of trial judge

The Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 to hear the appeal in an adverse possession case even though the trial court did not have authority to extend the time for plaintiffs to file the record on appeal by forty-five days, because: (1) defendants failed to object to the extension at the time and did not contest the extension in their objections to the proposed record on 18 January 2002; (2) plaintiffs complied with the order of the trial court and timely filed the record according to the order; and (3) there was an intervening death of the trial judge.

2. Deeds— language not patently ambiguous—extrinsic evidence

The trial court erred in an adverse possession case by granting defendants' motion in limine and ruling that a portion of the pertinent 1931 deed referring to three vacant lots of a subdivision was patently ambiguous, because: (1) the reference in the deed is sufficient for plaintiffs to present extrinsic evidence to attempt to prove that the disputed property was located within the three vacant lots of the 1931 deed and was subsequently conveyed by the 1941 deed; (2) defendants are free to present evidence that the disputed property had previously been legally conveyed or did not otherwise pass through the 1931 deed; and (3) plaintiffs' objection to the trial court's grant of the motion in limine preserved this issue for appeal.

3. Adverse Possession— directed verdict—continuous, actual, and open possession—hostility—privity and tacking

The trial court did not err by denying plaintiffs' motion for directed verdict under N.C.G.S. § 1A-1, Rule 50(a) on the issue of defendant's adverse possession, because: (1) defendants presented sufficient evidence of continuous, actual, and open pos-

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session of the land; (2) defendants presented sufficient evidence of the requisite hostility from 1992 through the date this action was filed; (3) defendants presented sufficient evidence of privity and tacking to satisfy the requisite statutory period of twenty years; and (4) nothing in our case law prevents multiple people from claiming ownership by tenancy in common against the true owner, and these multiple claimants could transfer their respective interests as tenants in common to a successor entity as was done here.

Judge HUNTER concurring in part and dissenting in part.

Appeal by plaintiffs from judgment entered 13 August 2001 and filed 14 August 2001 by Judge Dexter Brooks in Columbus County Superior Court. Heard in the Court of Appeals 8 January 2003.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for plaintiffs-appellants.

Michael W. Willis for defendant-appellee.

TYSON, Judge.

Carolyn Lancaster et al. (“plaintiffs”) and Maple Street Homeowners Association, Inc. (“defendant”) both claimed ownership to real property located in Columbus County (“disputed property”). On 13 August 2001, a jury determined that defendant acquired title to the disputed property by adverse possession. Plaintiff appeals. We affirm in part, reverse in part, and remand for a new trial.

I. Background

In 1900, John P. Council, Jr. acquired by deed a tract of land containing approximately 925 acres in Columbus County from Robb L. Bridger and wife, Emma, that included the disputed property. This deed is recorded at Book QQ, Page 355, Columbus County Registry. John P. Council, Jr. died intestate in 1929. On 28 February 1931, his heirs-at-law conveyed their interests in the property to Estate of J. P. Council, Inc., a North Carolina corporation. This deed is recorded at Book 139, Page 392, Columbus County Registry. This deed described five tracts by metes and bounds and a sixth “catch all” description of “Any right, title, or interest which J. P. Council, late of Columbus County, have had in any other real estate in Columbus County.” The

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“First Tract” set forth a description of approximately 686 acres of property. Following that description, the deed stated:

This description is intended to cover all of that tract of land known as the J. P. Council farm and to include three vacant lots of a subdivision of the property by J. P. Council on the north shore of Waccamaw Lake, provided these lots have not previously been legally conveyed and which three lots are not included in the boundary recited above.

After the description of the “Third Tract”, the deed stated:

For further description of the above three tracts, See records of Columbus County, Book QQ, page 355,56,57, which covers a tract of land deeded to J. P. Council by R. L. Bridger, from which tract conveyances have been made to J. Sam Wright, A. I. Smalley, The Council Tool Company, A.J. Edwards, J. A. Powell, et al.

On 5 April 1941, the Estate of J.P. Council, Inc. conveyed to K. Clyde Council real property in Columbus County. The 1941 deed contained a metes and bounds description of the property conveyed and excepted two tracts of land. It further provided:

The above description is intended to cover all of that tract of land known as the J. P. Council farm and referred to as the first tract in a conveyance from E. B. Council and others to the [Estate of J.P. Council, Inc.], recorded in Book 139, Page 392, Registry of Columbus County.

After K. Clyde Council died, his interest in the real property passed to plaintiffs.

The disputed property is located on and near the shore of Lake Waccamaw and on both sides of and at the end of Maple Street in three separate areas: (1) a strip north of Lake Shore Drive and south of the Hall’s lot between Lot No. 4 of the J.P. Council Subdivision and Maple Street; (2) a strip north of Lake Shore Drive between Maple Street and Lot No. 5 of the J.P. Council Subdivision; and (3) south of Lake Shore drive and north of the north shore of Lake Waccamaw between Lot No. 4 and Lot No. 5 of the J.P. Council Subdivision.

Several families residing on Maple Street began using the disputed property in the 1950’s for family recreational and social activities and for access to the lake. The families installed wooden posts along the lakeside property to prevent parking and littering. They maintained the property by cutting trees and removing them, cut-

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ting the grass, planting trees and shrubbery and generally maintained the landscape. The families built steps leading from the shore to the lake, placed picnic tables on the disputed property, and installed "Private Parking" signs on the disputed property. Vernon Hall testified that she thought of the disputed property as an extension of her own property.

Until 1992, some of the families along Maple Street believed that the property was owned by the Town of Lake Waccamaw. On 11 May 1993, the Town Council adopted a resolution which denied any ownership of the disputed property. After the town's resolution, the families deeded their interests in the property to defendant by quitclaim deeds. Defendant has paid the *ad valorem* property taxes on the disputed property since 1993.

Plaintiffs sued for trespass, injunction, and a determination of ownership of the disputed property. Defendant answered and asserted that it owned the property through adverse possession. The jury determined plaintiffs did not have record title to the disputed property and defendant owned the property through adverse possession. Plaintiffs appeal.

II. Issues

Plaintiffs contend that the trial court erred (1) in ruling that a portion of the 1931 deed was patently ambiguous; (2) in denying plaintiffs' motion for directed verdict on the issue of defendant's adverse possession; and (3) in allowing the cross-examination of witnesses regarding a change in plaintiffs' legal theory following a ruling on defendant's motion in limine.

III. Motion to Dismiss Appeal

[1] Defendant filed a motion to dismiss the appeal. Defendant contends that appellants' proposed record on appeal was served contrary to the Rules of Appellate Procedure and is subject to dismissal.

Rule 11(b) of the North Carolina Rules of Appellate Procedure provides that the appellant must serve the proposed record on appeal on the appellee "[w]ithin 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered . . . , or 35 days after filing of the notice of appeal if no transcript was ordered." Rule 27(c)(1) states that the trial court "for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 or Rule 18 for the service of the

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proposed record on appeal.” All other motions for extensions of time “may only be made to the appellate court to which appeal has been taken.” N.C. R. App. P. 27(c)(2) (2002). If the appellee objects to the filing of the proposed record, it has 21 days to “serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal.” N.C. R. App. P. 11(c). Within 10 days, the appellant may request the judge whose order is being appealed to settle the record on appeal. N.C. R. App. P. 11(c). “The hearing [to settle the record on appeal] shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge.” N.C. R. App. P. 11(c).

The trial court granted plaintiffs an extension of 45 days to submit a proposed record on appeal without objection from defendant. Plaintiffs complied with the trial court’s order and submitted its proposed record on the 45th day. Defendant objected to the content of the proposed record. Because the original trial court judge had died, a new judge was appointed. Ultimately, the record on appeal was settled 74 days after the appointment of the new judge.

Although the trial court did not have the authority to extend the time for plaintiffs to file the record on appeal by 45 days, defendants failed to object to the extension at the time and did not contest the extension in their objections to the proposed record on 18 January 2002. Plaintiffs complied with the order of the trial court. In light of the intervening death of the trial judge and the timely filing of the record according to the order, we exercise our discretion to hear this case under Rule (2) of the North Carolina Rules of Appellate Procedure in the interests of justice.

IV. Plaintiffs’ Record Ownership

[2] The trial court determined, in defendant’s motion in limine, that the words “and to include three vacant lots of a subdivision of the property by J. P. Council on the north shore of Waccamaw Lake, provided these lots have not previously been legally conveyed. . . .” in the 1931 deed were “patently ambiguous.” Plaintiffs were not allowed to present extrinsic evidence to show record title ownership to the property through that language of the 1931 deed and the subsequent 1941 deed. The trial court instructed the jury that it could not find the disputed property was located within the boundaries of the “three vacant lots.” Plaintiffs contend the trial court erred in granting

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defendant's motion in limine, excluding the evidence, and instructing the jury. We agree.

Language in an agreement is patently ambiguous and unenforceable only if the "terms of the writing leaves the subject of the contract, the land, in a state of absolute uncertainty, and refer to nothing extrinsic by which it might possibly be identified with certainty." *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E.2d 269, 273 (1964) (citing *Gilbert v. Wright*, 195 N.C. 165, 141 S.E. 577 (1928)). If the description "refers to something extrinsic by which identification might possibly be made" even though it is insufficient in itself to identify the property, only a latent ambiguity is present and parol or other evidence may be used to identify the property. *Id.*

The 1931 deed clearly references the subdivision of J. P. Council and the north shore of Lake Waccamaw. The deed further references the prior deeds and recordings by its statement after the "Third Tract". This reference is sufficient for plaintiffs to present extrinsic evidence to attempt to prove that the disputed property was located within the "three vacant lots" of the 1931 deed and was subsequently conveyed by the 1941 deed. We hold the trial court erred in finding the 1931 deed patently ambiguous and granting defendant's motion in limine. Defendants are free to present evidence that the disputed property had "previously been legally conveyed" or did not otherwise pass through the 1931 deed.

Defendants contend that such error is harmless because the property was not conveyed to K. Clyde Council in the 1941 deed, the source of plaintiffs' claim to the property. If the property was not conveyed in the 1941 deed, the property remained in the Estate of J. P. Council, Inc. which has since dissolved. The 1941 deed set forth a metes and bounds description which all parties concede does not include either the subject land or the "three vacant lots" from the "First Tract" of the 1931 deed. The deed recited that the metes and bounds description "intended to cover" all of the J.P. Council farm "and referred to as the first tract" in the 1931 deed. Plaintiffs contend they received their record ownership of the property because the 1941 deed intended to convey the entire "First Tract" of the 1931 deed which may include the subject property within the three vacant lots. We hold that the 1941 deed description was sufficient to convey the entire "First Tract" of the 1931 deed including the "three vacant lots." We express no opinion on whether the disputed property is located in or is a part of the "three vacant lots."

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V. Waiver

Defendant contends plaintiffs have waived their right to appeal the issue of the granting of the motion in limine because of their concessions at trial. Prior to trial, Judge Brooks heard arguments on the motion to amend the complaint and the motion in limine in chambers without the court reporter present. In the record, defendant's counsel stated the trial court "ruled on those two motions in chambers after we each had our chance to have our say-so about those motions. We, in fact, agreed to the motion to amend and [counsel for plaintiffs] conceded, as I recall, that he didn't—he didn't have any way to fight my motion." The trial court stated that plaintiffs conceded they did not have any legal basis to oppose the motion. At the close of all evidence, plaintiffs argued that, based on the evidence presented, the trial court should reconsider its grant of the motion in limine and allow plaintiffs to present evidence to the jury regarding the "three vacant lots" in the 1931 deed. The trial court responded, "The Court, upon reviewing the exhibit, chooses not to change its ruling." Plaintiffs objected to the trial court's grant of the motion in limine. This preserves the issue for appeal.

We hold the trial court erred in granting the motion in limine which found the language of the 1931 deed "patently ambiguous" and denying plaintiffs the opportunity to present evidence of whether the "three vacant lots" described in the 1931 deed included the disputed property.

VI. Adverse Possession

[3] Plaintiffs contend that the trial court erred in denying its motion for a directed verdict on the issue of adverse possession.

[A] motion . . . for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the [non-moving party]. A [party] is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the [non-moving party], establishes its defense as a matter of law.

Goodwin v. Investors Life Insurance Co. of North America, 332 N.C. 326, 329, 419 S.E.2d 766, 767 (1992) (citing *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 401 S.E.2d 837 (1991); *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452 (1979); *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E.2d 507 (1978)). If more than "a scintilla of evidence" sup-

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porting each element of the case exists, motions for directed verdict should be denied. *Clark v. Moore*, 65 N.C. App. 609-10, 309 S.E.2d 579, 580-81 (1983).

To prove adverse possession, defendants must show “actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period (seven years or twenty years) under known and visible lines and boundaries.” *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. rev. denied*, 354 N.C. 364, 556 S.E.2d 572 (2001) (citing *Curd v. Winecoff*, 88 N.C. App. 720, 364 S.E.2d 730 (1988)).

A. Actual, Open, and Continuous

Since the 1950's, the families on Maple Street continuously used and openly placed items such as tables, permanent steps, chairs, play equipment, fire pits, grills, and private parking signs on the property. The families also performed yard work, installed wooden posts, and asked strangers to leave the disputed property. Defendant presented sufficient evidence of continuous, actual, and open possession of the land to survive plaintiffs' motion for a directed verdict.

B. Hostile

Our Courts have long recognized that the party asserting the adverse possession claim must prove that their taking and possessing the land of another was hostile. Prior cases have looked to the intent of the party claiming the property to determine whether the required hostility was satisfied. Before 1985, our Courts held that to prevail on a claim under adverse possession, the party must have the mind of a thief. *Walls v. Grohman*, 315 N.C. 239, 244-46, 337 S.E.2d 556, 559-60 (1985). Possession was not adverse if a party possessed land under a mistake as to ownership and without color of title. *Id.* In *Walls*, our Supreme Court overruled the prior law and stated:

a rule which requires the adverse possessor to be a thief in order for his possession of the property to be “adverse” is not reasonable, and we now join the overwhelming majority of states, return to the law as it existed prior to *Price* and *Gibson*, and hold that when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite

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statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake.

Id. at 249, 337 S.E.2d at 562. If the possessor harbors a conscious doubt as to the true ownership of the land, "it is reasonable to inquire as to his state of mind in occupying the land in dispute." *Id.* at 246, 337 S.E.2d at 560. In *Sebrell v. Carter*, 105 N.C. App. 322, 413 S.E.2d 1 (1992), our Court upheld a jury instruction which stated:

[T]he possession must have been with an intent to claim title to the land occupied. A conscious intention to claim title to the land of the true owner is necessary to make out adverse possession. If the defendants acted under a mistake as to [the] true boundary between their property and that of the plaintiffs', then possession under mistake may satisfy this element if all other elements of their claim have been satisfied. But if they consciously [doubted] that title *and for a portion of the period did not intend to claim title then their possession is not adverse.* (emphasis supplied) (changes in the original).

105 N.C. App. at 324, 413 S.E.2d at 1-2. In the later case of *Enzor v. Minton*, 123 N.C. App. 268, 472 S.E.2d 376 (1996), our Court held:

where adverse possession originates in mistake but then, upon discovery of the mistake by the adverse possessor, is perpetuated by conscious intent, the uninterrupted periods of adverse possession may be tacked together and considered as one for the purpose of satisfying the prescriptive period set out in G.S. 1-40.

123 N.C. App. at 271, 472 S.E.2d at 378.

Viewed in the light most favorable to the non-moving party, defendant has presented sufficient evidence of the requisite hostility from 1992 through the date this action was filed to survive plaintiffs' motion for a directed verdict. Plaintiffs contend that the families did not have an intent to claim ownership prior to 1992 because they used the property under the mistaken belief that the city owned the disputed property. The cases of *Wall*, *Sebrell*, and *Enzor* are not completely determinative of the issue here. All three cases dealt with the question of mistake concerning the location of a boundary line between the plaintiffs and the defendants. Here, the mistake is the ownership of the property in a third party, the Town of Lake Waccamaw. If the families intended to claim the property as their own prior to 1992, the requisite hostility existed and the time of adverse

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possession prior to 1992 could tack to that adverse possession after 1992. *Enzor*, 123 N.C. App. at 271, 472 S.E.2d at 378.

Buddy Pope has lived on Maple Street since 1962 and was a charter member of defendant. He testified that since he moved onto the street, "Beverly [his wife] and I felt that it's [the disputed property's] ours, too." Since Vernon Hall and her husband moved onto Maple Street in 1959, they believed they had the right to use and enjoy the disputed property as their own. Barbara Elliot had lived on Maple Street with her husband since 1959. Since then, the Elliots used the disputed property the same as they used their own and believed that they had the right to use and enjoy the property because it "went with the street." The families never asked permission to use the land or make improvements and excluded others from parking on the property.

There is also evidence that the families invited their guests onto the property, excluded people from the property, and installed posts to keep people from parking on the disputed property. The families placed tables, chairs, play equipment, fire pits, grills, and constructed permanent steps leading from the property to the lake. This evidence, viewed in a light most favorable to defendant, shows that the families, who were predecessors to and who incorporated and transferred their interest to defendant, intended to claim ownership to the extent that the element of hostile possession was properly submitted to the jury.

C. Exclusive

Plaintiffs also contend that defendant has failed to offer evidence of exclusive possession of the property for the requisite statutory period of twenty years. "Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years." *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) (citing J. Webster, *Real Estate Law in North Carolina* § 289 (1971)).

The privity requirement is made out and tacking is thus permitted where an initial adverse possessor transfers his possession to a successor adverse possessor by some recognized connection. Thus the privity connection is made out if an adverse possessor transfers his possession to another by deed or will or even by parol transfer.

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James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 14-9, at 654 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999).

Defendant presented evidence of privity with the families on Maple Street who incorporated defendant. On 18 October 1992, Vernon Hall, the Popes, and the Elliots transferred title to the disputed property to defendant through a non-warranty deed. On 7 July 1994, the Highs transferred title to the disputed property to defendant through a non-warranty deed. Defendants presented sufficient evidence of privity and tacking to satisfy the requisite statutory period of twenty years for adverse possession.

Plaintiffs further contend that defendant's claim of adverse possession fails as a matter of law because multiple families claimed adverse possession and none are exclusive. Plaintiffs cite multiple cases against "co-adverse possession." However, the cases cited deal with tacking issues and disputes between joint tenants asserting adverse possession as against each other. Nothing in our case law prevents multiple people from claiming ownership by tenancy in common against the true owner. These multiple claimants to the property could transfer their respective interests as tenants in common to a successor entity, as was done here. Defendant must still show that its predecessors-in-interest, as tenants in common, exercised the requisite exclusivity as to the true owner. Defendant presented evidence that, although the families did not exclude their co-tenants, all co-tenants claimed and possessed the property to the exclusion of others. The families put private parking signs on the property, asked people to leave the property, invited guests onto the property, and placed posts along the edge of the property to prevent others from parking there. Taken in a light most favorable to defendant, these actions are sufficient indicia of exclusivity for the jury to determine whether the families claimed as tenants in common exclusively against the true owners.

The dissenting opinion takes the position that, viewed in a light most favorable to defendant, the "defendant failed to establish as a matter of law that defendant was entitled to the subject property by virtue of adverse possession" and that "the trial court erred in denying plaintiffs' motion for a directed verdict." While a jury may agree that "defendant has failed to show exclusive and hostile possession," under our standard of review of a motion for a directed verdict, the trial court properly denied plaintiffs' motion.

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The dissenting opinion quotes purportedly factually inconsistent testimony for several of the property owners adjoining the disputed property. These factual inconsistencies are solely for the jury to reconcile and cannot be decided by the trial court as a matter of law.

The dissenting opinion does “not dispute defendant’s possession of the property after 1992” and assumes “*arguendo* . . . defendant was in privity with these families to allow tacking.” Presuming the property owners mistakenly believed the property belonged to the Town of Lake Waccamaw, their possession would remain hostile and exclusive as against plaintiffs under the standard set forth in *Walls* and *Enzor*. North Carolina allows parties to gain title through adverse possession from a municipality. N.C. Gen. Stat. § 1-35 (2001). *See also Gault v. Town of Lake Waccamaw*, 200 N.C. 593, 158 S.E. 104 (1931).

The dissenting opinion relies on *Ramsey v. Ramsey*, 229 N.C. 270, 49 S.E.2d 476 (1948), to show that defendant’s use of the disputed land was not exclusive. *Ramsey* is distinguishable from the case at bar. First, the Supreme Court in *Ramsey* based its holding on the fact that a grantee may not tack the adverse possession of his predecessors-in-interest of land that is not embraced within the description in the grantee’s deed. 229 N.C. at 272-73, 49 S.E.2d at 477-78. Here, the disputed property is included in the description in the quitclaim deeds to defendant. Defendant has privity of title to the disputed land and may tack the adverse possession of the individual families.

Secondly, in *Ramsey*, the adverse land had been used “by consent of those who own the record title.” 229 N.C. at 272, 49 S.E.2d at 477. The question of record title is in contention in this case. The Town of Lake Wacamaw never held record title, thus, could not give consent. Plaintiffs never gave consent to either defendant or its predecessors-in-interest.

Finally, there is evidence in *Ramsey* that the general public used the property including “children”, “workmen”, and “those who passed along the road.” *Id.* Further, the defendant admitted that the land “has been open to the public for fifty years.” *Id.* Here, there is no evidence that the disputed land was open to or used by the “general public.” The testimony showed that the families erected “Private Parking” signs, excluded people from the property, and invited their guests onto the property. Even if some evidence was presented that the “general public” had used the land, there is evidence to the contrary. This evidence presents a question for the jury and cannot be resolved by the trial court on directed verdict.

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We hold that the trial court did not err in denying plaintiffs' motion for a directed verdict. Defendant presented sufficient evidence of each element of adverse possession to survive a motion for directed verdict.

VII. Conclusion

The trial court erred in concluding that the language of the 1931 deed was patently ambiguous, denying plaintiffs the opportunity to present extrinsic evidence to show which lots were included within the conveyance, and granting the motion in limine. We also hold that the 1941 deed conveyed all property contained in the "First Tract" of the 1931 deed. As the trial court erred in granting the motion in limine, we need not address plaintiffs' allegation of error in allowing the cross-examination of witnesses regarding a change in plaintiffs' legal theory following a ruling on the motion in limine. Plaintiff's motion for a directed verdict was properly denied. We hold that the trial court's error in granting defendant's motion in limine is prejudicial to plaintiff. We remand the case for a new trial on all issues.

Affirmed in part, reversed in part, and remanded for new trial.

Judge LEVINSON concurs.

Judge HUNTER concurs in part and dissents in part.

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

I agree with the majority's holding that the trial court erred in concluding that the language of the 1931 deed was patently ambiguous and in denying plaintiffs the opportunity to present extrinsic evidence of whether the "three vacant lots" described in the 1931 deed included the disputed property. However, since defendant failed to present sufficient evidence of the essential elements of adverse possession, I disagree with the majority's conclusion that the trial court properly denied plaintiffs' motion for a directed verdict on defendant's adverse possession claim. Therefore, I respectfully dissent.

A trial court must grant a moving party's motion for a directed verdict "where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish." *Beam v. Kerlee*, 120 N.C. App. 203, 210, 461 S.E.2d 911, 917 (1995). When ruling on a motion for a directed verdict, the trial court must consider the evidence in the

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light most favorable to the nonmovant. *Id.* “The party claiming title by adverse possession has the burden of proof on that issue.” *Crisp v. Benfield*, 64 N.C. App. 357, 359, 307 S.E.2d 179, 181 (1983). Here, the trial court erred in denying plaintiffs’ motion for a directed verdict since the evidence, viewed in the light most favorable to defendant, failed to establish as a matter of law that defendant was entitled to the subject property by virtue of adverse possession.

“To acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period (seven years or twenty years) under known and visible lines and boundaries.” *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). “The requirement that possession must be hostile in order to ripen title by adverse possession does not import ill will or animosity but only that the one in possession of the lands claims the exclusive right thereto.” *State v. Brooks*, 275 N.C. 175, 180, 166 S.E.2d 70, 73 (1969). Further, “[a] claim of adverse possession is based upon an assertion of ownership rights as against *all persons*, not simply the record owner.” *Lake Drive Corp. v. Portner*, 108 N.C. App. 100, 103, 422 S.E.2d 452, 454 (1992). Possession for twenty years is necessary to acquire title by adverse possession unless the possession is under color of title which requires seven years. *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1993); N.C. Gen. Stat. § 1-40 (2001); N.C. Gen. Stat. § 1-38 (2001). In the case *sub judice*, defendant was required to prove actual, open, hostile, exclusive, and continuous possession of the subject land for twenty years since it had not had possession under color of title for the required seven years. “Successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years.” *Beam*, 120 N.C. App. at 212, 461 S.E.2d at 918. Assuming *arguendo* that the families living on Maple Street who used the subject property prior to the formation of defendant were co-adverse possessors and defendant was in privity with these families to allow tacking, defendant has failed to show exclusive and hostile possession of the disputed tract prior to 1992.

Before 1992, the families living on Maple Street who used the disputed property believed that the property was owned by the Town of Lake Waccamaw (“the Town”). Thus, they thought their use was a permitted use and was available to all members of the general public. After the Town denied ownership of the disputed property, the fami-

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lies residing on Maple Street began their efforts to claim the property by conveying any interests they had in the property to defendant by non-warranty deeds. Thus, the evidence shows that the attempt of the families to claim ownership of the property was triggered by their discovery that the Town was not the owner of the subject property. I do not dispute defendant's possession of the property after 1992. However, prior to 1992, the Maple Street families did not have exclusive possession of the property nor were they claiming the property as their own as against all others.

There is no question that the families living on Maple Street prior and subsequent to 1978 used the disputed property as an access to the lake as well as a place for family recreational and social activities. These families also periodically provided maintenance of the disputed property, such as mowing, planting flowers, and picking up trash. However, there is no evidence that the Maple Street families had *exclusive possession* of the subject property. The general public still had access to the property since there were no barriers to the general public's ingress onto the property or egress from the property. In addition, there were no "Do Not Trespass" or "Private Property" signs maintained on the property. Use of the property and amenities on the property such as picnic tables, play equipment, permanent steps leading from the shore to the lake, fire pits, and grills was not limited to the families residing on Maple Street. I acknowledge that the families installed posts on the property to prevent parking and littering and installed a "Private Parking" sign on the property to prevent people from drinking alcoholic beverages and disposing of their containers on the property. However, defendant has failed to direct us to any evidence which demonstrates that the families excluded everyone but themselves (and their guests) from using the subject property.

There is also no evidence that the families were asserting ownership rights prior to 1992 since the families used the property as if it were a neighborhood park owned by the Town. The majority opinion quotes Buddy Pope ("Mr. Pope") who has lived on Maple Street since 1963 as stating, "Beverly [his wife] and I felt that it's [the disputed property's] ours, too." However, this statement does not show that Mr. Pope was claiming the disputed property under a claim of right. In fact, the following testimony elicited during cross and redirect examination of Mr. Pope illustrates his family's perceived permissive use of the property prior to 1992:

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Q. Now, your intention when you started working on the property which took place pretty soon after you moved in, didn't it?

A. Yes, sir.

Q. Was to maintain it for your satisfaction, wasn't it?

A. Well, to the satisfaction of people on the street. We wanted it to look nice like somebody cared about it.

Q. But there was no intention to claim—to maintain it for the purpose of claiming it until 1991, was there?

MR. WILLIS: Objection.

COURT: Overruled.

A. No, there was no intention of claiming it. We thought it belonged to the Town.

MR. LEE: No further questions.

REDIRECT EXAMINATION BY MR. WILLIS:

Q. Well, you used the property just like it was yours, didn't you, Mr. Pope?

MR. LEE: Objection.

A. Yes.

MR. LEE: He's leading his own witness, Your Honor.

COURT: Overruled.

A. Yes, we did.

Q. And I think what—when you say you had no intention to claim it, if somebody had come over there and tried to run you off of that property 20 years ago, would you have defended a lawsuit in court over that property 20 years ago?

MR. LEE: Objection.

COURT: Overruled.

A. Yes, probably would have; yeah.

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Q. Well, why would you have done it if you didn't have any intention to claim it, why would you have defended a lawsuit if you didn't have any intention to claim it?

MR. LEE: Objection.

COURT: Overruled.

A. Well, we thought we had **the right to use** it and we didn't want that right taken away from us by anyone and we would have tried to defend it, you know, if we could.

Q. Now, Mr. Lee said you were content to have the Town to [sic] control the property until you found out the Town didn't own it. What control did the Town ever exert over that property?

A. They never did anything down there. They just—**we thought it was theirs and—we kept it up, so they didn't bother it.**

(Emphasis added.) The majority opinion also states that Vernon Hall and her husband, who moved onto Maple Street in 1959, believed they had the right to use and enjoy the disputed property. The majority further points out that Barbara Elliot and her husband, who had lived on Maple Street since 1959, had used the property the same as they used their own. This evidence only shows that these people felt that they had the right to *use* the property not that they were claiming ownership of the property. Therefore, this evidence does not establish that the families' possession was adverse for the required twenty years.

I recognize this Court's holding

that where adverse possession originates in mistake but then, upon discovery of the mistake by the adverse possessor, is perpetuated by conscious intent, the uninterrupted periods of adverse possession may be tacked together and considered as one for the purpose of satisfying the prescriptive period set out in G.S. 1-40.

Enzor v. Minton, 123 N.C. App. 268, 271, 472 S.E.2d 376, 378 (1996). However, *Enzor* involved the adverse possessors taking possession of land, believing it to be theirs and using it as if it were theirs. Unlike *Enzor*, the Maple Street families in the instant case used the subject property prior to 1992 believing it belonged to the Town and believing they had permission from the Town to use the property. They were

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claiming a right to use the property, not claiming ownership of it. Therefore, their possession of the subject property was not adverse prior to 1992.

The instant case can be compared to *Ramsey v. Ramsey*, 229 N.C. 270, 49 S.E.2d 476 (1948), which involved a tract of land where a spring was located. The Court in *Ramsey* concluded that the defendant, who was claiming title of the tract through adverse possession, had not shown the necessary adverse and exclusive possession. The spring had been used by the defendant and his predecessors in title as the source of their water supply for many years. However, it had also been used by others, such as the plaintiff, children at a nearby school, workmen at a nearby sawmill, and others residing in the neighborhood. The Court noted that the defendant used the spring more regularly and more extensively than others. Nevertheless, the Court still concluded that the defendant's use was not enough to establish adverse possession for the statutory period of twenty years. In the instant case, the land in dispute was also used by the general public even though the neighborhood families used it more regularly and more extensively than others. Thus, as in *Ramsey*, defendant has failed to show the necessary adverse and exclusive possession to gain title to the subject land.

For the foregoing reasons, the trial court erred in denying plaintiffs' motion for a directed verdict on defendant's adverse possession claim because, even when viewed in the light most favorable to defendant, the evidence was insufficient to establish the essential elements of adverse possession.

STATE OF NORTH CAROLINA v. SHAN CARTER

No. COA02-24

(Filed 18 March 2003)

1. Evidence— hearsay—residual exception—unavailable witness

An out-of-court statement to officers by a witness who later married defendant and asserted marital privilege was properly admitted under the N.C.G.S. § 8C-1, Rule 804(b)(5) hearsay exception. The court conducted a two-day voir dire, determined

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that the witness was unavailable, found that the statement had been made voluntarily after the witness was told about the marital privilege and that she wasn't going to be arrested, and each of the six factors for determining whether hearsay should be admitted under the residual hearsay exception was systematically analyzed.

2. Constitutional Law— confrontation—unavailable witness

The admission of pretrial statements to police by a witness who later married defendant and asserted marital privilege at trial did not violate defendant's constitutional rights to due process and confrontation.

3. Witnesses— marital privilege—limits

Statements relating conversations with defendant which occurred before his marriage to the witness or in the presence of a third party did not violate statutory prohibitions on compelling a spouse to testify. N.C.G.S. § 8-57.

4. Witnesses— unavailable—refusal to testify

A witness was not available to testify, and thus his letter was admissible as against his penal interest under N.C.G.S. § 8C-1, Rule 804(b)(3), where he was not ordered to testify but refused to answer questions, was openly hostile to the court, and made clear that the threat of additional prison time made no difference to him since he was serving a term of 106 to 130 years.

5. Witnesses— absence not improperly procured—plea bargain—no prohibition on testimony

The State did not improperly procure the absence of a witness within the meaning of N.C.G.S. § 8C-1, Rule 804(a) where there was nothing in the witness's actual plea agreement which prohibited him from testifying, although an initial plea offer contained a provision that the witness would not be required to testify.

6. Evidence— hearsay—statement against penal interest

The trial court did not err by finding that letters from an accomplice were an attempt to persuade a witness to lie and that the two-prong test for admissibility under N.C.G.S. § 8C-1, Rule 804(b)(3) for admission against penal interest was satisfied.

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7. Evidence— hearsay—residual exception—letters from accomplice

Letters from an accomplice who refused to testify were admissible under the residual exception of the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 804(b)(5).

8. Constitutional Law— confrontation—letters from accomplice—no violation

Defendant's rights under the Confrontation Clause were not violated by the admission of letters from an accomplice who refused to testify; moreover, admission of the letters was not prejudicial given the substantial evidence of defendant's involvement in the crimes.

9. Evidence— similar subsequent offenses—chain of circumstances

The trial court did not abuse its discretion in a prosecution for murder, burglary, robbery, and kidnapping by admitting evidence of defendant's commission of four similar crimes within weeks of the charged offenses. Defendant asserted that the probative value was outweighed by the prejudice, but the court conducted a voir dire and entered an order which detailed the evidence and concluded that the evidence established a chain of circumstances or context and served to enhance the natural development of the facts.

Appeal by defendant from judgments entered 15 June 2000 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 10 February 2003.

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

Edwin L. West, III, P.L.L.C., by Edwin L. West, III, for defendant-appellant.

MARTIN, Judge.

Defendant, Shan Carter, was tried upon his pleas of not guilty to bills of indictment charging him with first degree murder, first degree burglary, second degree kidnapping, and robbery with a dangerous weapon. The State offered evidence tending to show that on 6 December 1996, Donald Brunson lived with his fiancé, Ana Santiago, and her three children, Angel, Brenda, and DeCarlos. During the early

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morning hours of 6 December, Santiago heard noises in the house, and before she could waken Brunson, three armed men wearing masks entered their bedroom and ordered them onto the floor. Santiago heard Brunson struggle and the men order him not to look up or look at their faces. Santiago then heard a gunshot. She testified the men began to violently beat Brunson with “hard impact blows.” Santiago heard a man in her daughters’ bedroom telling them to go back to sleep. She also heard the men take DeCarlos from his bedroom, followed by the sound of tearing bed sheets. The men tied DeCarlos’ hands and feet, laid him next to Santiago on the floor, and covered the two with bed sheets. Santiago could see that Brunson’s feet were also tied with torn sheets. Santiago testified she then heard the men pulling Brunson out of the bedroom as he struggled, and she could hear “his fingers just tearing on the door frame” in an attempt to stay in the room. The men took Brunson to DeCarlos’ room where they continued to beat him. Santiago heard Brunson “crying for his life” and stating his teeth had been knocked out. When Brunson asked “what this was about,” the men responded “[i]t’s about you.”

Santiago also heard the men demanding jewelry, money, and a gun from Brunson. The men took Brunson’s gold watch, Santiago’s gold watch, some money, and possibly a gun. Santiago eventually heard the men comment that Brunson was “out” and unconscious. She then heard the men whispering about “get[ting] the keys.” After the men left the house and Santiago heard cars leaving, she ran to the telephone, but all the lines had been cut. She looked out the window and saw that her white 1993 Honda was gone. She then searched the house for Brunson, but he was not there. Santiago estimated the men were in her home for approximately 30 minutes to an hour. During the encounter, Santiago observed that one of the men was dressed in a green Army fatigue jacket, blue jeans, and black Timberland boots, and another man wore rust-colored Gore-Tex shoes. Santiago had always assumed Brunson was involved with drugs.

The State also presented the testimony of Nakisha Bowen, who testified that in the early morning hours of 6 December 1996, she and Amber Little were driving around looking for their boyfriends. They saw defendant driving his car at a high rate of speed; Little’s boyfriend, Kwada Temoney, was a passenger in defendant’s car. Bowen and Little drove to Bowen’s house, where defendant had just parked his car and gotten out of the vehicle. Defendant instructed Bowen to get out of her car, and when she refused, he pointed a handgun at her head and stated it “was a life or death situation.” Defendant

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was acting “hyped up” and was in a hurry. Temoney then removed a bag of clothes which appeared to contain blue jeans and a pair of Timberland boots from the trunk of defendant’s car. When Bowen got out of her car, Temoney got into the car with Little. Little testified she noticed a blood stain on Temoney’s shirt, and a “really, really strong” burn smell “like something had caught on fire.” Temoney instructed Little to drive to an apartment complex where Little saw Temoney throw the bag of clothes and the Timberland boots into a dumpster.

At approximately 6:00 a.m. on the same morning, Santiago’s Honda was discovered with its trunk and driver’s side door open approximately 7 miles from her home in a wooded area behind a sewage plant. Detective Tim Karp testified he recovered a black hood from just outside the driver’s side door, a black ski mask from between the passenger’s seat and door, and a face mask from the back seat. DNA extracted from fibers on the ski mask matched that of Temoney. The driver’s side floor contained burnt debris and ashes, and testing revealed the presence of blood in various places in the car and trunk.

Later that afternoon, authorities discovered Brunson’s body in woods approximately 100 yards from the Honda. Brunson was clothed only in a bloody t-shirt, and a computer cord was tied around his right leg with a Nintendo controller at the other end. A bed sheet, a log with blood on it, and a bullet fragment were recovered near the body. Dr. John Almeida testified Brunson had a “gapping” laceration in his chin caused by a “significant blow” from a blunt object, a broken jaw, several abrasions to his head, several bruises about the back, cuts and other defense wounds to his hand, a bullet wound to his upper right arm, and three gunshot wounds to the back, including two entrance wounds and an exit wound. Dr. Almeida listed the cause of Brunson’s death as a gunshot wound to the back.

The State also called defendant’s wife, Keisha Carter (“Keisha”), as a witness at trial. After Keisha invoked the marital privilege, the State was permitted, over defendant’s objection, to introduce a videotaped statement which she gave to police officers on 14 October 1999. In the interview, Keisha stated that early on a morning in early December 1996, defendant came to her house crying and told her Temoney had just killed Brunson. Defendant told Keisha he and Temoney had followed Brunson home in order to rob him, waited until Brunson went to bed, then kicked in the door and entered the house. The two tied up Brunson and the others with bed sheets, beat

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Brunson, and stole money and drugs from the house. Defendant told Keisha he could not stop Temoney from beating Brunson, and when Brunson used Temoney's name, Temoney told defendant they would have to kill Brunson. When Brunson was rendered unconscious, defendant and Temoney placed him in the trunk of a white Honda parked at Brunson's house. Temoney drove the Honda to a wooded area while defendant followed in his own car. Defendant told Keisha that once they had parked in the woods, Brunson opened the trunk, got out, and started to run. Temoney then shot at Brunson until he fell, approached Brunson, and shot him again. Defendant stated Temoney put Brunson's body back in the Honda and attempted to light the car on fire. Defendant also relayed to Keisha that he and Temoney had encountered Bowen and Little after the killing, and that Little had asked Temoney why he had blood on his shirt.

Keisha told the officers she had overheard defendant and Temoney talk of robbing Brunson about a week prior to the incident. Temoney had used drugs with Brunson before, and the two knew Brunson was involved with drugs and likely had money. Keisha further stated that on the same morning defendant related these events, he repeatedly insisted that she marry him immediately. Keisha assumed defendant was being insistent about marrying because he knew he would be going to prison. The two were married approximately one week later, on 12 December 1996. Additionally, Keisha provided information in the interview about other robberies defendant told her he had committed with Temoney.

The State also introduced letters written to Little by Temoney in June 1997 while he was incarcerated for unrelated murder charges. In the letters, Temoney urged Little to lie about the events of 6 December 1996 and state that she was with Temoney at all relevant times. Temoney directed Little to destroy his letters after reading them and not to discuss them with anyone. Additionally, over defendant's objection, the State was permitted to introduce evidence of four other crimes committed by defendant and Temoney involving robberies and assaults of known drug dealers within weeks of the Brunson murder.

Defendant did not testify, but presented testimony from Keisha, to whom he was still married, that she spoke to authorities on 14 October 1999 because she was afraid she might be arrested, and that the information she gave authorities during that interview was based on what she had "heard on the streets about the case." Keisha testified the statements she gave during the interview were true, but

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denied defendant had given her the information, maintaining only that she heard it “on the streets.” Keisha also testified that she struggled with depression and had been admitted to two mental health institutions. Keisha’s grandfather testified she had been staying at Cherry Hospital around the time she made her statement to law enforcement.

Defendant also presented testimony from Santiago’s son, DeCarlos, that he believed there were as many as four or five intruders in his home on 6 December 1996, and that some of the men had “New York City accent[s].”

Defendant was found guilty of all charges and sentenced to consecutive sentences of life imprisonment without parole for first degree murder, a minimum of 103 months and maximum of 133 months for robbery with a dangerous weapon, a minimum of 103 months and maximum of 133 months for first degree burglary, and a concurrent sentence of a minimum of 34 months and maximum of 50 months for second degree kidnapping. Defendant appeals.

Of one hundred and four assignments of error contained in the record on appeal, defendant brings forward fourteen in his brief. The remaining ninety assignments of error are deemed abandoned. *See* N.C.R. App. P. 28(a) (2002).

I.

[1] By five assignments of error, defendant asserts he is entitled to a new trial due to the admission of Keisha Carter’s 14 October 1999 out-of-court statements to officers with respect to the Brunson crimes and other robberies. He argues the statements constituted unreliable hearsay and the admission thereof violated his constitutional rights to due process and confrontation. The trial court permitted the State to play portions of the videotape of Keisha’s interview with police and admitted transcripts of the interview into evidence under G.S. § 8C-1, Rule 804(b)(5). We hold the statements, though hearsay, were admissible under the exception to the rule against hearsay embodied in Rule 804(b)(5), and their admission did not violate defendant’s constitutional rights.

“North Carolina Rule of Evidence 804(b) provides for certain exceptions to the hearsay rule when the declarant is determined to be unavailable under North Carolina Rule of Evidence 804(a).” *State v. Williams*, 355 N.C. 501, 535, 565 S.E.2d 609, 629 (2002) *cert. denied*,

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— U.S. —, 154 L. Ed. 2d 808 (2003). Rule 804(b)(5) provides in pertinent part:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2002). Once the trial court determines the declarant to be unavailable, the court must conduct a six-part inquiry to ascertain whether the hearsay evidence should be admitted under this exception. *Williams*, 355 N.C. at 535-36, 565 S.E.2d at 629-30. This inquiry includes an analysis of the following six factors:

- (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
- (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
- (3) That the statement possesses “equivalent circumstantial guarantees of trustworthiness”;
- (4) That the proffered statement is offered as evidence of a material fact;
- (5) Whether the hearsay is “more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means”; and
- (6) Whether “the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence.”

State v. Fowler, 353 N.C. 599, 609, 548 S.E.2d 684, 693 (2001), *cert. denied*, 535 U.S. 929, 152 L. Ed. 2d 230 (2002) (citation omitted). Moreover, when considering the third factor, whether the evidence possesses equivalent circumstantial guarantees of trustworthiness, the Supreme Court has held that the trial court must examine “(1) the

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declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth, (3) whether the declarant recanted, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *Id.* at 612, 548 S.E.2d at 694.

In the present case, prior to admitting Keisha's videotaped statements, the trial court conducted an extensive two-day *voir dire* hearing, including testimony from Keisha, and entered an "Order on Admissibility." In its order, the court determined Keisha was unavailable as a witness because she had asserted the marital privilege under G.S. § 8-57 not to testify or be compelled to testify against her husband. As a preliminary matter, the court made findings that prior to giving her statements on 14 October 1999, Keisha was told by law enforcement that she was free to leave, was not under arrest, and was not going to be arrested; that her statements were made freely, voluntarily, and willingly without coercion or intimidation by the officers and after she had been informed of the marital privilege; and that Keisha was lucid and coherent during the interview, and she understood and was responsive to questions.

The trial court also systematically analyzed each factor of the required six-prong inquiry, determining that the defense was given proper notice of the State's intent to use Keisha's statements, its particulars, and Keisha's name and address; that the statements were not specifically covered by any other hearsay exception; that the statements possessed circumstantial guarantees of trustworthiness without reference to corroborating evidence; that the statements were evidence of a material fact because they directly established defendant's involvement with the Brunson crimes and other robberies; that the statements were more probative on the issue than any other evidence which the State could reasonably produce given that Keisha was exempt from testifying and there were no other means by which to proffer the evidence; and finally, that the interests of justice would be served by admission of the statements because they were the only direct evidence of defendant's involvement in the crimes.

On the issue of trustworthiness, the trial court made extensive findings of fact, including that the statements contained assurances of personal knowledge. In support of this finding, the trial court noted that Keisha and defendant lived together before they were married; that defendant gave Keisha specific details about the events of 6 December on the same morning they occurred and on the same morning he asked Keisha to marry him; that defendant was highly emotional and crying at the time he gave Keisha the specific details; and

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that defendant gave Keisha specific details about the additional robberies shortly after their marriage and close in time to commission of those crimes. The court also found the evidence trustworthy based on Keisha's motive to tell the truth. On that factor, the trial court found that prior to contacting authorities, Keisha told a friend she could no longer keep to herself the information defendant had told her and that she desired to inform authorities of what she knew; that Keisha initiated contact with authorities and voluntarily gave her statements; that her statements were not casual remarks to disinterested persons, but were made to authorities whom Keisha knew would investigate the truth of her statements; that Keisha's statements actually minimized defendant's culpability in the crimes because defendant had expressed he did not want to help Temoney kill Brunson and Keisha stated defendant was a good person and had a heart; that Keisha expressed no anger towards defendant and had no motive to lie; and that there existed no credible evidence that Keisha intended to falsely implicate defendant in the crimes.

The trial court also found that Keisha had never recanted the substance of her statements despite subsequent meetings with law enforcement officers and an attorney and, in fact, had reiterated the truth of the information she provided in her statements. The trial court further found that Keisha rendered her statements of events to authorities more than once, yet the details of her statements remained the same; that the fact her statements were given on videotape allowed the court to view her demeanor and ascertain credibility; that her statements were not based on the memory or notes of a third party; and that the statements were not given in exchange for leniency or other promises.

We are bound by the trial court's findings of fact as to admissibility of evidence under Rule 804(b)(5) where such findings are supported by competent evidence, despite the existence of evidence from which a different conclusion could have been reached. *State v. Brown*, 339 N.C. 426, 451 S.E.2d 181 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995). In this case, the trial court's findings on admissibility are supported by ample competent evidence, and these findings, which conform to the inquiries required of the trial court on this issue, sufficiently support the trial court's admission of Keisha's statements under Rule 804(b)(5).

[2] We also hold admission of the evidence did not violate defendant's constitutional rights to due process and confrontation. Our Supreme Court has adopted the use of a two-part test to determine

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whether the admission of hearsay evidence violates the Confrontation Clause: (1) “the prosecution must ‘either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use,’ ” meaning the State has made a good-faith effort to obtain the declarant’s presence at trial; and (2) “the statements at issue have sufficient ‘indicia of reliability.’ ” *Fowler*, 353 N.C. at 615, 548 S.E.2d at 696 (citations omitted). Where the hearsay evidence does not fall under a “firmly rooted” exception to the hearsay rule, and Rule 804(b)(5) is not such an exception, the evidence should also not be admitted without “a showing of particularized guarantees of trustworthiness drawn from the totality of the circumstances surrounding the statements.” *Id.* However, the Supreme Court has recognized that these inquiries are encompassed within the six-prong test for admissibility set forth above. *Id.* Thus, where an analysis of the factors considered in reviewing admissibility under Rule 804(b)(5) sufficiently supports admission of the evidence, the analysis simultaneously demonstrates that its admission would not violate the Confrontation Clause. *Id.* at 615, 548 S.E.2d at 697.

Nevertheless, our Supreme Court has also recognized that “‘courts should independently review whether the government’s proffered guarantees of trustworthiness satisfy the demands of the [Confrontation] Clause.’ ” *Id.* at 616, 548 S.E.2d at 697 (citation omitted). Accordingly, we have independently reviewed defendant’s claim under the Confrontation Clause and conclude that admission of Keisha’s statements did not violate defendant’s constitutional rights. The State amply demonstrated Keisha’s unavailability as a witness due to her assertion of the marital privilege. Moreover, the trial court entered extensive findings, as noted above, on the reliability and trustworthiness of the statements. Those findings indicate that Keisha made her statements voluntarily without coercion or promises; that she did so without motive to lie or wrongly implicate defendant; that her statements minimized defendant’s culpability in the crimes; that defendant loved and trusted Keisha at the time he related his involvement in the crimes, and was emotional while doing so; that defendant related specific details about the manner in which the crimes were committed shortly after their commission; that Keisha had not recanted her statements but had re-emphasized the truth of their substance; and that the substance of Keisha’s statements remained consistent despite her multiple renditions to law enforcement officers. These findings are supported by the evidence and amply support a determination that the statements possessed

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the requisite indicia of reliability and particularized guarantees of trustworthiness sufficient for admission under the applicable two-prong test.

In any event, Keisha later waived her privilege not to testify and was called by the defense as a witness. Defendant therefore had every opportunity to confront Keisha at trial regarding her statements to the authorities on 14 October 1999 and, indeed, did confront her on these issues, eliciting her testimony that defendant did not tell her the information she shared with authorities and that she had been both angry at defendant and suffering from depression around the time she made the statements. These assignments of error are therefore overruled.

II.

[3] Defendant next argues the trial court erred in admitting Keisha's out-of-court statements to authorities because the admission amounted to compelled testimony in violation of the marital privilege contained in G.S. § 8-57. Under that statute, in a criminal action, "[n]o husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other *during their marriage.*" N.C. Gen. Stat. § 8-57(c) (2002) (emphasis added).

Under the plain language of G.S. § 8-57, the privilege extends only to communications between spouses during the marriage. Defendant and Keisha were not married on 6 December 1996 when defendant told Keisha about the Brunson crimes. Therefore, Keisha's statements to authorities regarding her conversation with defendant on 6 December are not covered by G.S. § 8-57. The trial court made findings to this effect which were supported by the evidence.

During her interview with authorities, Keisha also relayed information about defendant's involvement in crimes against Tyrone Baker, Louis Tyson, and Keith Richardson. Defendant's statements to Keisha about the Baker robbery were made prior to their marriage, and thus, the privilege does not apply. At the time defendant told Keisha about the Tyson and Richardson crimes, he and Keisha were married. The trial court accordingly excluded Keisha's statements as to the Richardson robbery. However, as to the Tyson robbery and shooting, the trial court found, and the record supports, that defendant made statements to Keisha about that incident in the presence of a third party. "The [marital] privilege is waived in criminal cases where the conversation is overheard by a third person." *State v.*

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Harvell, 45 N.C. App. 243, 249, 262 S.E.2d 850, 854 (1980). The admission of Keisha's statements therefore did not violate G.S. § 8-57.

III.

[4] Third, defendant contends the trial court erred in admitting into evidence letters Temoney had written to Little urging her to lie about the events of 6 December 1996. As with Keisha Carter's statements, defendant maintains Temoney's letters were inadmissible hearsay and violated his constitutional rights under the Confrontation Clause. The trial court conducted a *voir dire* hearing on the issue and then entered an "Order on Admissibility" admitting the letters under Rule 804(b)(3), or in the alternative, Rule 804(b)(5).

Rule 804(b)(3) provides an exception to the rule against hearsay for statements against interest where the declarant is unavailable:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) (2002). Our courts have interpreted this rule as requiring a two-prong inquiry into whether (1) the statement was against the declarant's penal interest; and (2) the court is satisfied that corroborating circumstances indicate the trustworthiness of the statement. *State v. Wardrett*, 145 N.C. App. 409, 414, 551 S.E.2d 214, 218 (2001). "The corroborating circumstances . . . may include other evidence presented at trial." *State v. Kimble*, 140 N.C. App. 153, 157, 535 S.E.2d 882, 885-86 (2000).

In the present case, the trial court first determined Temoney was unavailable as a witness. Defendant takes issue with this determination, arguing the trial court never officially ordered Temoney to testify. Rule 804 provides that a witness may be deemed unavailable where the witness "[p]ersists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so." N.C. Gen. Stat. § 8C-1, Rule 804(a)(2) (2002).

However, the trial court found, and the transcript of *voir dire* testimony supports, that Temoney refused to answer questions, was

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openly hostile to the court, and repeatedly made clear that the threat of being given additional prison time for his refusal to testify made no difference to him. Temoney repeatedly stated, "I'm not here to testify . . . so you can go ahead and ship me back up the road that I came from." Temoney informed the trial court that he did not have to testify and that "ya'll don't control me." When threatened with being held in contempt of court for his refusal, Temoney stated, "Man, find me in contempt? I got 106 to 130 years. You think I care if you hold me in contempt of court?" The evidence supports the trial court's finding that "though the court did not specifically order Temoney to testify because it would have been futile to do so[,] Temoney, by his conduct and testimony, made it clear that there were no circumstances, including court intervention or order, which would compel him to testify."

[5] Defendant also argues the trial court should not have found Temoney unavailable because his absence was improperly procured by the State. Under Rule 804, a declarant is not unavailable if his refusal to testify "is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying." N.C. Gen. Stat. § 8C-1, Rule 804(a) (2002). Defendant asserts Temoney's initial plea offer from the State to avoid the death penalty contained a provision that Temoney would not be required to testify for the State.

The trial court found there was nothing in Temoney's actual plea agreement which prohibited him from testifying for the State, and that the State did not wrongfully procure his refusal to testify. These findings are supported by competent evidence. Neil Weber, Temoney's attorney for the Brunson crimes, testified on *voir dire* that while negotiating a plea with the State, there was at one time a plea provision that Temoney would not be required to testify for the State, but that the State later rejected that provision. Weber testified that despite the State's rejection of that provision, Temoney nevertheless accepted a plea from the State which did not contain any provision that Temoney would not be called to testify in defendant's trial. Accordingly, the trial court's findings are supported by competent evidence, and those findings support a determination that Temoney was unavailable as a witness.

[6] As to admitting the evidence under Rule 804(b)(3), the trial court found Temoney's letters were an attempt to persuade Little to lie about seeing defendant and Temoney together on the night Brunson was murdered, and that the letters instructed Little to give authorities

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a different version of events. The trial court found that the letters implicate Temoney in the Brunson crimes, show Temoney's fears about being seen with defendant that evening, thereby linking defendant to the crimes, and show Temoney's fears about defendant telling authorities about their involvement in the Brunson crimes. The trial court found as corroborating circumstances that Bowen and Little both testified they saw Temoney and defendant together the night of the crimes; that Keisha's videotaped statements established that defendant told her he and Temoney had seen Bowen and Little on that night; and that Temoney instructed Little to destroy the letters after reading them and to lie if asked about their contents.

Based on these findings, the trial court concluded Temoney had first-hand knowledge of the events of 6 December 1996, that his statements in the letters were such that a reasonable person would not have written them unless their contents were true, that the contents of the letters were against defendant's penal interest at the time he wrote them, and that the letters were sufficiently trustworthy. The trial court's findings were supported by competent evidence, are therefore binding, and are sufficient to satisfy the applicable two-prong test and support the trial court's conclusion of admissibility under 804(b)(3).

[7] We likewise uphold the trial court's determination that the evidence was also admissible under Rule 804(b)(5). The applicable law on admitting evidence under this subsection is fully set forth in Part I of this opinion. The trial court's order establishes that upon finding Temoney unavailable as a witness, it considered and analyzed each of the six factors required for admissibility under this rule. As to circumstantial guarantees of trustworthiness, the trial court again made extensive findings of fact, including that the letters had the assurance of personal knowledge based on the details Temoney set forth in his letters which would have been known only to someone involved in the events. The court also found Temoney had a motive to tell the truth in the letters, given that they were written two years prior to his being charged with the Brunson crimes; that he wrote them to Little, whom he trusted and loved, addressing her as his loving wife, though they were not married; that the letters implicated him in the crimes; and that he understood the damaging nature of the letters as evidenced by his directing Little to destroy the letters and never discuss their contents. The trial court further found Temoney had never recanted the statements made in the letters, and that the letters were not written for government authorities or in the context of interroga-

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tion, but were written freely and voluntarily only for Little, whom defendant trusted. Upon careful review of the record, we hold the trial court's findings are supported by competent evidence, and that its findings, which encompass all necessary inquiries, support its determination that the letters were admissible under Rule 804(b)(5).

[8] Moreover, following the same analysis applied in Part I, we have independently reviewed defendant's claim that admission of the letters violated his rights under the Confrontation Clause. The State amply demonstrated on *voir dire* that Temoney, who refused to testify, was unavailable as a witness. Additionally, the trial court entered extensive findings, as set forth above, on the issue of the letters' reliability and particularized guarantees of trustworthiness. Those findings established the existence of various corroborating circumstances; that it was evident Temoney had first-hand knowledge of the events of 6 December; that Temoney had a motive to tell the truth in the letters; that the letters were written to someone Temoney loved and trusted and he did so voluntarily; that the letters implicated him in the crimes; that Temoney understood the damaging nature of his statements; and that Temoney had not recanted those statements. These findings are sufficient under the applicable two-prong test to support a determination that admission of the letters did not violate defendant's constitutional rights.

In any event, given the substantial evidence admitted on defendant's involvement in the Brunson crimes, defendant cannot meet his burden of establishing that admission of Temoney's letters urging Little to lie about the events of 6 December were so prejudicial that defendant would not have been convicted had the letters not been admitted. *See* N.C. Gen. Stat. § 15A-1443(a) (2002). This argument is overruled.

IV.

[9] Defendant next maintains the trial court erred in admitting under G.S. § 8C-1 Rule 404(b) evidence of four similar crimes committed by defendant within weeks of the Brunson murder. Defendant does not argue that the evidence was too dissimilar or remote to be admissible under Rule 404(b); he simply asserts the probative value of the evidence was outweighed by its prejudice.

Despite a ruling that evidence is admissible under Rule 404(b), "it nevertheless remains subject to the balancing test of Rule 403. . . .

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“The responsibility to determine whether the probative value of relevant evidence is outweighed by its tendency to prejudice the defendant is left to the sound discretion of the trial court.” *State v. Thibodeaux*, 352 N.C. 570, 579, 532 S.E.2d 797, 804 (2000) (citation omitted), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001). Evidence probative of the State’s case is necessarily prejudicial to the defendant; the proper inquiry is one of degree. *State v. Ward*, 354 N.C. 231, 264, 555 S.E.2d 251, 272 (2001). “ “Unfair prejudice,” as used in Rule 403, means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.” ’ ” *Id.* (citations omitted).

The trial court conducted a *voir dire* hearing on the evidence of the other crimes and entered an extensive “Order on Admissibility.” In its order, the court detailed the evidence as to each of the four crimes, all of which happened within weeks of the Brunson murder, and set forth its specific findings of similarity and relevance to the Brunson crimes, including, but not limited to, (1) the victims were known drug dealers; (2) defendant and Temoney were both involved in the commission of the crimes; (3) the crimes occurred around midnight or in the early morning hours and involved forcible entry into the victims’ homes; (4) the perpetrators were seeking, and in most cases found and stole, jewelry, money, guns, and drugs, and in one case, a pair of “Gore-Tex Timberline boots” similar to those worn by defendant on the night of Brunson’s murder; (5) in two of the cases the occupants of the homes were forced to lie on the floor and were either tied up or covered; (6) in one case the victim’s phone lines were cut and his car stolen; (7) in one case the victim was repeatedly asked for money by one intruder while the other severely beat him about the head and he was shot by Temoney; and (8) defendant, who was apprehended at the scene of one of the crimes, was wearing clothing similar to that worn during the Brunson crime.

Based on its findings, the trial court concluded the evidence supported a reasonable inference that defendant committed the Brunson crimes and that it “establishes a chain of circumstances or context of the charged crime and serves to enhance the natural development of the facts and is necessary to complete the story of the charged crime for the jury.” The trial court further concluded this probative value of the evidence outweighed its potential prejudice to defendant. We discern no abuse of discretion in this conclusion, and therefore reject defendant’s argument on this ground.

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V.

In his final argument, defendant maintains, for preservation purposes only, that his indictment was insufficient to charge first degree murder. Defendant concedes our Supreme Court has addressed and rejected identical arguments. *See, e.g., State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 808 (2003). Accordingly, we likewise reject his argument.

No error.

Chief Judge EAGLES and Judge GEER concur.

DEBRA CIALINO, EMPLOYEE, PLAINTIFF v. WAL-MART STORES, EMPLOYER; AND
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER,
DEFENDANTS

No. COA02-412

(Filed 18 March 2003)

**1. Workers' Compensation— temporary partial disability—
continuing presumption of total disability**

The Industrial Commission did not err in a workers' compensation case by limiting plaintiff employee's award to temporary partial disability even though plaintiff contends that a continuing presumption of total disability arose based on the fact that she was injured at work and was unable to continue working or find suitable alternative employment at the same wages and for the same number of hours, because neither the Court of Appeals nor our Supreme Court has ever applied a continuing presumption of disability in a context other than an award by the Industrial Commission, a Form 21, or a Form 26 settlement agreement.

**2. Workers' Compensation— findings of fact—symptoms not
related to compensable occupational disease**

The Industrial Commission did not err in a workers' compensation case by finding as facts that plaintiff employee's symptoms after 31 December 1998 were not related to her compensable occupational disease, and that all of her hand, wrist, and arm problems were not related to her employment with defendant employer, because the findings are supported by competent evi-

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dence and the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

3. Workers' Compensation— attorney fees—failure to address request

The Industrial Commission erred in a workers' compensation case by failing to address plaintiff employee's request for attorney fees under N.C.G.S. § 97-88.1 and the case is remanded to the full Commission to determine whether defendant employer had a reasonable basis to defend the claim.

4. Workers' Compensation— occupational disease—competent evidence

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee developed a compensable occupational disease as a result of her employment, because the Commission was presented with competent evidence that: (1) plaintiff was exposed to disease causing job duties while working for defendant employer; (2) plaintiff was not exposed to these duties outside of her employment with defendant; (3) plaintiff's medical history did not reveal any problems with her hands, wrists, or arms; and (4) there was uncontroverted evidence from three medical professionals relating the symptoms and disease afflicting plaintiff to her employment with defendant.

5. Workers' Compensation— disability—competent evidence

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was disabled within the meaning of N.C.G.S. § 92-2(9), because there was competent evidence in the record that: (1) plaintiff reported an injury on the night of 23 June 1998 to her assistant manager; (2) plaintiff was taken by a fellow employee to a doctor; (3) plaintiff was advised to cease working based on the disease contracted while working; (4) plaintiff was subsequently terminated based on her injury rendering her unable to perform the requisite job duties; (5) plaintiff was unable to procure alternative employment at the same wages for the same hours despite reasonable efforts; and (6) plaintiff justifiably refused defendant's alternative employment offers.

Appeal by plaintiff and defendants from Opinion and Award of the North Carolina Industrial Commission entered 7 November 2001. Heard in the Court of Appeals 21 January 2003.

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

Young, Moore, and Henderson, P.A., by Joe A. Austin, Jr. and Dawn Dillon Raynor, for defendants.

WYNN, Judge.

In this workers' compensation appeal, Debra Cialino contends that the full Commission erred in awarding her temporary partial disability because the record reflects her entitlement to a presumption of total disability. On the other hand, her employer, Wal-Mart Stores, Inc. argues the full Commission erred by concluding Ms. Cialino had a compensable occupational disease attributable to her employment with Wal-Mart. After carefully reviewing the record, we hold the Commission's findings of fact are supported by competent evidence. Accordingly, "the [] Commission's findings of fact [are] conclusive on appeal." *Adams v. AVX Corp.*, 349 N.C. 676, 682, 509 S.E.2d 411, 414 (1998). Furthermore, the Commission's findings of fact support its conclusions of law. Therefore, we affirm the Opinion and Award of the Industrial Commission. We remand, however, because the full Commission failed to address Ms. Cialino's request for attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2002).

I. Facts

The evidence in the record tends to show that Ms. Cialiano began working for Wal-Mart on 3 February 1998. Lacking the financial resources to afford daytime childcare, Ms. Cialino worked Wal-Mart's night shift from 10:00 p.m. to 7:00 a.m. At Wal-Mart, her job duties involved the repetitive use of her hands, wrists, and arms; Ms. Cialino was required to unload boxes from delivery trucks, move the boxes to appropriate locations within the store, stock shelves with the contents of the boxes, and break down the boxes with box cutters. Over the course of her employment with Wal-Mart, Ms. Cialino began to experience pain and numbness in her hands, wrists, and arms. The symptoms were bilateral, but worse on the right side. For a few months, Ms. Cialino treated the pain by placing band-aids around her fingers, wrapping her wrists in bandages, and by applying ointment to inflamed areas.

On 23 June 1998, Ms. Cialino experienced and reported an inflammation of her symptoms to her Wal-Mart assistant manager, Joe McDonald. A fellow employee escorted Ms. Cialino to Wal-Mart's

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company doctor at Knightdale Primary Care where Rena Hodges, a board certified Physician's Assistant, initially diagnosed Ms. Cialino with a bilateral repetitive motion injury consistent with carpal tunnel syndrome. Ms. Hodges prescribed the following work restrictions: (1) to lift no more than ten pounds, (2) to wear wrist splints, and (3) to limit the use of both hands to no more than forty minutes per hour.

After receiving treatment, Ms. Cialino reported to the store Manager for Wal-Mart, Beatrice Floyd: "The doctor said it looks like carpal tunnel"; Ms. Floyd responded: "Just go home." Ms. Cialino went home; however, later that night, she called Ms. Floyd to inquire about her employment. According to Ms. Cialino, Ms. Floyd stated that Wal-Mart did not have a suitable position on the night shift; accordingly, Ms. Floyd offered her a position during the daytime as a greeter. However, Ms. Cialino refused that offer because of her child-care needs. Moreover, Ms. Floyd purportedly offered Ms. Cialino a temporary position monitoring a fireworks tent during the Fourth of July weekend. Ms. Cialino did not accept this position because of concerns for her safety. When Ms. Cialino did not accept the employment alternatives, Wal-Mart terminated her employment.¹

On 13 July 1998, Ms. Cialino returned to Knightdale Primary Care for a follow-up visit with Ms. Hodges. Although Ms. Cialino reported that her symptoms had improved, she was still experiencing pain in her hands, wrists, and arms. Based on three visits and a series of medical tests, Ms. Hodges testified on the issue of causation that the repetitive motion Ms. Cialino was exposed to at Wal-Mart was a substantial contributing factor to her symptoms. Unable to provide Ms. Cialino with relief, Ms. Hodges referred her to a board certified orthopedist with an expertise in the field of hand surgery, Dr. James R. Post.

Dr. Post's deposition testimony tends to show that: On 5 November 1998, he first examined Ms. Cialino who complained of

1. Although the Commission found that Ms. Cialino used reasonable efforts to procure suitable employment, Ms. Cialino was unable to find employment at the same wage for the same hours. However, Ms. Cialino accepted a part-time job at Gold's Gym in August 1998 doing childcare at a decreased pay rate. At this job, Ms. Cialino earned \$6.00 an hour and worked twenty-five hours a week. On 30 December 1998, Ms. Cialino ceased working for Gold's Gym and accepted a child care position at Ladies Fitness and Wellness Center on 20 January 1999. Ms. Cialino earned \$6.00 per hour, worked approximately twenty hours a week, and continued working through 1 May 1999. Ms. Cialino gave un-controverted testimony that: (1) the childcare positions did not require the repetitive use of her hands, wrists, or arms; and (2) that she did not lift weights while working at either gym.

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bilateral hand pain from working with boxes at Wal-Mart. Dr. Post's initial examination revealed symptoms consistent with bilateral de Quervain's Tenosynovitis and mild bilateral carpal tunnel syndrome. Dr. Post prescribed anti-inflammatory medication, and used a splint to immobilize Ms. Cialino's thumb and wrist. Subsequent medical tests, ruled out the preliminary diagnosis of carpal tunnel syndrome. On 3 December 1998, Dr. Post examined Ms. Cialino for a second time, and noted an improvement in de Quervain's tenosynovitis. However, Ms. Cialino complained of numbness in the dorsum of her right hand and pain in the base of her left thumb. With respect to this pain, Dr. Post made a new diagnosis of "Synovitis of the basial thumb joint." On 31 December 1998, tests performed by Dr. Post revealed that Ms. Cialino's tenosynovitis had completely resolved itself. However, Ms. Cialino still complained of diffuse pain in her hands, wrists, and arms.

In his deposition, Dr. Post expressed the opinion that: (1) the symptoms of de Quervain's tenosynovitis afflicting Ms. Cialino were related to her work at Wal-Mart; (2) Ms. Cialino's work duties at Wal-Mart were a substantial contributing factor in the development of these symptoms; and (3) members of the general public are not equally exposed to the repetitive activities which Ms. Cialino experienced while working at Wal-Mart. However, Dr. Post did express reservations about whether Ms. Cialino's synovitis of the left thumb was caused by her work at Wal-Mart. Dr. Post noted that the synovitis of the left thumb did not appear until 3 December 1998, and that it would not take five months for these symptoms to appear. Furthermore, because tests conducted on 31 December 1998 revealed that Ms. Cialino's tenosynovitis had completely resolved itself, Dr. Post testified that he was "not sure" whether any of Ms. Cialino's symptoms after 31 December 1998 were related to her employment with Wal-Mart.

By the time of their final meeting and appointment on 11 March 1999, Dr. Post testified he had exhausted all non-invasive treatment options and made a diagnosis of bilateral hand pain. According to Dr. Post, Ms. Cialino's symptoms indicated a gradual progression from specific symptoms to a diffuse bilateral pain. Because Dr. Post was uncertain of the cause or diagnosis of these complaints, Dr. Post suggested a referral to the Cedar Neurology Pain Clinic.

Ms. Cialino was subsequently examined by an expert in the field of Neurology, Dr. Gregory M. Bertics. For some reason not explicated in the record, Dr. Bertics was unaware of (1) previous tests per-

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formed by Dr. Post and Ms. Hodges, and (2) the fact that many of Ms. Cialino's symptoms arose months after her termination from Wal-Mart. Accordingly, Dr. Bertics duplicated many of the previous diagnoses and tests made by Dr. Post and Ms. Hodges, and based his medical conclusions on the mistaken belief that all of Ms. Cialino's symptoms arose at the same time. Ultimately, Dr. Bertics only contributed one substantial piece of evidence to the record: He testified on the issue of causation that the temporal relationship between Ms. Cialino's duties at Wal-Mart and her symptoms led to a "common sense" conclusion that a "cause and effect relationship" existed between Ms. Cialino's job duties at Wal-Mart and her complaints of diffuse pain. On 17 July 1999, Dr. Bertics released Ms. Cialino from his care.

II. Procedural History

On 9 September 1998, Ms. Cialino filed a Form 18, notifying Wal-Mart of her injury and workers' compensation claim. On 20 July 1998, Wal-Mart filed a Form 61 denying the claim. On 3 September 1998, Ms. Cialino filed a Form 33, requesting that her claim be set for a hearing before a Deputy Commissioner of the North Carolina Industrial Commission. On 12 November 1998, Wal-Mart filed a Form 33R denying that the injury afflicting Ms. Cialino arose from her course of employment with Wal-Mart. On 20 June 2000, a Deputy Commissioner filed an Opinion and Award concluding that: (1) Ms. Cialino acquired and aggravated her synovitis and tenosynovitis while performing job duties at Wal-Mart; and (2) Ms. Cialino "is entitled to temporary total disability."

On 11 December 2000, Wal-Mart filed a Form 44, a notice of appeal from the Deputy Commissioner's Opinion and Award and an application of review to the full Commission. On 17 January 2001, Ms. Cialino filed a Motion with the Industrial Commission praying for the Commission to refer the matter to the Commissioner of Insurance to investigate Wal-Mart for apparent bad faith practices in violation of N.C. Gen. Stat. § 97-88.1. On 7 November 2001, the full Commission filed an Opinion and Award modifying the Opinion and Award of the Deputy Commissioner. Notably, in Finding of Fact 29 the full Commission found:

Having considered all the evidence, the Commission finds that the opinions of Dr. Post are entitled to greater weight than those of Ms. Hodges or Dr. Bertics. Ms. Hodges is not a physician Dr. Bertics did not see plaintiff until April

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1999 . . . [and] was not aware of the changes in plaintiff's reported symptoms as noted by Dr. Post. Further, Dr. Bertics' opinion concerning causation is based in large part, if not solely, on the temporal relationship between the work activity and the symptoms as related to him by plaintiff. His opinion is thus based on the inaccurate history that all plaintiff's symptoms started soon after she began her work activities with defendant-employer. The more credible evidence shows that the undiagnosed, more diffuse complaints did not arise until December 1998, several months after the initial onset and after plaintiff had ceased her employment with defendant-employer.

Based substantially on this credibility determination, the full Commission determined in Finding of Fact 31 that: "From and after June 24, 1998, until and through December 31, 1998, [Ms. Cialino] was incapable because of her compensable injury to perform her former employment . . . or other suitable employment at the same wages for the same number of hours." However, the full Commission did note, in Finding of Fact 32, that Ms. Cialino was able to procure employment and work between sixteen and twenty-five hours per week during her bout with her compensable injury. Accordingly, the full Commission concluded, as a matter of law, that Ms. Cialino "is entitled to temporary partial disability compensation at the rate of two-thirds of the difference between her pre-injury average of \$304.99 and her wages earned at Gold's Gym and Ladies Fitness and Wellness, from June 24, 1998, and continuing through and including December 31, 1998." From this Opinion and Award, Ms. Cialino and Wal-Mart appeal.

III. Ms. Cialino's Appeal

In her appeal, Ms. Cialino assigns error to the full Commission's findings of fact and conclusions of law. "Under our Workers' Compensation Act, 'the Commission is the fact finding body.'" *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). " 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The Commission's findings of fact " 'are conclusive on appeal if supported by any competent evidence.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). Thus, this Court is precluded from weighing the evidence on

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appeal; rather, we can do no more than “‘determine whether the record contains any evidence tending to support the [challenged] finding.’” *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274). “However, the Commission’s legal conclusions [drawn from competent findings of fact] are [fully] reviewable by” this Court. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) (citation omitted).

[1] By her first argument, Ms. Cialino contends the Industrial Commission erred as a matter of law by limiting her compensation to partial disability benefits. Ms. Cialino argues she was entitled to a legal presumption of continuing total disability until she returned to work at suitable employment. After carefully reviewing the record, we disagree.

It is a well-established legal principle in North Carolina that “once the disability is *proven* [by the employee], ‘there is a presumption that [the disability] continues until the employee returns to work at wages equal to those [she] was receiving at the time [her] injury occurred.’” *Brown v. S & N Communs.*, 124 N.C. App. 320, 329, 477 S.E.2d 197, 202 (1996) (quoting *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 476, 374 S.E.2d 483, 485 (1988) and *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)) (emphasis added). In cases involving the *Watkins* presumption, the claimant can meet the initial burden of *proving* a disability in two ways: (1) by a previous Industrial Commission award of continuing disability, or (2) by producing a Form 21 or Form 26 settlement agreement approved by the Industrial Commission. *See e.g.*, *Watkins*, 279 N.C. at 137, 181 S.E.2d at 592 (“If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred.”); *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994) (presumption arose when “defendant admitted liability . . . through approved settlements (Form 21 and Form 26)”). *See also Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 139, 530 S.E.2d 62, 64 (2000) (Form 21); *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997) (Industrial Commission award); *Dancy v. Abbott Labs.*, 139 N.C. App. 553, 557, 534 S.E.2d 601, 604 (2000) (Form 21).

In this case, Ms. Cialino does not claim that she satisfied the initial burden of *proving* her disability, thus spawning a presumption of

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continuing total disability, from a prior award of the Industrial Commission or a settlement agreement pursuant to a Form 21 or a Form 26.² Instead, Ms. Cialino contends that a continuing presumption of total disability arose because she was injured at work, and, thereafter, she was unable to continue working or find suitable alternative employment at the same wages and for same number of hours. Seemingly, Ms. Cialino argues that there is a third method of establishing a continuing presumption of disability. Neither this Court nor our Supreme Court has ever applied a continuing presumption of disability in a context other than an award by the Industrial Commission, a Form 21, or a Form 26 settlement agreement. We decline to do so in this case. Therefore, the full Commission did not err; consequently, the corresponding assignments of error are overruled.

[2] By her second and third arguments, Ms. Cialino contends the Industrial Commission made erroneous factual findings that: (1) Her symptoms after 31 December 1998 were not related to her compensable occupational disease, and (2) all of her hand, wrist, and arm problems were not related to her employment with Wal-Mart. After carefully reviewing the record we hold the Commission had competent evidence to make the challenged factual determinations, and, therefore, these factual findings are binding on appeal. *See Adams*, 349 N.C. at 682, 509 S.E.2d at 414.

Throughout Findings of Fact 19, 20, 21, 28, and 29 the Commission noted the existence of conflicting evidence in the record regarding pain and symptoms afflicting Ms. Cialino after 31 December 1998. Specifically, where Dr. Bertics and Ms. Hodges testified that the symptoms after 31 December 1998 were caused by her employment with Wal-Mart, Dr. Post was "not sure." The Commission aptly summarized this testimony in Finding of Fact 19, 20, 21, 28, and 29:

19. Dr. Post initially testified that [Ms. Cialino] had de Quervian's tenosynovitis of both hands and synovitis of the left thumb, both of which were caused by her employment with [Wal-Mart]. Dr. Post, however, subsequently testified that the synovitis of the left thumb did not appear until December 3, 1998, and that it would not take five months for these symptoms to appear; he thus concluded that the de Quervian's tenosynovitis is related to [Ms. Cialino's] employment with [Wal-Mart], but he was unable to relate her other symptoms to her employment.

2. In fact, Wal-Mart filed a Form 61 denying Ms. Cialino's workers' compensation claim.

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20. As found by Dr. Post, [Ms. Cialino's de Quervian's] tenosynovitis had completely resolved and her tests for this condition were negative by December 31, 1998. . . .

21. Although Dr. Post testified that [Ms. Cialino's] bilateral tenosynovitis was caused by [Ms. Cialino's] employment, he was unable to reach a diagnosis concerning [Ms. Cialino's] other, diffuse complaints. Dr. Post explained that these symptoms seemed to change with each visit and that he was unsure that these symptoms were related to her employment. Dr. Post testified that [Ms. Cialino's] current complaints could be psychogenic hand pain, rheumatologic problems, causalgia, or reflex sympathetic dystrophy. As he was uncertain of the diagnosis for these complaints, Dr. Post suggested that referral to a multi-disciplinary pain clinic . . . would be beneficial.

. . . .

28. Dr. Bertics rendered an opinion that [Ms. Cialino's] symptoms were related to her employment and testified that although he had not diagnosed the condition causing [Ms. Cialino's] symptoms, he related the symptoms to employment because of the temporal relationship between the activities and the onset of symptoms. Because Dr. Bertic did not have Dr. Post's records, he was not aware that [Ms. Cialino's] symptoms changed during the course of Dr. Post's treatment.

29. Having considered all the evidence, the Commission finds that the opinions of Dr. Post are entitled to greater weight than those of Ms. Hodges or Dr. Bertics. Ms. Hodges is not a physician Dr. Bertics did not see plaintiff until April 1999 . . . [and] was not aware of the changes in plaintiff's reported symptoms as noted by Dr. Post. Further, Dr. Bertics' opinion concerning causation is based in large part, if not solely, on the temporal relationship between the work activity and the symptoms as related to him by plaintiff. His opinion is thus based on the inaccurate history that all plaintiff's symptoms started soon after she began her work activities with defendant-employer. The more credible evidence shows that the undiagnosed, more diffuse complaints did not arise until December 1998, several months after the initial onset and after plaintiff had ceased her employment with defendant-employer.

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Although the testimony of all three medical professionals was competent evidence, the Commission decided that Dr. Post's opinions were more credible than the opinions of Dr. Bertics or Ms. Hodges. Our Supreme Court has made it eminently clear that: "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413. The Commission concluded that: (1) Ms. Cialino contracted de Quervian's tenosynovitis, a compensable occupational disease, through her employment with Wal-Mart; (2) Ms. Cialino's de Quervian's tenosynovitis condition was resolved by 31 December 1998; and (3) Ms. Cialino's diffuse complaints of pain after 31 December 1998, particularly Dr. Post's diagnosis of synovitis of the left thumb, were not related to Ms. Cialino's employment with Wal-Mart.³ Because the Commission's findings of fact are supported by competent evidence in the record, and because the Commission is the sole judge of the credibility of the witnesses and weight to be given their testimony, this Court may neither revisit these findings nor re-weigh this evidence on appeal. Accordingly, these findings of fact are binding, and, therefore, the corresponding assignments of error are overruled.

³ Ms. Cialino challenges this finding and relies on upon the workers' compensation presumption established in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541-42, 485 S.E.2d 867, 869 (1997). The *Parsons* presumption applies to claims for additional medical compensation under N.C. Gen. Stat. § 97-25. Under the *Parsons* analysis:

In an action for additional compensation for medical treatment, the medical treatment sought must be "directly related to the original compensable injury." . . . If additional medical treatment is required, there arises a rebuttable presumption that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury.

Reininger v. Prestige Fabricators, Inc., 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (quoting *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996)).

While, under *Parsons*, there is a presumption that the medical care sought by Ms. Cialino for her hand is related to her workplace injury, this presumption is rebuttable. Pursuant to *Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 368 (1997), defendants can rebut this presumption (1) by producing evidence that Ms. Cialino was capable of returning to work at wages equal to those she was receiving at the time of injury, or (2) by offering medical evidence that she no longer retained any impairment as a result of the workplace injury. See also *Harrington v. Adams-Robinson Enters.*, 128 N.C. App. 496, 500-01, 495 S.E.2d 377, 380 (Walker, J., dissenting), *adopted per curiam*, 349 N.C. 218, 504 S.E.2d 786 (1998) (medical evidence that doctor released plaintiff to return to unrestricted work rebutted presumption). Here, the record contains competent medical evidence to support the Commission's findings, establishing that defendants rebutted the presumption, that the work related injuries resolved completely by 31 December 1998.

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[3] In her fourth argument, Ms. Cialino contends the Industrial Commission erred by failing to address her request for attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. After carefully reviewing the record, we agree.⁴

"This Court has held that when the matter is 'appealed' to the full Commission. . . , it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992). Under N.C. Gen. Stat. § 97-88.1, the sanctions and attorney's fees statute:

If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable attorney's fees

"The purpose of [this] section is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (citing *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982)). In support of her request for costs and attorney's fees, Ms. Cialino argues that Wal-Mart denied her claim without reasonable investigation and failed to accept the claim when liability became reasonably clear. The full Commission's failure to address this issue was error.⁵

Ms. Cialino urges this Court to decide the issue of her entitlement to attorney's fees in this appeal; we decline to do so. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995). Instead, we believe the Commission is better suited, in this particular case, to determine whether Wal-Mart had a "reasonable

4. Furthermore, Ms. Cialino contends the Industrial Commission erred by failing to address her 17 January 2001 motion to have the underlying claim referred to the Department of Insurance for an investigation into Wal-Mart's alleged improper behavior. However, by not referring the matter to the Department of Insurance before hearing the case, the Commission implicitly, and effectively, denied the motion.

5. Although Wal-Mart cites *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 85 S.E.2d 596 (1995), and *Guy v. Burlington Indus.*, 74 N.C. App. 685, 329 S.E.2d 685 (1985), for the proposition that the "Commission is not required to make findings as to facts . . . not material to [Ms. Cialino's] claim," we find this argument unpersuasive. Whether Wal-Mart had a reasonable ground to deny Ms. Cialino's workers' compensation claim is material.

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basis” to defend the claim. Accordingly, we remand this issue to the full Commission. We have carefully reviewed Ms. Cialino’s remaining assignments of error and find them to be without merit.

IV. Wal-Mart’s Appeal

[4] On appeal, Wal-Mart contends the Industrial Commission erred by concluding that Ms. Cialino developed a compensable occupational disease as a result of her employment. After carefully reviewing the record, we find no error.

Wal-Mart argues the full Commission erred in concluding that Ms. Cialino developed a compensable occupational disease as a result of her employment.⁶ Notably, Wal-Mart concedes that Ms. Cialino produced competent evidence that her employment with Wal-Mart aggravated symptoms, but argues that Ms. Cialino failed to present competent evidence that her employment with Wal-Mart caused the underlying occupational disease. This argument is without merit.

Our Supreme Court has recognized that: “In the case of occupational diseases proof of a causal connection between the disease and the employee’s occupation must of necessity be based on circumstantial evidence.” *Booker v. Duke Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979). The *Booker* Court noted that the Commission should consider the following circumstances when considering whether an occupational disease is caused, “(1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee’s medical history.” *Id.*

In the case *sub judice*, the Commission was presented with competent evidence that Ms. Cialino was exposed to disease causing job duties while working for Wal-Mart, that Ms. Cialino was not exposed to these duties outside of her employment with Wal-Mart, and that her medical history did not reveal any problems with her hands, wrists, or arms. Moreover, the uncontroverted evidence from three medical professionals related the symptoms and disease afflicting Ms. Cialino to her employment with Wal-Mart. Thus, the Commission had competent

6. As noted, the Commission’s findings of fact are binding on appeal if supported by any competent evidence. Moreover, “[t]he evidence tending to support plaintiff’s claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.” *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

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evidence from which to find an occupational disease. Accordingly, the Commission's findings of fact are binding on appeal. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

[5] Furthermore, Wal-Mart contends the Commission erroneously concluded that Ms. Cialino was "disabled" within the meaning of the Workers' Compensation Act. Under the Act, disability is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 92-2(9). Our Supreme Court has consistently held that:

In order to support a conclusion of disability, the Commission must find: (1) [] plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in the same employment, (2) [] plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) [] plaintiff's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 594, 290 S.E.2d 682, 683 (1982). See also, *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 345 S.E.2d 374 (1986); N.C. Gen. Stat. § 97-2(9).

In the case *sub judice*, competent evidence in the record reveals that Ms. Cialino reported an injury on the night of 23 June 1998 to her assistant manager; she was taken by a fellow employee to a doctor; she was advised not to continue working because of a disease contracted while working; she was subsequently terminated because her injury rendered her unable to perform the requisite job duties; and she was unable to procure alternative employment at the same wages for the same hours despite reasonable efforts. Although the Commission received evidence that Wal-Mart offered Ms. Cialino alternative employment, the Commission concluded that "the position[s] [were] not suitable," and, in the alternative, that Ms. Cialino "justifiably refused." There is competent evidence in the record to support all of these findings. Accordingly, the Commission satisfied the requirements of *Hilliard*, and Wal-Mart's assignments of error are, consequently, overruled.

We have reviewed Wal-Mart's remaining assignments of error, and find them to be without merit.

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Affirmed in part, and remanded.

Judges BRYANT and GEER concur.

IN RE: FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM ELI BROWN AND VELVET BROWN, IN THE ORIGINAL AMOUNT OF \$143,600.00, DATED OCTOBER 18, 1999, AND RECORDED IN BOOK 2724, PAGE 568, DURHAM COUNTY REGISTRY **CURRENT OWNER(S):** ELI BROWN AND VELVET BROWN, LAWRENCE S. MAITIN, SUBSTITUTE TRUSTEE

No. COA01-838

(Filed 18 March 2003)

1. Mortgages and Deeds of Trust— foreclosure hearing—testimony of substitute trustee

There was no error in a superior court foreclosure hearing where a substitute trustee testified on direct examination about his efforts to serve the debtors (respondents) with notice of the hearing, his testimony expanded under questioning by the judge to include the existence of a valid debt, default, and power of sale, and he answered still more questions under cross-examination from respondents. It was proper for the mortgage company to inquire into the trustee's efforts to serve the debtors and, after the judge broadened the scope of the testimony, respondents further expanded the testimony on cross-examination. Parties may not complain of actions they induced.

2. Evidence— unserved affidavits—no objection to earlier, identical affidavits—no prejudice

The superior court did not abuse its discretion in a foreclosure hearing by admitting unserved affidavits which related the trustee's efforts to serve notice of the hearing and the existence of the statutory elements for foreclosure. Earlier, identical affidavits from the same witnesses had been admitted without objection, respondents were clearly familiar with the assertions contained therein, and the new affidavits contained no new assertions which respondents could contradict through further investigation or additional time.

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3. Evidence— affidavit—weak method of proof—need for expeditious procedure

An affidavit from a mortgage company official was properly admitted in a superior court foreclosure hearing because the necessity for expeditious procedure outweighs the weakness of the method of proof. Requiring the lender and mortgage servicer to present live testimony as to the existence of the statutory foreclosure elements would frustrate the ability of the deed of trust's sale provision to function as an expeditious and less expensive alternative to a foreclosure by action; moreover, requiring an out-of-state lender or servicer (in this case from California) to be present at a foreclosure hearing would be a burden which would be passed on in the form of increased lending costs.

4. Evidence— foreclosure—trustee's testimony—beyond personal knowledge—other sufficient evidence

There was no prejudice in a foreclosure hearing before a superior court judge from the trustee's testimony about elements of foreclosure beyond his personal knowledge because the promissory note, deed of trust, and affidavit from the mortgage service company constituted sufficient evidence of the debt and default.

5. Mortgages and Deeds of Trust— foreclosure—notice—posting on rental property

A motion to dismiss a foreclosure proceeding was properly denied where respondents contended that service of process by certified mailings to the property and posting on the property were insufficient because they rented out the property, but respondents were represented by counsel at hearings before the clerk and the superior court and requested multiple continuances. Although the tax records listed an address different from the subject property, the trustee had no way of knowing that the names on the tax records, one of which was a corporation, represented the same individuals who signed the deed of trust.

6. Mortgages and Deeds of Trust— burden of proof—judge's remark

A superior court judge's remark that the debtors had failed to show valid reason for a foreclosure not to proceed did not improperly shift the burden of proof but indicated the judge's legal conclusion. The mortgage company offered sufficient com-

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petent evidence of each of the required elements and respondents only offered evidence tending to disprove notice.

Appeal by respondents from judgment entered 17 April 2001 by Judge Evelyn W. Hill in Durham County Superior Court. Heard in the Court of Appeals 27 January 2003.

Stubbs, Cole, Breedlove, Prentis & Biggs, P.L.L.C., by Terry D. Fisher, for petitioner-appellee Option One Mortgage Corporation.

Law Offices of Thomas H. Stark, by Thomas H. Stark and John G. Briggs III, for respondent-appellants Eli Brown and Velvet Brown.

ELMORE, Judge.

Respondents Eli and Velvet Brown (collectively, “respondents” or “the Browns”) appeal from a 17 April 2001 trial court order authorizing substitute trustee, Lawrence S. Maitin (“substitute trustee” or “Maitin”), to proceed with foreclosure on a deed of trust securing the Browns’ indebtedness on certain real property located at 2227 University Drive, Durham, North Carolina (“subject property”). Appellee Option One Mortgage Corporation (“Option One”) services the Browns’ loan account under a promissory note executed by Eli Brown and secured by the subject deed of trust. Option One is also part of a business entity involving Norwest Bank Minnesota, N.A., which is the holder of the promissory note and subject deed of trust.

Respondents assign error to the admission of testimonial evidence from the substitute trustee, as well as the testimony via affidavit of Option One’s assistant secretary, in the trial court proceedings. Respondents also appeal the trial court’s denial of their motion to dismiss, argue that the trial court improperly shifted the burden of proof in the foreclosure hearing to respondents, and assert that the foreclosure sale should be deemed defective. For the reasons stated herein, we affirm the trial court’s order authorizing foreclosure.

On 18 October 1999, Eli Brown and Tandem National Mortgage, Inc. (“Tandem”) executed the promissory note, whereby Tandem extended to Eli Brown a mortgage loan in the principal amount of \$143,600.00, plus interest, for the purchase of the subject property. Tandem thereafter transferred its rights as the note holder to

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“Norwest Minnesota Bank, N.A., as trustee, for the registered holders of Option One Mortgage Loan Trust.” Tandem also transferred the deed of trust to Option One. The promissory note contained the following relevant provisions:

7. BORROWER'S FAILURE TO PAY AS REQUIRED

...

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of the principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

...

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the [subject] Property Address above or at a different address if I give the Note Holder a notice of my different address.

The promissory note was secured by the subject deed of trust, executed by Eli Brown and Velvet Brown on 18 October 1999, and recorded at the Durham County Registry on 19 October 1999. The deed of trust provided in pertinent part as follows:

Borrower irrevocably grants and conveys to Trustee and Trustee's successors and assigns, in trust, with power of sale, the [subject property].

14. Notices. Any notice to Borrower provided for in this [deed of trust] shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the [subject] Property Address or any other address Borrower designates by notice

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to Lender. . . . Any notice provided for in this [deed of trust] shall be deemed to have been given to Borrower . . . when given as provided in this paragraph.

. . .

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this [deed of trust] . . . If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this [deed of trust] without further demand and may invoke the power of sale and any other remedies permitted by applicable law.

The Browns defaulted on their loan by failing to make any monthly payments after the period ending 1 December 1999. Pursuant to the terms of the promissory note and deed of trust, Option One thereafter accelerated the Browns' indebtedness and declared the balance to be immediately due. When no payment was forthcoming from the Browns, Maitin was named substitute trustee and instituted foreclosure proceedings by filing a petition for hearing and notice of hearing with the Durham County Clerk of Superior Court on 21 June 2000. Maitin attempted to serve these papers upon respondents by mailing them to the subject property, addressed to Eli Brown and Velvet Brown individually, via certified mail on 6 June 2000. These certified mailings, which were mistakenly addressed to Eli Brown and Velvet Brown at 2225, rather than 2227, University Drive, were returned to Maitin marked "unclaimed" on 8 June 2000. A return of service, dated 23 June 2000, was thereafter executed by a Durham County Sheriff's deputy with respect to both Eli Brown and Velvet Brown individually, stating that service was effected upon each "[b]y posting the Notice of hearing on the door of [the subject] property, after having first made due and diligent search and not having found the respondents." A foreclosure hearing before the clerk was set for 18 July 2000.

The foreclosure hearing was thereafter continued until 1 August 2000, apparently due to a death in the clerk's family. At the Browns' request, the hearing was subsequently continued until 22 August 2000. For reasons which are unclear from the record, the hearing did not take place on 22 August 2000. On 21 September 2000, Maitin filed an amended notice of hearing, which set the foreclosure hearing for 24 October 2000. Once again, Maitin attempted to serve respondents

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via individual certified mailings of the amended notice to Eli and Velvet Brown at the subject property address, but these certified mailings, which were properly addressed, were returned to Maitin marked “unclaimed” on 26 September 2000. As was the case in June, a Durham County Sheriff’s deputy executed a return of service for each of the respondents on 25 September 2000, stating that the amended notice of hearing was served upon Eli Brown and Velvet Brown “by posting the Amended Notice of hearing on the door of [the subject] property, after first having made due and diligent search and not having found the respondents.”

On 24 October 2000, a foreclosure hearing was held before the Durham County Clerk of Superior Court. By order filed on 26 October 2000, the clerk authorized Maitin, the substitute trustee, to proceed with foreclosure on the subject deed of trust. Also on 26 October 2000, a document entitled “Affidavit of Velvet Brown” was filed with the clerk’s office, wherein Velvet Brown testified “[t]hat she has not gone on the property which is the subject matter of this proceeding and, therefore, has not seen any posting which may or may not have been located on the real property[.]” On 6 November 2000, respondents filed their notice of appeal to the superior court of the clerk’s order, pursuant to N.C. Gen. Stat. § 45-21.16(d1). The superior court hearing was initially calendared for 13 February 2001, but for reasons not reflected in the record, the hearing was not held at that time. The Durham County Trial Court Administrator thereafter notified Maitin and respondents’ counsel by mail that the matter had been placed on the 16 April 2001 trial calendar. On 17 April 2001, counsel for the Browns, counsel for Option One, and Maitin appeared for the hearing *de novo* before the superior court. By order filed 17 April 2001, Judge Hill authorized Maitin to proceed with foreclosure under a power of sale. On 26 April 2001, respondents filed notice of appeal to this Court.

I.

[1] Respondents first assign error to the trial court’s decision allowing the substitute trustee, Maitin, to testify “adversely” to respondents. At the superior court hearing, counsel for Option One called Maitin as a witness, and Maitin’s testimony on direct examination was strictly limited to his efforts to serve respondents with the notice of hearing and amended notice of hearing. In response to questioning from Judge Hill, Maitin testified as to the existence of a valid debt, default, and existence of a power of sale with respect to the subject deed of trust. On cross examination, counsel for respondents

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inquired as to Maitin's personal knowledge of (1) efforts to serve the Browns, (2) the existence of a valid debt, (3) the identity of the note holder, and (4) whether there had been a default. Respondents contend that Maitin's testimony was improper because it tended to support the four findings the court must make in order to authorize foreclosure, namely (1) a valid debt, (2) default, (3) right to foreclose under the instrument, and (4) notice to all parties so entitled. N.C. Gen. Stat. § 45-21.16(d) (2001). We find no merit in respondents' argument.

"In deed of trust relationships, the trustee is a disinterested third party acting as the agent of both the debtor and the creditor." *In re Proposed Foreclosure of McDuffie*, 114 N.C. App. 86, 88, 440 S.E.2d 865, 866 (1994). In a foreclosure proceeding, the trustee is charged with the duty to effect service of the notice of hearing. N.C. Gen. Stat. § 45-21.16(a) (2001). At the outset of the superior court hearing, respondents' counsel stated that he was "appearing for the purposes of challenging jurisdiction . . . not making a general appearance." Respondents challenged the trial court's jurisdiction on the grounds that Maitin's service of the notice of hearing was inadequate. Consequently, it was not improper for the trial court to allow Option One to rebut respondents' assertion by calling Maitin as a witness and inquiring as to his efforts to serve the Browns, since Maitin had a statutory duty to effect valid service of process in this matter. Because the trustee's duty to serve notice of the foreclosure hearing inures just as much to the benefit of the *borrower* as it does to the lender, we do not find that Maitin's testimony concerning his efforts to fulfill this duty has removed him in any way from his proper status as a "disinterested third party" in the instant deed of trust relationship. Option One's direct examination of Maitin was strictly limited to the means employed by Maitin to obtain service of process upon the Browns. While Judge Hill broadened the scope of Maitin's testimony by inquiring as to the existence of a valid debt, default, and power of sale, counsel for respondents on cross-examination further expanded Maitin's testimony by inquiring as to his personal knowledge of these additional foreclosure elements. A party may not complain of action which that party induced. *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). This assignment of error is overruled.

II.

[2] Respondents next assign error to the superior court's admission into evidence of (1) an affidavit of service executed on 12 April 2001, by which Maitin testified regarding his efforts to serve the notice of

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hearing upon the Browns; and (2) an affidavit executed on 11 April 2001 by Kathy Milchak, Option One's assistant secretary, by which Milchak testified as to the existence of the statutory elements for foreclosure. Respondents also assert that the superior court erred by admitting two additional affidavits, executed by Maitin on 23 October 2000 and by Milchak on 4 May 2000, which are identical to the aforementioned affidavits in all respects save date of execution. Respondents assert that the superior court improperly relied on these affidavits as evidence of the four statutory elements of foreclosure. Respondents contend that admission of these affidavits was error because they were not properly served, and because Milchak's affidavit was inadmissible hearsay. We do not agree with respondents' assertions.

Rule 5(a) of the North Carolina Rules of Civil Procedure provides in pertinent part that "every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties." N.C. Gen. Stat. § 1A-1, Rule 5(a) (2001). Proof of service of such papers must be filed with the court. N.C. Gen. Stat. § 1A-1, Rule 5(c) (2001). Respondents contend that because the affidavits of Maitin and Milchak were not served upon them prior to the hearing, and because the affidavits do not have certificates of service attached, the trial court should not have admitted these unserved affidavits into evidence.

In *Chaplain v. Chaplain*, 101 N.C. App. 557, 559-60, 400 S.E.2d 121, 122, *rev. denied*, 328 N.C. 570, 403 S.E.2d 508 (1991), this Court found the defendant's argument that "the trial court erred in receiving the affidavit of plaintiffs' counsel . . . because it was not served on counsel before the hearing" to be "without merit." The *Chaplain* Court held as follows:

The provision requiring service of materials before a hearing for summary judgment is not inviolable. *Unserved materials are receivable within the court's discretion.* Rule 6(d), N.C. Rules of Civil Procedure. The main purpose of requiring service of affidavits before the hearing is, of course, to enable the other party to answer the matters sworn to. That purpose was not compromised or frustrated by receiving the unserved affidavit, since the record does not show, and defendant does not contend, that if she had been served before the hearing she could or would have contradicted the assertion [contained within the unserved affidavit].

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Id. at 560, 400 S.E.2d at 122-23 (emphasis added). With respect to the trial court's admission into evidence of unserved affidavits, we find no reason why this Court should distinguish between affidavits filed in support of a motion for summary judgment and affidavits filed in support of a petition for foreclosure, and we hold that the unserved affidavits of Maitin and Milchak were properly received into evidence within the trial court's discretion. Where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason or so arbitrary that they could not have been the result of a reasoned decision. *Id.*

Here, as in *Chaplain*, respondents' ability to "answer the matters sworn to" in these affidavits was not "compromised or frustrated" by their admission into evidence. The earlier affidavits of Maitin and Milchak had already been admitted into evidence at the hearing before the clerk, and there is nothing in the record to indicate respondents' counsel objected to their admission at that time. They are identical in content to the latter affidavits. Respondents were clearly familiar with the assertions contained therein—specifically, that each of the four elements of foreclosure was present. Respondents came to the superior court hearing fully prepared to challenge the "notice" element, as evidenced by counsel's assertion at the hearing's outset that he was "appearing for the purpose of challenging jurisdiction" based on improper service. As in *Chaplain*, these affidavits contained no new assertions which respondents could "contradict" through further investigation or additional time to construct an argument prior to the hearing. We hold that the trial court did not abuse its discretion by admitting the unserved affidavits into evidence.

[3] Respondents also contend that Milchak's affidavits should not have been admitted into evidence because they are inadmissible hearsay. 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). Hearsay evidence "is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2001) (emphasis added).

Pursuant to N.C. Gen. Stat. § 45-21.16(d), in a foreclosure hearing before the clerk of court, "the clerk shall consider the evidence of the

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parties and may consider . . . affidavits and certified copies of documents.” The statute, however, is silent regarding admission of affidavits as evidence in foreclosure hearings *de novo* before the superior court. In their brief, respondents acknowledge the statutory provision allowing affidavits as evidence in foreclosure hearings before the clerk, but argue, without citing any authority, that affidavits should not be admitted in hearings *de novo* before the superior court because “the standards of what constitutes competent evidence undoubtedly change when a matter is appealed to a higher court for a trial *de novo*.” We do not find respondents’ argument on this point persuasive.

This Court has stated that affidavits, while “inherently weak as a method of proof,” are properly admitted as evidence “in certain limited situations in which the weakness of this method of proof is deemed substantially outweighed by the necessity for expeditious procedure.” *In re Custody of Griffin*, 6 N.C. App. 375, 378, 170 S.E.2d 84, 86 (1969). With respect to Milchak’s affidavit, we find the instant foreclosure hearing to be such a situation. A power of sale is a contractual arrangement in a deed of trust which confers upon the trustee or mortgagee the power to sell the real property mortgaged, without a court order, in the event of a default. *In re Foreclosure of Michael Weinman Associates*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993). “A power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action.” *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). In the case *sub judice*, the lender and the servicer of the mortgage loan are out-of-state corporations. Requiring those entities to present live witness testimony, through a corporate officer or employee, at the hearing as to the existence of the statutory foreclosure elements would frustrate the ability of the instant deed of trust’s power of sale provision to function as a more expeditious and less expensive alternative to a foreclosure by action. The burden of requiring a mortgage lender or servicer who, like Kathy Milchak, works in California to be present at a foreclosure hearing in North Carolina would be passed on to all borrowers in the form of increased lending costs. This is especially true in the instant case, where the hearings before both the clerk and the superior court were continued multiple times at the respondents’ request. We hold that, in the instant case, the “necessity for expeditious procedure” substantially outweighs any concerns about the efficacy of allowing Milchak to testify by affidavit, and the trial court properly admitted her affidavit into evidence. *Griffin*, 6 N.C. App. at 378, 170 S.E.2d at 86.

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We note that respondents do not argue in their brief that Maitin's affidavit testimony is inadmissible hearsay. Any such argument is thus properly deemed abandoned. N.C. R. App. P. 28(b)(5). We hold that the superior court properly admitted the affidavits of Maitin and Milchak into evidence, and these assignments of error are overruled.

III.

[4] Respondents next argue that the superior court erred by (1) admitting and relying on Maitin's oral hearsay testimony about matters outside of his personal knowledge, and (2) denying respondents' motion to dismiss for lack of sufficient evidence of a valid debt and default. As noted above, Judge Hill, and counsel for respondents on cross-examination, elicited testimony from Maitin as to the existence of a valid debt, default, and power of sale, despite Maitin's lack of personal knowledge regarding these foreclosure elements. "Where both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence." *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804 (1978). When sitting without a jury, the trial court is able to eliminate incompetent testimony, and the presumption arises that it did so. *Walker v. Walker*, 38 N.C. App. 226, 228, 247 S.E.2d 615, 616 (1978). Kathy Milchak's affidavit and the promissory note and deed of trust constitute sufficient competent evidence of a valid debt and default, even without considering Maitin's testimony regarding these foreclosure elements. These assignments of error are therefore without merit.

IV.

[5] By their next assignment of error, respondents contend that the trial court improperly denied their motion to dismiss on the basis that there was insufficient evidence establishing service of process. Respondents argue that because they rented out the subject property and did not reside therein, Maitin's efforts to serve the notice of hearing by certified mailings to the subject property address, and ultimately by posting the subject property, were insufficient. We disagree.

Notice is one of the four findings the trial court must make in order to authorize foreclosure. N.C. Gen. Stat. § 45-21.16(d). The statute further provides that:

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[N]otice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However . . . if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the hearing.

N.C. Gen. Stat. § 45-21.16(a) (2001). “In determining whether due diligence has been exerted in effecting service, this Court has rejected use of a ‘restrictive mandatory checklist’ and has held determination in each case is based upon the facts and circumstances thereof.” *Barclays American/Mortgage Corp. v. BECA Enterprises*, 116 N.C. App. 100, 103, 446 S.E.2d 883, 886 (1994). A “reasonable and diligent effort” under N.C. Gen. Stat. § 45-21.16(a) necessitates employment of reasonably ascertainable information. *Id.* The public record is generally regarded as being reasonably ascertainable, and this Court has consistently attached significance to whether or not the public record has been inspected in order to determine an appropriate address for service of process. *Id.* at 104, 446 S.E.2d at 886.

In the instant case, Maitin attempted service of the notice of hearing and amended notice of hearing upon Eli and Velvet Brown by certified mailings addressed to the subject property. The notice of hearing was mistakenly addressed to 2225, rather than 2227, University Drive. The amended notice was properly addressed. After each mailing was returned unclaimed, Maitin attempted personal service by sheriff, who posted the notice and amended notice of hearing at the subject property. Respondents, who requested multiple continuances, were represented by counsel at the hearings before both the clerk and the superior court, and timely filed notice of appeal from each decision. At the superior court hearing, respondents introduced Durham County tax records for properties owned by “Eli Brown III” and “Eli Brown Incorporated,” each of which listed an address different from the subject property. Respondents argue that because Maitin did not attempt to serve the Browns at these addresses before posting the subject property, his attempts at effecting service were not “reasonable and diligent” and service was therefore defective.

Based on this evidence, we agree with the trial court’s analysis of the “facts and circumstances” and hold that Maitin’s efforts to serve respondents prior to posting the property were “reasonable and dili-

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gent” within the meaning of N.C. Gen. Stat. § 45-21.16(a). Maitin had no way of knowing whether the names on the tax records, one of which was a corporation, represented the same individuals who signed the deed of trust. We find it significant that respondents clearly had actual notice of both hearings, since they were either present or represented by counsel at each. Where respondents “received no notice of the hearing, but the record shows that [they were] present at the hearing and participated in it,” we have held that respondents cannot complain of lack of notice, as they are unable to show any prejudice to their rights by it. *In re Foreclosure of Norton*, 41 N.C. App. 529, 531, 255 S.E.2d 287, 289 (1979). Since respondents here have likewise failed to show any prejudice to their rights, this assignment of error is overruled.

V.

[6] By their next assignment of error, respondents contend that the trial court erred by placing the burden of proof on the Browns to prove there was no valid reason for the foreclosure to proceed. Respondents contend that by stating “the debtors, having shown no valid legal reason why foreclosure should not commence” immediately before issuing the order authorizing foreclosure, Judge Hill indicated that she had improperly placed the burden on respondents to prove why foreclosure should not proceed. We disagree.

In a foreclosure proceeding, the lender bears the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice. *In re Foreclosure of Kitchens*, 113 N.C. App. 175, 177; 437 S.E.2d 511, 512 (1993); *see also* N.C. Gen. Stat. § 45-21.16(d). The debtor must be given notice of his right to appear at the foreclosure hearing and “show cause as to why the foreclosure should not be allowed to be held.” N. C. Gen. Stat. § 45-21.16(c)(7) (2001). In the instant case, Option One offered sufficient competent evidence which tended to prove each of these elements. Respondents only offered evidence tending to disprove the notice element. We hold that Judge Hill’s remarks did not indicate an improper shift of the burden of proof, but rather were her legal conclusion that respondents, in light of Option One’s evidence and respondents’ lack thereof, failed to “show cause as to why the foreclosure should not be allowed to be held.” *Id.* This assignment of error is overruled.

VI.

By their final assignment of error, respondents contend that the foreclosure sale of the subject property should be deemed defective

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due to an alleged defect in the publication dates for the sale, as reflected in the amended notice of foreclosure sale. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1). Since this issue was never considered by the trial court and is raised for the first time on appeal, it is not properly before this Court, and we decline to address it.

Accordingly, for the reasons stated herein, the trial court's order authorizing foreclosure on the subject deed of trust is

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JAMES BARTLEY, JR.

No. COA02-500

(Filed 18 March 2003)

1. Robbery— dangerous weapon—challenge to sufficiency of evidence—failure to move for motion to dismiss

The trial court did not err by failing to dismiss the charge of felonious robbery with a dangerous weapon, because: (1) N.C. R. App. P. 10(b)(3) provides that a defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged when he did not move to dismiss the charge against him, and defendant in this case did not move to dismiss the charge against him; (2) defendant's attempt to invoke plain error review is inappropriate when the assignment of error concerns the sufficiency of the evidence and not an instructional error or an error concerning the admissibility of evidence; and (3) there was sufficient evidence that defendant was armed even though defendant contends he never made a verbal statement that he had a gun or that he would shoot the victim.

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2. Robbery— dangerous weapon—failure to instruct on lesser-included offense of common law robbery

The trial court did not commit plain error in a robbery with a dangerous weapon case by failing to instruct the jury on the lesser-included offense of common law robbery, because common law robbery involves the use of violence or fear generally whereas robbery with a dangerous weapon involves the use of a dangerous weapon to create this violence or fear, and the only evidence of the use of violence or fear in this case was through defendant's alleged brandishing of a firearm.

3. Robbery— dangerous weapon—indictment—ownership of stolen property

An indictment which alleged that defendant took and carried away "personal property of Crown Fast Fare #729, U.S. Currency, from the person and presence of James Burke" by threatening use of a dangerous weapon sufficiently identified the owner of the property allegedly stolen by defendant because: (1) the key is whether the indictment is sufficient to negate the idea that defendant was taking his own property; and (2) the language in the indictment sufficiently does so.

4. Robbery— dangerous weapon—jury instruction—mandatory presumption victim's life endangered and threatened by firearm

The trial court did not err in a robbery with a dangerous weapon case by instructing the jury that a mandatory presumption existed that the victim's life was endangered and threatened by a firearm, because: (1) defendant cannot attempt to invoke plain error review when the challenge is to the sufficiency of the evidence; and (2) even if plain error review were available, the jury instruction was supported by the law.

5. Sentencing— prior record level—robbery with a dangerous weapon

The trial court erred in a robbery with a dangerous weapon case by sentencing defendant as a prior record level IV based on the State's uncontested and unsupported statement that defendant had eleven points placing him in that record level, because: (1) N.C.G.S. § 15A-1340.14 requires that each of a felony offender's prior convictions be proven to determine the offender's prior record level and that the State bears the burden of proving any prior convictions by a preponderance of the evi-

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dence; and (2) the State failed to present evidence in the form of a stipulation of the parties, a copy of the court record of defendant's prior convictions, or a copy of any record maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts.

Appeal by defendant from judgment dated 25 October 2001 by Judge Herbert O. Phillips, III in Superior Court, New Hanover County. Heard in the Court of Appeals 30 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for the State.

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

McGEE, Judge.

James Bartley, Jr. (defendant) was found guilty on 25 October 2001 of robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87. The trial court entered judgment, finding defendant to have a prior record level of IV, and sentenced defendant to a minimum term of 105 months and a maximum term of 135 months active imprisonment. Defendant appeals the conviction.

The State's evidence at trial tended to show that at approximately 12:30 a.m. on 8 May 2001, James Burke (Burke) was working at the Crown Fast Fare Convenience Store (store) in Wilmington, North Carolina when he heard a bell ring signaling that someone had entered the store. Burke was at the rear of the store facing away from the entrance. When he turned around, Burke saw a man in a blue jacket with a white T-shirt covering his face, who had his hand in his pocket as if he was brandishing a gun in the pocket. That man was later identified as defendant. Burke testified that defendant "made like he had a gun. He had his pocket up like this and make [sic] like he had a gun." When Burke saw defendant he immediately raised his hands over his head. Defendant began screaming, "give me the money, give me the money" and Burke ran to the front counter with his hands still over his head. While Burke was behind the counter, he managed to push a panic button on a beeper he wore which notified a security service of the robbery. Defendant kept saying "give me the money, give me the money" and acting as if he was brandishing a gun inside his coat pocket while Burke tried to reassure defendant he was complying as quickly as possible. Burke opened the cash register and engaged a second panic button. He took out all the money in the reg-

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ister, approximately \$27.00, and threw it on the counter with a couple of rolls of pennies, saying "that's all I can give you." Burke noted that defendant seemed very nervous and in a hurry. Defendant grabbed the money and ran out of the store.

At the same time, Jerry Lanning (Lanning), a college student, was driving past the store and saw defendant run out of the store. As Lanning drove closer to the store, defendant stopped running and began to walk. Lanning saw defendant get into an older model blue, two-door, foreign car parked in an auto sales lot next to the store. Defendant pulled out of the parking lot at a high rate of speed and began following Lanning very closely. Defendant passed Lanning's car in the center turn lane, and Lanning noted the license tag number of defendant's vehicle. Lanning returned to the store to see what had happened.

After defendant left the store, Burke called 911 to report the incident. Burke gave a description of defendant, describing him as good-sized, well-built with dark hair, appearing to be either Spanish or Hispanic. While Burke was on the telephone, Lanning entered the store. Lanning told Burke what he had seen. Lanning also spoke to the dispatcher, giving a similar description of defendant, a description of the car and its license tag number. Lanning described defendant as large, with a dark complexion and facial hair, wearing "all blue" clothing, long sleeves, long pants, and having his hands full as if he had something in them. The police were also informed that defendant was barefoot.

Officer Fred Elder (Officer Elder) of the Wilmington Police Department testified he was on patrol that night when he received a report to be on the lookout for a person matching the descriptions given by Burke and Lanning and driving a car of the type and with the license tag number described by Lanning, in connection with an armed robbery. After the license tag number was checked, Officer Elder was told to go to a residence in a trailer park to look for the owner of a car matching the description. Officer Elder arrived at the residence at approximately 1:10 a.m. and was there for about five minutes when a vehicle drove up with its headlights off. Defendant, the driver of the vehicle, was a heavy-set Hispanic man who was barefoot and was wearing blue jeans and a shirt. Officer Elder arrested defendant, searched defendant and the vehicle, and found a blue jacket in the vehicle. Officer Elder did not find a firearm in his search of either defendant or defendant's vehicle.

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Shortly after defendant's arrest, Burke was taken to defendant's house in a police car. Burke stated that because the suspect's face had been covered, he could not be 100 percent certain in his identification of defendant, but because of other identifying features of the suspect, Burke identified defendant as the man who had robbed the store earlier that night. Lanning was also taken to where defendant was located. Lanning stated that he was 100 percent certain defendant was the man he had seen running from the store earlier that night and who had gotten into the vehicle Lanning had previously described.

Defendant's wife testified that she did not recognize her husband as the perpetrator on the surveillance tape of the store the night in question, and that her husband did not own a blue jacket like the one found by police. However, defendant's wife did testify that her husband was not at home at the time of the robbery. Defendant did not testify.

I.

[1] Defendant argues that, even though he did not move to dismiss the charge against him, the trial court erred by failing to dismiss the charge of felonious robbery with a dangerous weapon due to the insufficiency of the evidence. N.C.R. App. P. 10(b)(3) states in pertinent part:

A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of non-suit, at trial.

Defendant did not move to dismiss the charge against him, and thus did not meet the requirements of N.C.R. App. P. 10(b)(3). Defendant's attempt to invoke plain error review is inappropriate as this assignment of error concerns the sufficiency of the evidence, not an instructional error or an error concerning the admissibility of evidence. *See State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). However, even if we were to review defendant's first assignment of error on its merits, there is sufficient evidence to submit the charge of robbery with a dangerous weapon to the jury.

The appropriate test 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 relevant evi-

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dence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995) (citation omitted). Our review requires that we consider the evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from that evidence. *State v. Jaynes*, 342 N.C. 249, 274, 464 S.E.2d 448, 463 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). This review is the same whether the evidence is direct, circumstantial, or both. *Id.*

The essential elements of robbery with a dangerous weapon are:

“(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. ‘Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.’ ”

State v. Small, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (quoting *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982) and *State v. Mull*, 224 N.C. 574, 576, 31 S.E.2d 764, 765 (1944)). Defendant challenges the sufficiency of the evidence as to the second element. Defendant claims that Burke’s eyewitness account creates no more than “surmise, conjecture, or suspicion” that defendant was armed, which under *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967), would be insufficient to support the charge of robbery with a dangerous weapon. We do not believe that the State’s evidence creates merely “surmise, conjecture, or suspicion” as suggested by defendant.

Burke testified that defendant “made like he had a gun. He had his pocket up like this and make [sic] like he had a gun and kept screaming, ‘give me the money, give me the money.’ ” Burke also responded to a question by the State as to whether he knew what was in defendant’s pocket at the time by saying, “No. A gun, it was, like, of course.” In addition, upon seeing defendant with his hands in his pocket “like he had a gun,” Burke’s immediate reaction was to raise his hands in the air, a natural reaction of one who believes he is being confronted by someone with a gun. The fact that Burke never actually saw a firearm, never asked if defendant had a firearm, nor sought to prove defendant had a firearm by any other means does not negate Burke’s testimony. *State v. Thompson*, 297 N.C. 285, 288-89, 254 S.E.2d 526, 528 (1979) (“We would not intimate, however, that a robbery victim should force the issue merely to determine the true character of the

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weapon. Thus, when a witness testified that he was robbed by use of a firearm . . . , his admission on cross-examination that he could not positively say it was a gun or dangerous weapon is without probative value.”).

Defendant cites two cases, *State v. Lee*, 128 N.C. App. 506, 495 S.E.2d 373, *disc. review denied*, 348 N.C. 76, 505 S.E.2d 883 (1998) and *State v. Harris*, 115 N.C. App. 560, 445 S.E.2d 626 (1994), and attempts to distinguish the present case. In *Lee*, the defendant covered the victim's face during the crime so that the victim could not actually see the weapon. *Lee*, 128 N.C. App. at 510, 495 S.E.2d at 376. However, in *Lee*, the defendant made several statements to the victim that he would shoot her if she resisted, as well as stating, “[w]here did I drop my gun?”. *Id.* at 510-11, 495 S.E.2d at 376. This Court found the facts in *Lee* sufficient to establish that the defendant was armed in that case. *Id.* at 511, 495 S.E.2d at 376.

In the present case, defendant argues that because he never made a verbal statement that he had a gun or that he would shoot Burke, the facts are insufficient to establish that defendant was armed. The legal standard announced in *Lee* is that

[t]o obtain a conviction for armed robbery, it is not necessary for the State to prove that the defendant displayed the firearm to the victim. Proof of armed robbery requires that the victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime.

Id. at 510, 495 S.E.2d at 376. Where the evidence tends to show that the “victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime,” *Id.*, the result should be the same whether a defendant verbally stated he had a firearm or, as in the present case, visually indicated he had a firearm, even when the victim did not actually see a firearm.

Similarly, *Harris* does not warrant a different result. In *Harris*, where the defendant made physical contact with the victim and uttered threats that he would cut her, this Court found the evidence sufficient to submit the charge of robbery with a dangerous weapon to the jury. *Harris*, 115 N.C. App. at 563-64, 445 S.E.2d at 629. While the defendant in *Harris* actually touched the victim with a weapon and made verbal threats similar to those in *Lee*, the facts in *Harris* do not establish the minimum that must be shown to submit the charge of robbery with a dangerous weapon to a jury. *See id.* *Harris* merely

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shows one possible way the State may satisfy its burden in a charge of robbery with a dangerous weapon.

Considering the evidence in the present case in a light most favorable to the State, the evidence was sufficient to submit to the jury the charge of robbery with a dangerous weapon. Therefore the trial court did not err in doing so. Defendant's first assignment of error is dismissed.

II.

[2] Defendant also argues that, even though defendant failed to request the instruction, the trial court erred in failing to instruct the jury on the lesser-included offense of common law robbery. Defendant did not object when the trial court submitted to the jury as its possible verdicts, guilty of robbery with a firearm, or not guilty. Normally, a party may not assign as error any portion of a jury charge or omission unless he or she objects before the jury retires. N.C.R. App. P. 10(b)(2). However, under N.C.R. App. P. 10(c)(4), a defendant may assign error where the judicial action questioned is specifically and distinctly contended to amount to plain error. As this is a question concerning jury instructions, plain error review is available to defendant on this issue. *Steen*, 352 N.C. at 256, 536 S.E.2d at 18.

Normally, however, if a defendant fails to assert plain error in an assignment of error, an appellate court will not conduct plain error review. *State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995); *State v. Lovett*, 119 N.C. App. 689, 693-94, 460 S.E.2d 177, 180-81 (1995). Further, a defendant asserting plain error must, in his brief, "specifically and distinctly" contend that any error committed by the trial court amounted to plain error. *State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999); *State v. Alston*, 131 N.C. App. 514, 517-18, 508 S.E.2d 315, 318 (1998). While defendant could have more clearly indicated his desire for plain error review in his assignment of error, the wording of the assignment shows defendant is seeking such a review. Defendant's argument in his brief supports this contention.

However, under plain error review, defendant's second assignment of error fails. In *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), our Supreme Court explained 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,

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

307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (internal citations omitted)). Our Supreme Court noted that "every failure to give a proper instruction [does not] mandate[] reversal regardless of the defendant's failure to object at trial," because such a rule would negate the purpose of N.C.R. App. P. 10(b)(2). *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. In fact, even after the adoption of the plain error rule, our Supreme Court noted 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." *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). With these principles in mind, we must examine the entire record and determine whether the alleged error in the jury instructions "had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (citation omitted).

After a thorough review of the record, we find that the trial court's instruction only on the verdicts of guilty of robbery with a dangerous weapon or not guilty do not rise to the level of plain error. The elements of robbery with a dangerous weapon are basically the same as common law robbery, except that common law robbery involves the use of violence or fear generally, and robbery with a dangerous weapon involves the use of a dangerous weapon to create this violence or fear. *Compare State v. Jones*, 339 N.C. 114, 164, 451 S.E.2d 826, 854 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995), *with Small*, 328 N.C. at 181, 400 S.E.2d 416.

In the present case, the only evidence of the use of violence or fear was through defendant's alleged brandishing of a firearm. Therefore, the evidence presented could lead to one of two conclusions: defendant had a firearm and created violence or fear through the use of it, or defendant had no firearm, in which case the State's proof would have failed as to the use of a deadly weapon element of

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robbery with a dangerous weapon, as well as the use of violence or fear element of common law robbery. Thus, we find no probable impact on the jury's verdict by the trial court's failure to instruct the jury on common law robbery. Defendant's second assignment of error is overruled.

III.

[3] Defendant next argues that the trial court should have arrested judgment due to the failure of the indictment to sufficiently identify the owner of the property allegedly stolen. We first note that defendant failed to make a request, motion, or objection regarding the sufficiency of the indictment before the trial court. *See* N.C.R. App. P. 10(b).

As a general rule, a defendant waives an attack on the indictment when the indictment is not challenged at trial. *State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402, 411 (1990). However, when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court. *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000), *cert. denied*, [531] U.S. [1130], 148 L. Ed. 2d 797 (2001).

State v. Call, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense. *State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d. 449, 451 (1982). Defendant in this case contends the indictment fails to charge an essential element of the offense. This issue is therefore properly before this Court.

The indictment states, in pertinent part that defendant

unlawfully, willfully and feloniously did steal, take and carry away personal property of Crown Fast Fare #729, U.S. Currency, from the person and presence of James Burke. The defendant committed this act by having in his possession, and threatening the use of a dangerous weapon, to wit: a firearm, whereby the life of James Burke was threatened and endangered.

Defendant specifically argues that the owner of the property in question was not sufficiently identified in this indictment and therefore, judgment should be arrested.

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However, in a robbery indictment

it is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of the robbery and negates the idea that the accused was taking his own property.

State v. Spillars, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972) (citations omitted). See also *State v. Jackson*, 306 N.C. 642, 650-51, 295 S.E.2d 383, 388 (1982) (“As long as the evidence shows the defendant was not taking his *own* property, ownership is irrelevant. A taking from one having the care, custody or possession of the property is sufficient.”) (citations omitted); *State v. Pratt*, 306 N.C. 673, 681, 295 S.E.2d 462, 467 (1982) (“As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery.”) (citation omitted).

The key inquiry is whether the indictment in the present case is sufficient to negate the idea that the defendant was taking his own property. See *Spillars*, 280 N.C. at 345, 185 S.E.2d at 884. The language in the indictment is sufficient to do so. Accordingly, defendant’s third assignment of error is overruled.

IV.

[4] Defendant also argues that the trial court erred in instructing the jury that a mandatory presumption existed that the victim’s life was endangered and threatened by a firearm. Defendant argues that such an instruction was not supported by the law or facts of the case. The pertinent portion of the trial court’s actual jury instructions were that:

when a person commits a robbery by the use or threatened use of an implement which appears to be a firearm, the law presumes, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be, an implement endangering or threatening the life of the person being robbed. Thus, where there is evidence that a Defendant has committed a robbery with what appears to the victim to be a firearm, and nothing to the contrary appears in evidence, the presumption that the victim’s life was endangered or threatened is mandatory.

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Defendant did not object at trial to the jury instructions he now challenges, and therefore did not preserve this question for review. N.C.R. App. P. 10(b)(2). However, questions concerning a jury instruction may be made the basis of an assignment of error where the action in question is specifically and distinctly contended to amount to plain error. N.C.R. App. P. 10(b)(4); *see Steen*, 352 N.C. at 256, 536 S.E.2d at 18. As discussed above, normally, if a defendant fails to assert plain error in an assignment of error, an appellate court will not conduct plain error review. *Truesdale*, 340 N.C. at 232-33, 456 S.E.2d at 301; *Lovett*, 119 N.C. App. at 693-94, 460 S.E.2d at 180-81.

While defendant did not assert in his fourth assignment of error that the challenged jury instruction amounted to plain error, he did so assert in his brief. However, this is of little moment because defendant's argument fails on its merits. The jury instructions were supported by the law in that the trial court simply stated the established law of this State that if the jury found that defendant possessed a firearm, the presumption that Burke's life was endangered was mandatory where no evidence was presented to the contrary. *See State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 728-29 (1994); *State v. Allen*, 317 N.C. 119, 124-26, 343 S.E.2d 893, 897-98 (1986). Further, defendant is actually challenging the sufficiency of the evidence as to whether defendant represented that he had a firearm and whether Burke reasonably believed defendant had a firearm and might use it. As indicated by our discussion concerning defendant's first assignment of error, this argument has no merit. Thus, even if we reviewed his fourth assignment upon its merits, defendant would not prevail. Defendant's fourth assignment of error is dismissed.

V.

[5] Defendant's final assignment of error states that the trial court erred in sentencing defendant as a prior record level IV as the State did not prove, nor did defendant stipulate to, such a record level pursuant to the North Carolina sentencing statutes.

N.C. Gen. Stat. § 15A-1340.14 (2001) requires that each of a felony offender's prior convictions be proven to determine the offender's prior record level. N.C.G.S. § 15A-1340.14 also provides that the State bears this burden of proving any prior convictions by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f) (2001) lists several methods the State may use to prove prior convictions:

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- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

In the present case, the prosecutor stated to the trial court that “in this case the defendant has 11 prior sentencing points, which places him in prior Record Level 4.” The State presented no evidence in the form of a stipulation by the parties, a copy of the court record of defendant’s prior convictions, nor a copy of any record maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts. After the State made its statement to the trial court, the trial court began to determine where defendant fit on the appropriate sentencing guideline chart.

We do not find evidence in the record that would indicate that the State carried its burden of proving each prior conviction by a preponderance of the evidence. As stated above, the State submitted no records of conviction, no records from the agencies listed in N.C.G.S. § 15A-1340.14(f)(3), nor is there any evidence of a stipulation by the parties as to prior record level. An unsupported statement by the State that an offender has eleven points, and thus is a record level IV, even if uncontested, does not rise to the level sufficient to meet the catchall provision found in N.C.G.S. § 15A-1340.14(f)(4). *State v. Mack*, 87 N.C. App. 24, 34, 359 S.E.2d 485, 491 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 663 (1988). *See State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000). We must remand this case for a resentencing hearing due to the failure of the State to meet its burden under N.C.G.S. § 15A-1340.14.

No error in part; remanded in part for resentencing.

Judges HUNTER and CALABRIA concur.

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SHELIA D.P. LEA, INDIVIDUALLY AND AS THE PRESIDENT OF THE GUILFORD COUNTY ASSOCIATION OF EDUCATORS, ELIZABETH H. SEEL, CATHERINE L. HAZELTON, EDWARD C. McMILLAN, III, GUILFORD COUNTY ASSOCIATION OF EDUCATORS, AND THE NORTH CAROLINA ASSOCIATION OF EDUCATORS, PLAINTIFFS-APPELLANTS v. DR. TERRY GRIER, SUPERINTENDENT, PUBLIC SCHOOLS OF GUILFORD COUNTY, IN HIS OFFICIAL CAPACITY ONLY, AND GUILFORD COUNTY BOARD OF EDUCATION, DEFENDANTS-APPELLEES

No. COA02-538

(Filed 18 March 2003)

1. Schools and Education— restructuring school calendar— minimum hours of school instruction

A de novo review revealed that the trial court did not err by granting the school board's motion to dismiss claims by teachers for declaratory, injunctive, and monetary relief for alleged violations of N.C.G.S. §§ 115C-84.2 and 115C-301.1 regarding defendant school board's restructuring of the school calendar to satisfy statutory requirements for the minimum hours of school instruction for the 1999-2000 school year, because: (1) the teachers failed to allege that the school board has continued or will continue violating the mandates of sections 115C-84.2 and 115C-301.1 in order to get declaratory relief; and (2) the teachers' request for monetary or injunctive relief could not be fulfilled when N.C.G.S. §§ 115C-84.2 and 115C-301.1 do not enunciate an explicit or implicit intent on the part of the General Assembly to create a statutory protection for teachers.

2. Constitutional Law— equal protection—differential treatment among schools

The trial court did not err by dismissing plaintiff teachers' claims under the Equal Protection Clause of the United States and North Carolina Constitutions alleging that defendant school board failed to adopt a uniform policy applicable to all teachers regarding the restructuring of the school calendar to satisfy statutory requirements for the minimum hours of school instruction for the 1999-2000 school year, because the teachers failed to allege an essential element of an equal protection claim that there was arbitrary or irrational state action.

3. Schools and Education— breach of contract—restructuring school calendar

The trial court erred by dismissing plaintiff teachers' breach of contract claim regarding defendant school board's restructur-

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ing of the school calendar to satisfy statutory requirements for the minimum hours of school instruction for the 1999-2000 school year which caused the teachers to work six more days than required by law, because the teachers' contractual rights create a private right of action independent of statutes and constitutions.

4. Parties— dismissal—lack of standing

The trial court did not err by dismissing the North Carolina Association of Educators (NCAE) as a party-plaintiff based on lack of standing because NCAE was only seeking injunctive and declaratory relief for violations of N.C.G.S. §§ 115C-84.2 and 115C-301.1, and the Court of Appeals held that plaintiff teachers are not entitled to either declaratory or private relief under those statutes.

Appeal by plaintiffs from Order entered 16 January 2002 by Judge Russell G. Walker, Jr., in Superior Court, Guilford County. Heard in the Court of Appeals 12 February 2003.

Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham and Corie Pauling, for plaintiffs-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson and James C. Adams, II, for defendants-appellees.

WYNN, Judge.

In the aftermath of Hurricane Floyd, the Guilford County Board of Education ("the Guilford County School Board") restructured the school calendar to satisfy statutory requirements for the minimum hours of school instruction. Appellants, four Guilford County teachers and the North Carolina Association of Educators (collectively "the teachers"), brought an action alleging the calendar restructuring violated their constitutional, statutory, and contractual rights. From the dismissal of their claims under Rule 12(b)(6), the teachers appeal to this Court. We find no error with respect to the dismissal of the teachers' statutory and constitutional claims; however, we remand with instructions to reinstate the teachers' breach of contract claims.

I. Facts

The underlying facts to this appeal tend to show that at the outset of the 1999-2000 school year, the provisions of N.C. Gen. Stat. § 115C-84.2 (1999) provided that:

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(a) School Calendar—Each local board of education shall adopt a school calendar consisting of 220 days A school calendar shall include the following: (1) A minimum of 180 days and 1,000 hours of instruction (2) A minimum of 10 annual vacation leave days (3) The same or an equivalent number of legal holidays (4) Ten days, as designated by the local board, for use as teacher workdays

. . . .

(b) Limitations.—The following limitations apply when developing the school calendar: (1) The total number of teacher workdays . . . shall not exceed 200 days.

After the devastation of Hurricane Floyd, the North Carolina General Assembly recognized that many school districts had lost a significant number of instructional days and faced problems in meeting the required minimum of 180 instructional days. Accordingly, the General Assembly enacted the “Hurricane Floyd Recovery Act of 1999” which amended the school calendar by providing for “a minimum of *either* 180 days *or* 1,000 hours of instruction.” N.C. Gen. Stat. § 115C-84.2(a)(1)(a) (1999) (emphasis added). The Floyd Recovery Act, however, did not amend any other provisions of N.C. Gen. Stat. § 115C-84.2.

By February 2000, the Guilford County School Board was forced to cancel a total of twelve instructional days because of weather conditions including Hurricane Floyd. Consequently, the existent school calendar dropped to 168 days and less than 1,000 hours of instruction. To meet the statutory hours minimum, the Guilford County School Board voted on 3 February 2000 to (1) add thirty minutes of instructional time to each school day, (2) alter six scheduled teacher workdays to instructional days, and (3) various other measures. These modifications allowed the Guilford County School Board to provide 1,000 instructional hours in 174 days.¹

In their 4 January amended complaint, the teachers alleged that as a result of the modifications, they were (1) required to work extra hours without compensation; (2) forced to forfeit planning peri-

1. The teachers allege in their amended complaint that the 174 days of instruction, when considered “in light of the amended statute . . . [and] the facts of this case . . . [should be considered] . . . the equivalent of 180 instructional days worked by the teachers regardless of the number of days in which they were completed.”

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ods in violation of N.C. Gen. Stat. § 115C-301.1;² and (3) required to work 206 days, six more than permitted, respectively, by N.C. Gen. Stat. §§ 115C-84.2(4-5), 115C-84.2(a), and 115C-84.2(b)(1),³ because the “Board’s actions brought the total number of teacher workdays to 26 days, [and] increased the school calendar to 226 days.” Furthermore, the teachers alleged that a number of schools under the Guilford County School Board’s authority “acknowledged that the increase in instructional time of thirty minutes each day also increased teachers’ overall workloads and thus allowed teachers to use this additional time to substitute for optional workdays.” The teachers contended the failure of the Guilford County School Board to adopt a uniform policy applicable to all teachers contravened the equal protection guarantees of the United States and North Carolina Constitutions.

Based on these modifications, the teachers initially sued the Guilford County School Board in 2000; voluntarily dismissed the action without prejudice; and on 24 September 2001, re-filed the action under Rule 41(a) seeking declaratory, injunctive, and monetary relief for alleged violations of statutory, constitutional, and contract law. On 26 November 2001, the Guilford County School Board filed a motion to dismiss under Rule 12(b)(6) of North Carolina’s Rules of Civil Procedure for failure to state a claim upon which relief could be granted. On 16 January 2002, the trial court granted the Guilford County School Board’s motion to dismiss and dismissed all of the teachers’ claims with prejudice. From that dismissal, the teachers timely filed a Notice of Appeal making four assignments of error.⁴

2. N.C. Gen. Stat. § 115C-301.1, provides that

All full-time assigned classroom teachers shall be provided a daily duty free period during regular student contact hours. The duty free period shall be provided to the maximum extent that . . . the safety and proper supervision of children may allow . . . and insofar as funds are provided for this purpose by the General Assembly. . . . Principals shall not unfairly burden a given teacher by making that teacher give up his or her duty free period on an ongoing period, regular basis without the consent of the teacher.

3. Again, the teachers arrive at these numbers by equating 1,000 hours of instruction in 174 days with 180 days of instruction. *See supra*.

4. On 17 July 2002, the teachers filed a motion to amend the record to include the following assignment of error: “The trial court erred in granting Defendants’ Motion to Dismiss because Defendants breached Plaintiffs’ employment contracts.” Herein, we grant this motion to amend, and will, consequently, consider appellants’ revised and amended fifth assignment of error.

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II. Statutory Claims

[1] By their first two assignments of error, the teachers contend the trial court erred in granting the Guilford County School Board's motion to dismiss because the teachers stated a cognizable claim for declaratory, injunctive, and monetary relief for violations of N.C. Gen. Stat. §§ 115C-84.2 and 115C-301.1. We disagree, and will address the standard of review, and the teachers' claims for declaratory and private relief, in turn.

A. Standard of Review

We review de novo the grant of a motion to dismiss. *See e.g., McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404 (1998). A motion to dismiss made pursuant to . . . Rule 12(b)(6) tests the legal sufficiency of the complaint. *See e.g., Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (citations omitted). Accordingly, when entertaining "a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are sufficient to state a claim upon which relief may be granted under some legal theory." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 28, 568 S.E.2d 893, 897 (2002) (citations omitted). "This rule . . . generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Ladd*, 314 N.C. at 481, 334 S.E.2d at 755. However, where the "requested relief [is] not authorized by statute, the [complaint is necessarily]" defective because "the court [is] powerless to grant [the relief] regardless of what facts could be proved." *Forrester v. Garrett*, 280 N.C. 117, 122, 184 S.E.2d 858, 861 (1971).

B. Declaratory Relief

North Carolina's Declaratory Judgment Act provides that: "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (2002). "Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347

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S.E.2d 25, 29 (1986). Accordingly, where “the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under . . . Rule 12(b)(6) will be granted.” *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234-35, 316 S.E.2d 59, 62 (1984).

In this case, the teachers failed to allege “an actual genuine existing controversy.” The teachers alleged that the Guilford County School Board violated the mandates of N.C. Gen. Stat. §§ 115C-84.2 and 115C-301.1 during the 1999-2000 school year. Although the teachers state in their amended complaint that “the actions of [the Guilford County School Board], *if allowed to continue*, have created a legal controversy . . . and will lead to unavoidable litigation,” the teachers failed to allege that the Guilford County School Board *has* continued, or *will continue*, violating the mandates of Sections 115C-84.2 and 115C-301.1. Our Supreme Court has made it eminently clear that “a litigant [who] seeks relief under the declaratory judgment statute, must set forth in [the] pleading all facts necessary to disclose the existence of an actual controversy between the parties.” *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949). Here, the teachers did not meet this threshold burden. Accordingly, the trial court properly dismissed the teachers’ request for declaratory relief under the aforementioned statutes.

C. Private Right of Action

Next, the teachers sought injunctive and private relief under N.C. Gen. Stat. §§ 115C-84.2 or 115C-301.1. However, “[o]ur case law generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute.” *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 339, 511 S.E.2d 41, 44 (1999). Here, neither Section 115C-84.2 nor Section 115C-301.1 expressly creates a private cause of action. Moreover, appellants have failed to make any arguments that N.C. Gen. Stat. §§ 115C-84.2 or 115C-301.1 implicitly create a private right of action.

Nonetheless, the teachers rely on our decision in *Williams et. al. v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 495 S.E.2d 406, for the proposition that a private right of action exists under Sections 115C-84.2 and 115C-301.1. In *Williams*, however, the statute, N.C. Gen. Stat. § 15C-363 (1991) (repealed 1992), implicitly created a private right of action by *requiring* school boards to *pay* specific sums to teachers participating in the Effective Teaching Training Program. See N.C. Gen. Stat. § 115C-363.11 (repealed 1992) (providing that: “If

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the pilot programs established pursuant to the provisions of G.S. § 115C-363 are discontinued, any employee who has received a salary increment pursuant to the Career Development Plan *shall* continue to be paid the salary increment”) (emphasis added). In *Williams*, the school board refused to pay teachers vested in the pilot program the salary, bonuses, and supplements which they were statutorily entitled to receive after the program was discontinued. We reversed the trial court’s summary judgment, because “[t]he statutes without a doubt enunciate the intent of the General Assembly . . . to create statutory protection for teachers.” *Williams*, 128 N.C. App. at 604, 495 S.E.2d at 409. In the case *sub judice*, the statutes at issue do not enunciate an explicit or implicit intent on the part of the General Assembly to create a statutory protection for teachers. Accordingly, the teachers reliance on *Williams* is misplaced.

We, therefore, must hold that the trial court did not err by dismissing the teachers’ requests for monetary and/or injunctive relief under the aforementioned statutes.

III. Constitutional Claims

[2] By their third assignment of error, the teachers contend the trial court erred in dismissing their claims under the Equal Protection Clause of the United States and North Carolina Constitutions. We disagree.

“Arbitrary and capricious acts by [the] government are [] prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions.” *Dobrowolska v. Wall*, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000); *see also* U.S. Const. amend. XIV, § 1; N.C. Const. art. 1, § 19. The equal protection “principle requires that all persons similarly situated be treated alike.” *Wall*, 138 N.C. App. at 14, 530 S.E.2d at 599 (citing *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996)). Accordingly, to state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated.

In this case, the teachers allege that some schools (but not all) under the Guilford County School Board’s authority decided to allow teachers to count the accumulation of time, caused by the extra thirty minute period, as optional workdays. The teachers allege that the Guilford County School Board’s failure to adopt a uniform policy applicable to all teachers violates the equal protection guarantees of

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the United States and North Carolina Constitutions. However, North Carolina statutes expressly authorize differential treatment among schools in the same administrative unit. For instance, N.C. Gen. Stat. § 115C-84.2(a)(1a) (1999) specifically provides that “the number of instructional hours in an instructional day may vary according to local school board policy and does not have to be uniform among the schools in the [same] administrative unit.” Furthermore, N.C. Gen. Stat. §§ 115C-84.2(a)(4) and (5) provide that “[a] school board may schedule different purposes for different personnel on any given day and is not required to schedule the same dates for all personnel.”

Accordingly, this differential treatment was permitted by North Carolina statutory law. Of course, this is not fatal to the teachers’ equal protection claims. *See e.g., Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (“The Equal Protection Clause . . . [does not allow] States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”). Nevertheless, because the teachers concede at oral argument that they are not mounting a facial challenge to the statutes permitting differential treatment among teachers under one school board’s authority, a presumption exists that this differential treatment, permitted by statutes duly enacted by the General Assembly, have a rational, rather than arbitrary, basis. *See e.g., Peoples’ Bank v. Loven*, 172 N.C. 666, 670, 90 S.E. 948, 950 (1916).

However, in their amended complaint, the teachers failed to allege that the Guilford County School Board exceeded its authority under the aforementioned statutes, acted arbitrarily, or that the challenged differential treatment was unrelated to the statutory objectives. Accordingly, the teachers’ allegations, even when assumed correct and construed most favorably, merely express discontent with actions wholly consistent with the Guilford County School Board’s authority under state law. Because the teachers failed to allege an essential element of an equal protection claim, arbitrary or irrational state action, their equal protection claims were properly dismissed and this assignment of error is overruled.

IV. Contract Claims

[3] By their fifth assignment of error, the teachers argue that the trial court erred in dismissing their breach of contract claims. We agree.

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In their complaint, the teachers allege that the Guilford County School Board's "unlawful acts violated the terms of [the teachers'] valid contracts of employment." Specifically, the teachers allege that their contracts with the Guilford County School Board "mandate . . . compliance with state law," and, consequently, the Guilford County School Board's unlawful acts constituted a breach of contract.⁵ This breach caused damage, the teachers allege, because the Guilford County School Board's modifications of the school calendar required them to work six more days than required by law. Taking the teachers' allegations as true, "we conclude that the breach of contract claim as alleged in the complaint was sufficient to withstand [the Guilford County School Board's] . . . motion to dismiss." *Brandis v. Lightmotive Fatman*, 115 N.C. App. 59, 62, 443 S.E.2d 887, 888 (1994). Accordingly, we remand with instructions to reinstate the teachers' breach of contract claims.

V. Association Standing

[4] Finally, the teachers argue the trial court erred by dismissing the North Carolina Association of Educators as a party-plaintiff for lack of standing. On appeal, the teachers contend the North Carolina Association of Educators is only seeking injunctive and declaratory relief for violations of N.C. Gen. Stat. §§ 115C-84.2 and 115C-301.⁶ We held *supra*, however, that the teachers are entitled to neither declaratory nor private relief pursuant to Section 115C-84.2 or Section 115C-301.1. Accordingly, because the North Carolina Association of Educators concedes on appeal that it seeks only declaratory and injunctive relief pursuant to these statutes for its membership, it is no longer necessary to resolve this assignment of error.

Affirmed in part, reversed in part, and remanded.

Judges TIMMONS-GOODSON and LEVINSON concur.

5. The Guilford County School Board argues this issue is inextricably bound to our resolution of the teachers' statutory and constitutional claims. For instance, the Guilford County School Board contends that if we find *no private right of action* pursuant to N.C. Gen. Stat. § 115C, then we should find that appellants have failed to state a valid contract claim. However, we disagree. Rather, the teachers' contractual rights create a *private right of action* independent of statutes and constitutions.

6. Although in their amended complaint the teachers do not limit the North Carolina Association of Educator's participation in the class action to injunctive and declaratory relief, in a stipulation filed before the hearing on the Guilford County School Board's motion to dismiss, and again on appeal, the teachers expressly assert

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MARY TERRY, EMPLOYEE, PLAINTIFF/APPELLEE v. PPG INDUSTRIES, INC., EMPLOYER,
AND KEY RISK MANAGEMENT SERVICES, INC., CARRIER, DEFENDANT/APPELLANTS

No. COA02-342

(Filed 18 March 2003)

**1. Workers' Compensation— ex parte contact with doctor—
testimony and records excluded**

Sections of a doctor's deposition testimony and records were excluded from a workers' compensation proceeding where there was ex parte contact between the doctor and defendant's safety manager. Although the doctor visited the plant once a week to see employees with work-related injuries and the conversation was not with defendant's attorney, the doctor's role was that of a treating physician and the protection of patient privacy and physician-patient confidentiality was involved. Finally, although plaintiff had stipulated to the medical records, she moved to exclude them prior to the hearing before the deputy commissioner and again before the full Commission, and the Commission determined that the ex parte contact rule had been violated.

**2. Workers' Compensation— depression—licensed psychologist—
testimony competent**

Testimony from a licensed clinical psychologist about plaintiff's depression was competent in a workers' compensation proceeding.

**3. Workers' Compensation— treatment not approved in advance—
authorization sought within reasonable time**

The Industrial Commission did not abuse its discretion by approving a psychologist's treatment of a workers' compensation plaintiff where the treatment was not approved in advance, but plaintiff moved for authorization within three weeks of the initial visit and two days of her second visit. The Commission also found that plaintiff's treating physicians had not provided successful relief for plaintiff's condition.

4. Workers' Compensation— depression—consequence of injury

The Industrial Commission's conclusion that the depression of a workers' compensation plaintiff was a direct and natural con-

that the "North Carolina Association of Educators as a plaintiff in this matter does not seek damages on behalf of the Association, but does seek declaratory and injunctive relief as set out in the complaint."

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sequence of her work injury was supported by its findings, which were supported by evidence concerning the psychological effects of plaintiff's chronic pain and the teasing and criticism she had endured at work.

5. Workers' Compensation—surveillance video—disregarded

The Industrial Commission did not err in a workers' compensation case by considering and then disregarding a surveillance videotape of plaintiff where the Commission concluded that defendant's agent had presented a skewed and incomplete video record to a doctor in an attempt to distort the doctor's view of plaintiff's truthfulness.

Appeal by defendants from Opinion and Award entered 1 August 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 January 2003.

Raymond M. Marshall for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Philip J. Mohr, for defendant-appellants.

EAGLES, Chief Judge.

PPG Industries, Inc. and Key Risk Management Services, Inc. ("defendants") appeal from an Opinion and Award of the Full Commission awarding Mary Terry ("plaintiff") total disability compensation and ordering defendants to pay for psychological or psychiatric treatment of the plaintiff. After careful consideration, we affirm.

PPG Industries, Inc. ("PPG") employed plaintiff for twenty-one years. At the time of her injury, plaintiff worked "running" a "warping chopper." On 18 September 1995, a "pin truck" struck plaintiff's left heel causing a contusion. The following day, plaintiff went to the emergency room where she was given medication and crutches to use for walking. Plaintiff saw Dr. Hunter Strader, Jr. ("Dr. Strader") on 3 October 1995. Plaintiff continued to suffer pain and Dr. Strader referred plaintiff to Dr. Jasper Simmons Riggan, III, ("Dr. Riggan") an orthopedic specialist. Dr. Riggan examined plaintiff and believed plaintiff suffered a partial tear of her achilles tendon. Dr. Riggan placed plaintiff in a fracture walker, a type of removable cast. Over the next several years, plaintiff still suffered pain along with involuntary muscle spasms in her lower left leg. Plaintiff was referred to several doctors during this time.

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Defendants admitted plaintiff's right to compensation because of her 18 September 1995 injury and paid plaintiff temporary total disability benefits from 20 November 1995 until 25 February 1996 and from 17 June 1996 until 9 January 1997. From January 1997 until July 1997, plaintiff worked in a light duty job for PPG. Plaintiff still suffered pain and plaintiff's attorney referred her to a psychologist, Jerry Noble, Ph.D. ("Noble"). Noble saw the plaintiff on 30 June 1997. Noble diagnosed plaintiff with "major depression, single episode, without psychotic features." Noble examined the plaintiff again on 16 July and "recommended that she not work." Noble examined the plaintiff on 28 July and "recommended that [plaintiff] continue individual psychotherapy" and "consult a psychiatrist or a physician about psychotropic medications."

In early June 1997, plaintiff requested that her claim for permanent and total disability benefits be assigned for a hearing. The Deputy Commissioner heard the matter and concluded that the plaintiff was "released to perform light duty work, and the defendant provided work suitable to her restrictions" and that plaintiff is entitled to permanent partial disability compensation for a period of 14.4 weeks. The Deputy Commissioner further concluded and ordered that defendants pay for psychiatric expenses but that defendant "is not liable for the treatment by Jerry Noble, Ph.D., as said treatment was unauthorized." Plaintiff appealed to the Full Commission.

The Full Commission heard the case on 28 February 2001 and affirmed in part and reversed in part the Opinion and Award of the Deputy Commissioner. The Full Commission concluded that plaintiff was totally disabled and ordered that defendants pay total disability compensation until further order of the Commission and that defendants pay "all medical expenses incurred or to be incurred in the future including psychological or psychiatric treatment provided by and through Dr. Jerry Noble." Defendants appeal.

On appeal, defendants contend that the Full Commission erred in: (1) striking the testimony and stipulated medical records of Dr. Strader based upon his *ex parte* communication with the employer; (2) in finding that plaintiff remained disabled, and thereby justifiably refused employment, based solely on Jerry Noble's testimony; (3) in determining that plaintiff's disabling condition was a direct and natural result of her compensable injury; and (4) in failing to consider the video tape surveillance of plaintiff in evaluating the plaintiff's credibility. After careful consideration, we affirm.

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“The standard of appellate review of an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission’s findings of fact are supported by any competent evidence in the record; and (2) whether the Commission’s findings justify its legal conclusions.” *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 25, 514 S.E.2d 517, 520 (1999). “If supported by competent evidence, the Commission’s findings are binding on appeal even when there exists evidence to support findings to the contrary.” *Ward v. Long Beach Vol. Rescue Squad*, 151 N.C. App. 717, 720, 568 S.E.2d 626, 628, *disc. review denied*, 356 N.C. 314, 571 S.E.2d 219 (2002). “This Court reviews the Full Commission’s conclusions of law *de novo*.” *Bowser v. N.C. Dep’t of Corr.*, 147 N.C. App. 308, 311, 555 S.E.2d 618, 621 (2001), *disc. review denied*, 355 N.C. 283, 560 S.E.2d 796 (2002).

[1] Defendants first contend that the Full Commission erred in striking the testimony and stipulated medical records of Dr. Strader based upon his *ex parte* communication with the employer.

Defendants argue that *Salaam v. N.C. Dept. of Transportation*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), *disc. review improvidently allowed*, 345 N.C. 494, 480 S.E.2d 51 (1997) is not applicable to the facts here because Dr. Strader was not a nonparty treating physician. Defendant also argues that the conversation was not with defendant’s attorney and that it did not involve plaintiff’s treatment. Defendant further argues that even if *Salaam* applies to strike Dr. Strader’s testimony, the Full Commission should not have stricken stipulated medical records. We are not persuaded.

Crist v. Moffatt, 326 N.C. 326, 336, 389 S.E.2d 41, 47 (1990), held that “defense counsel may not interview plaintiff’s nonparty treating physicians privately without plaintiff’s express consent.” “[T]he *Crist* rule precludes non-consensual *ex parte* communications during adversarial proceedings.” *Salaam*, 122 N.C. App. at 88, 468 S.E.2d at 539. This Court in *Salaam* applied *Crist* to workers’ compensation proceedings. *Id.* *Salaam* “conclude[d] the Commission erred by admitting Dr. Pritchard’s deposition testimony in light of the non-consensual *ex parte* contact between NCDOT and Dr. Pritchard.” *Id.* In reaching its determination, the Court noted the rationale behind the holding in *Crist* which included “patient privacy, the confidential relationship between doctor and patient, and the adequacy of formal discovery devices.” *Id.* See also *Pittman v. International Paper Co.*, 132 N.C. App. 151, 155, 510 S.E.2d 705, 708, *aff’d*, 351 N.C. 42, 519 S.E.2d 524 (1999).

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Here, Dr. Strader has been in private practice for thirty-six years and is “board certified in family practice.” As part of an arrangement with PPG, Dr. Strader visits their plant once a week to see employees with work-related injuries. Dr. Strader first saw plaintiff on 3 October 1995 for her work-related injury. Dr. Strader saw plaintiff approximately twenty-four more times between 3 October 1995 and 29 July 1997 about her condition. Dr. Strader testified that while he “beg[a]n to take a back seat in terms of treatment,” he would still:

[S]ee people in this situation often enough to be sure that the plant understands what level of activity is reasonable to confirm with a consultant that the activities that have been assigned to the employee are reasonable in view of the problem that they may be having.

And so at times I will talk with a consultant, be sure that we understand what they think is reasonable activity. And be sure that their medications are being renewed appropriately, to be sure they’re keeping their appointments with the consultants, and getting the tests done as ordered.

Plaintiff’s counsel asked Dr. Strader if it would “be a fair statement” that he was clearly “not treating [plaintiff] as a patient?” Dr. Strader responded that “I can’t say that because I was reviewing her medicines and her consultations and her complaints as I do with any patient that I see. So I think I was involved in that, although her primary care was being received from other physicians.” Upon inquiry as to whether his “relationship with employees that [he saw] at the plant [was] any different from [his] physician/patient relationship with patients [he saw] in [his] office,” Dr. Strader responded “[f]rom my standpoint, no, there is none.” Based on the evidence, Dr. Strader’s role with the plaintiff is that of a treating physician. While the plaintiff became a patient of Dr. Strader because of his “arrangement” with PPG, the “considerations of patient privacy” and “the confidential relationship between doctor and patient” still exist.

Defendants argue that Dave Ulmer, manager of safety and plant protection at defendant PPG, not defendants’ attorney, talked with Dr. Strader and that the discussion was not about plaintiff’s condition. Ulmer requested the surveillance of plaintiff. Ulmer met with Dr. Strader and showed him a surveillance videotape of plaintiff taken without her consent. The tape showed the plaintiff walking in “closed-toe” shoes with heels. Dr. Strader was asked whether he recalled having a conversation with Ulmer after watching the video-

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tape. In response, Dr. Strader testified that “[y]eah. I told him I was absolutely shocked, because my impression of [plaintiff] from the very beginning had been that this was a significant injury and I had certainly taken all of her statements to me at face value. And I was—I was shocked to see the film, and I told him about it.” In response to a question about the purpose of watching the video, Dr. Strader testified that “I would assume that—I did assume that this was information which would add to my knowledge of the patient’s degree of disability.” Dr. Strader further testified that:

Q. So you-all talked about what you were going to talk to her—

A. Yeah.

Q. What you were going to do in your appointment with her?

A. Exactly. And part of that was that I was not comfortable in discussing the video or confronting her with that. I did not think that was appropriate, but that I did think for my information it was helpful to know whether she had been wearing shoes other than just on that particular day.

....

A. We had not had a long discussion about how we were going to trick this lady into answering questions the way we want her to prove her guilt. We had a very brief conversation after I viewed the video and the conclusion whether it originated in my mind or his was it would be helpful to me and to them to know whether, you know, she had been wearing these shoes or not. Obviously, if she denies it this creates real problems in their mind and in my mind when they have her on video wearing it.

Here, the evidence shows that Dave Ulmer, an employee of defendant PPG, showed plaintiff’s treating physician, a videotape of plaintiff walking. Ulmer and Dr. Strader then discussed questioning plaintiff about the type of shoes she had been wearing. The evidence also showed that Dr. Strader “assume[d] that this was information which would add to my knowledge of the patient’s degree of disability.” The involvement of Ulmer and his conversation with Dr. Strader involves the “considerations of protecting patient privacy, the confidential relationship between physician and patient and ‘the untenable position in which *ex parte* contacts place the nonparty treating physi-

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cian,' ” *Pittman*, 132 N.C. App. at 155, 510 S.E.2d at 708 (citation omitted), which *Salaam* protects.

The Full Commission also struck Dr. Strader’s medical records that involved the plaintiff following the *ex parte* contact. Defendants argue that the plaintiff stipulated to these medical records and cannot later seek their exclusion. We do not agree.

Here, the plaintiff moved to exclude those records prior to the hearing before the Deputy Commissioner. In plaintiff’s application for review to the Full Commission, the plaintiff assigned as error the Deputy Commissioner’s denial of the motion to exclude those records. The Full Commission determined that the *ex parte* contact between Ulmer and Dr. Strader violated *Salaam*. Accordingly, the Full Commission struck those sections of Dr. Strader’s deposition testimony and the medical records which involved the plaintiff that occurred after the *ex parte* contact.

Because “[i]n a workers’ compensation case, a physician may not engage in *ex parte* communications with the defendant,” *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 261, 523 S.E.2d 720, 724 (1999), this assignment of error is overruled.

[2] Next, defendants contend that the Full Commission erred in relying on Jerry Noble’s testimony to find that plaintiff remained disabled and thereby justifiably refused employment.

Defendants argue that the Full Commission erred in accepting the testimony of Noble. First, defendants cite *Martin v. Benson*, 125 N.C. App. 330, 481 S.E.2d 292 (1997), *rev’d on other grounds*, 348 N.C. 684, 500 S.E.2d 664 (1998) as support for the argument that Noble could not provide competent testimony “about whether plaintiff could return to work based upon her pain” because he is a psychologist and not a medical doctor. Second, defendants argue that Noble was not an authorized physician when he gave his testimony so the Full Commission should not have accepted his opinion. Defendants argue that plaintiff failed to prove that she sought or gained approval from the Industrial Commission for treatment by Noble. We do not agree.

“[T]he opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” *Maloney v. Hospital Systems*, 45 N.C. App. 172, 177, 262 S.E.2d 680,

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683, *disc. review denied*, 300 N.C. 375, 267 S.E.2d 676 (1980). “The qualifications of a medical expert are judged according to the same standards as those of expert witnesses in general: The common law . . . does not require that the expert witness on a medical subject shall be a person *duly licensed to practice medicine*.” *Id.* at 178, 262 S.E.2d at 683 (quoting 2 Wigmore on Evidence § 569, pp. 667-68 (3d ed. 1940)) (emphasis in original). Here, the defendants stipulated that Noble was a licensed clinical psychologist. As a licensed clinical psychologist, Noble’s testimony regarding the cause of plaintiff’s depression is competent. *But see Martin*, 125 N.C. App. at 337, 481 S.E.2d at 296 (holding that the trial court erred in allowing a neuropsychologist to testify that an accident did not cause the plaintiff to suffer a closed head injury).

[3] Defendants also argue that Noble’s opinion should not be given any weight because he was not an authorized physician at the time of his testimony.

“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.” *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 173, 573 S.E.2d 703, 707 (2002). “[A]n injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.” G.S. § 97-25. “[T]he injured employee need not seek approval for a physician’s services prior to the treatment.” *Ruggery v. N.C. Dep’t of Correction*, 135 N.C. App. 270, 276, 520 S.E.2d 77, 82 (1999). “The employee’s request for approval may even be filed after the treatment has been procured, just as long as the request is filed within a reasonable time thereafter.” *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 626, 540 S.E.2d 785, 789 (2000). “Approval of an employee-selected physician is left to the sound discretion of the Commission.” *Id.* “This Court will disturb the Commission’s determination on this issue only upon a finding of manifest abuse of discretion.” *Lakey*, 155 N.C. App. at 174, 573 S.E.2d at 707.

Here, the plaintiff saw Noble on 30 June 1997 because she “felt depressed” and suffered “crying spells” and “physical pain.” Plaintiff saw Noble again on 16 July and 28 July. Plaintiff moved to allow psychological treatment and to have Noble’s treatment approved by the Industrial Commission on 18 July 1997. The Industrial Commission denied plaintiff’s motion by order filed 12 January 1998 but did state that “[p]laintiff may request a hearing if she continues to contend that

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she is in need of psychological treatment.” Plaintiff moved for authorization within three weeks from her initial visit with Noble and two days after her second visit. Plaintiff’s request was made within a reasonable amount of time after she began treatment with Noble. Further, the Full Commission found that:

Although plaintiff did not receive authorization from either defendant or the Industrial Commission for this treatment, the undersigned note that the only physician plaintiff was still seeing at this time was Dr. Strader, and neither Dr. Strader nor any of the other physicians who had provided plaintiff with treatment had successfully effected a cure or provided relief for her condition.

The Full Commission also found that:

The record in this case contains a letter dated 14 July 1997 from defendant’s then-counsel, G. Thompson Miller to Ms. Phyllis Brookbank of Key Risk Management Services, in which Mr. Thompson states that plaintiff’s counsel called him seeking approval for Dr. Noble to be designated as plaintiff’s treating physician. Mr. Thompson forwarded the request to Ms. Brookbank with the recommendation that the request be denied. There is no further reference to this issue in the record. Based on the evidence of record, plaintiff timely requested that defendant authorize Dr. Noble as plaintiff’s treating psychologist prior to or shortly after 30 June 1997. There is no evidence of defendant’s response. Dr. Noble’s treatment of plaintiff is authorized.

Competent evidence supports these findings which in turn support the conclusion to have defendants pay for plaintiff’s treatment by Noble. The Full Commission did not abuse its discretion in approving Noble’s treatment. This assignment of error is overruled.

[4] Defendants contend that the Full Commission erred in determining that plaintiff’s disabling depression was a direct and natural result of her compensable injury. We do not agree.

Defendants argue that the Full Commission’s findings of fact and the testimony of Noble do not support the conclusion that the plaintiff’s injury caused her disabling depression. Defendants argue that the plaintiff’s disabling depression was the result of her co-employees’ “teasing, criticizing and accusing her of faking her physical problems.”

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The Full Commission made the following findings:

30. Dr. Noble diagnosed plaintiff with major depression, due at least in part to her work-related injury. There was some question as to whether the death of plaintiff's husband several years earlier contributed to the level of plaintiff's depression; however, Dr. Noble stated that plaintiff's depression most clearly rested on the occupational injury and the circumstances at work.
31. On 16 July 1997, plaintiff returned to Dr. Noble. She stated at that time that the job she was performing at work required her to stand, that she could not stand on a protracted basis, and that there were no sitting assignments available to her. Plaintiff related that she had been subject to teasing and criticism at work specifically accusing her of faking her physical problems, and that she had received the same reactions from management. These incidents caused plaintiff great embarrassment, and further complicated her depression. For these reasons, Dr. Noble recommended that plaintiff not return to work.

Based on these findings, the Full Commission concluded that “[a]s a result of her injury by accident, plaintiff suffers from disabling depression which is a direct and natural consequence of her work injury and is therefore compensable.”

In response to a question seeking his opinion as to the cause of plaintiff's depression, Noble testified that “[t]he most important factor is her occupational injury.” Further, Finding 31 states that the “teasing and criticism” plaintiff received at work “*further complicated her depression.*” (Emphasis added). In addition to Noble's testimony, Dr. Strader testified that the plaintiff suffered chronic pain as a result of her foot and leg problems and that chronic pain has a psychological effect on people. Dr. Strader further testified that he “certainly felt that [plaintiff] was somewhat depressed as I think almost anyone would be because of the persistence of her problem.” The testimony of Noble and Strader is competent evidence to support the Full Commission's findings of fact which in turn support its conclusion that plaintiff's depression is a “direct and natural consequence of her work injury.” This assignment of error is overruled.

[5] Defendants contend that the Full Commission erred in failing to consider the video tape surveillance of the plaintiff in evaluating plaintiff's credibility. We do not agree.

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“Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it.” *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (emphasis in original).

Here, the Full Commission examined the record and made the following finding:

23. Dave Ulmer, defendant’s director of safety and plant protection, ordered video surveillance of plaintiff. On 17 December 1996, without the knowledge or consent of plaintiff, Mr. Ulmer showed a portion of the video lasting a few minutes to Dr. Strader, in which plaintiff was seen walking in shoes with heels of one to one and one half inches, for approximately half a block to and from her car at the funeral of a relative. According to Dr. Strader, plaintiff was not limping. Dr. Strader testified that the purpose of Mr. Ulmer showing him the tape was to cast doubt upon the extent of plaintiff’s injury and her representation of the level of her disability. Dr. Strader’s opinions were tainted by defendant’s *ex parte* communication with him. Following their viewing of the video tape, Dr. Strader and Mr. Ulmer discussed plaintiff’s veracity regarding her condition.

The Full Commission then concluded that “[t]he evidence of record demonstrates that the agent of defendant presented a skewed and incomplete video record to Dr. Strader in an attempt to distort his view of plaintiff’s truthfulness, and that the attempt was successful.” The Full Commission considered the video tape evidence and concluded to disregard it. This assignment of error is overruled.

Accordingly the Opinion and Award of the Full Commission is affirmed.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

STATE v. MORGAN

[156 N.C. App. 523 (2003)]

STATE OF NORTH CAROLINA v. FREDERICK DEAN MORGAN

No. COA02-620

(Filed 18 March 2003)

1. Evidence— prior crimes or bad acts—domestic violence protective orders

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting evidence of prior and expired 50-B domestic violence protective orders and prior acts by defendant which led to issuance of the restraining orders, because: (1) it is proper to admit other crimes, wrongs, or acts under N.C.G.S. § 8C-1, Rule 404(b) to show intent; and (2) the evidence was competent to prove that defendant had the intent to kill, and the trial court properly limited the purposes in its instruction by requiring the jury to consider the evidence only to show intent and only as against defendant's estranged wife.

2. Assault— deadly weapon inflicting serious injury—broken wine bottle—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss two charges of assault with a deadly weapon inflicting serious injury, because there was substantial evidence that defendant assaulted two victims with a broken wine bottle as a deadly weapon.

3. Assault— deadly weapon inflicting serious injury—jury instruction—broken wine bottle a deadly weapon as a matter of law

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by instructing the jury that a broken wine bottle was a deadly weapon as a matter of law because in the circumstances of its use by defendant here, it was likely to produce death or great bodily harm.

4. Sentencing— prior record level—clerical errors

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by finding that defendant was a prior record level IV felon, because: (1) the misspelling of defendant's middle name as well as the incorrect birth date were clerical errors; and (2) the State presented a preponderance of evidence to show that defendant was the same person convicted in the disputed convictions.

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[156 N.C. App. 523 (2003)]

5. Sentencing— nonstatutory aggravating factors—assault in presence of child—course of conduct

The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury case by finding two non-statutory aggravating factors including that defendant beat his wife and the other victim in the presence of a six-year-old child which caused her serious trauma stress, and defendant's course of conduct, because contrary to defendant's assertion: (1) the assault in the presence of a minor child was not a joinable offense of misdemeanor child abuse; and (2) the course of conduct factor was not precluded even though defendant pled guilty to the joined offense of violation of the 50-B domestic violence protective order.

Appeal by defendant from judgments entered 6 December 2001 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Allen, for the State.

Maitri "Mike" Klinkosum for defendant-appellant.

TYSON, Judge.

Frederick Dean Morgan ("defendant") appeals from his conviction and his aggravated sentence as a prior record level IV felon entered after a jury found him guilty of two counts of assault with a deadly weapon inflicting serious injury. Defendant plead guilty to misdemeanor breaking and entering and the violation of a domestic violence protection order. We find no error.

I. Background

Early in the morning of 13 April 2001, April Ladawn Warren Morgan ("Morgan") was home with her two children, Jade, six-years-old, and Ladawn, three-years-old. Also present were Jason Kyle Marshall ("Marshall"), Jerry Joyce, and Keith Dodd. At approximately 1:00 a.m., Joyce and Dodd left to go to the store leaving Morgan and Marshall sitting on the couch, watching television.

Morgan testified that she married defendant in 1996 and conceived Jade and Ladawn. Morgan and defendant separated in February of 1999 because defendant "wouldn't work" and because of "the violence." Morgan testified that defendant repeatedly threat-

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ened her and impliedly threatened to kill her after they separated. Morgan caused multiple 50-B domestic violence protective orders (“50-B orders”) to be issued against defendant because of violence and threats.

On 13 April 2001, two glass Arbor Mist wine bottles, filled with colored water, were sitting in Morgan’s kitchen as decorations. The bottles were made of “thick” glass and each held 1.5 pints. While Morgan was sitting on the couch with Marshall, she “looked up and saw the defendant coming through my kitchen.” After defendant hit Marshall in the head with an Arbor Mist bottle, the glass broke and cut Marshall. Defendant then assaulted Morgan. Morgan put up her arms to defend herself and received blows to her arms and cuts on them. She received cuts to her face, lips, side of her head, legs, arms, and back. Morgan suffered permanent nerve damage and disfigurement as a result of the assault.

Marshall testified that “someone came from my right side—the blind side—and struck me in the head with a bottle.” After Marshall was struck initially, the unidentified man continued to “hit me and then he cut me a few times” on Marshall’s forehead and on the top of his head. Marshall was dazed by the blows and “really couldn’t see because the blood kept pouring in my eyes.” Marshall continually wiped the blood out of his eyes and observed the man hitting Morgan with the end of the bottle. He testified that the bottle “was broke and it was just the handle.”

Marshall attempted to leave through the front door but was struck again in the side of his face by defendant. Marshall testified that defendant “went back” to Morgan and “kept on hitting her.” While defendant remained in the living room, Jade, the daughter, threw an ashtray at defendant, but defendant continued to beat Morgan.

Defendant was indicted and tried on first degree burglary and the two felony assault charges. After the close all evidence, the trial court dismissed the first degree burglary charge and defendant pled guilty to misdemeanor breaking and entering. The trial court submitted both charges of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury to the jury on both Morgan and Marshall. The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury on both Morgan and Marshall. Defendant was sentenced to two consecutive aggravated sentences of a minimum of 58

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months to a maximum of 79 months each as a prior record level IV felon.

II. Issues

Defendant contends the trial court erred in (1) admitting evidence of prior 50-B orders and acts of defendant surrounding those orders, (2) denying defendant's motion to dismiss, (3) finding and instructing the jury that the broken wine bottle was a deadly weapon as a matter of law, (4) finding that defendant was a prior record level IV felon, and (5) finding two non-statutory aggravating factors.

III. Prior Acts by Defendant

[1] Defendant contends the trial court erred in admitting evidence of prior and expired 50-B domestic violence orders and in admitting evidence of prior acts by defendant which led to the issuance of the restraining orders. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001) (Emphasis supplied). Evidence of "other crimes, wrongs, or acts" is admissible only if for a proper purpose. *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). It is proper to admit "other crimes, wrongs, or acts" under Rule 404(b) to show intent. N.C. Gen. Stat. § 8C-1, Rule 404(b).

Defendant was charged with assault with a deadly weapon *with the intent to kill* inflicting serious injury. The State was required to prove that defendant had the intent to kill as an element of the crime. The State presented evidence of the prior 50-B orders and the actions of defendant which caused those orders to show the requisite intent to kill Morgan.

The trial court instructed the jury:

Evidence has been received in this case tending to show that the defendant has made threats or committing previous assaults against [Morgan] and that two 50-B restraining orders have been

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taken out by [Morgan] against the defendant. This evidence was received or admitted solely for the purpose of showing that the defendant had the intent to kill which is a necessary element of the crime charged of assault with a deadly weapon with intent to kill inflicting serious injury against [Morgan]. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. This evidence was not received for the purpose of intent as it relates to the assault charge against [Marshall].

The trial court did not err in admitting this evidence to show defendant's intent to kill Morgan. The trial court properly limited the purposes in its instruction by requiring the jury to consider the evidence only to show intent and only as against Morgan. This assignment of error is overruled.

IV. Denial of Motion to Dismiss

[2] Defendant contends the trial court erred in denying his motion to dismiss because there was (a) a fatal variance between the indictment and the evidence at trial and (b) insufficient evidence that the broken wine bottle was a deadly weapon. Defendant argues that, as against Marshall, the evidence at trial goes toward the use of defendant's hands as a deadly weapon and not assault with a broken wine bottle as a deadly weapon. Defendant further contends there is insufficient evidence of a broken wine bottle being a deadly weapon as a matter of law. We disagree.

A motion to dismiss should be denied when, reviewed in a light most favorable to the State, the State presents substantial evidence of every element of the crime charged. *State v. Powell*, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117-18 (1980). 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). The State must present substantial evidence that (1) defendant (2) assaulted another (3) with a deadly weapon (4) with the intent to kill (5) inflicting serious injury. The indictments alleged the broken wine bottle to be the deadly weapon in both cases. Defendant admitted the assaults and does not contest that the assaults inflicted serious injury on both Morgan and Marshall. The jury found no intent to kill.

Defendant contends that there is insufficient evidence that defendant assaulted Marshall with the broken wine bottle as a deadly

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weapon. Defendant argues that the evidence only shows defendant hit Marshall with an unbroken wine bottle, which shattered upon impact, but that there was no evidence of hitting Marshall with anything else besides his fist. We disagree.

Marshall testified that, after defendant blind-sided him in the head with the wine bottle that broke upon impact, “[h]e hit me and then he cut me a few times.” The cuts came one after the other and not all at once. Taken in a light most favorable to the State, there was substantial evidence that defendant assaulted Marshall with a broken wine bottle to survive defendant’s motion to dismiss.

As to the assault against Morgan, Marshall testified that after he had been beaten and cut, defendant “went after [Morgan].” Defendant “started hitting her and swinging the bottle . . . The end of the bottle . . . It broke and it was just the handle.” Morgan testified that defendant assaulted her with the broken bottle. She received cuts to her arms, legs, back, face, and head. Taken in a light most favorable to the State, substantial evidence was presented that defendant assaulted Morgan with a broken bottle to survive defendant’s motion to dismiss.

V. Wine Bottle as a Deadly Weapon

[3] Defendant contends the trial court erred in instructing the jury that the wine bottle was a deadly weapon. During the charge conference, defendant did not request the trial court to instruct further on the element of a deadly weapon. After the trial court instructed the jury, defendant did not object to the jury instructions as required by N.C. R. App. P. Rule 10(b)(2). Defendant never requested the lesser included offense of assault inflicting serious injury be submitted to the jury.

Our review is limited to plain error when defendant fails to object to jury instructions. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). “[E]ven when the ‘plain error’ rule is applied, ‘[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.’ ” *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). Plain error is defined as:

[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

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that justice cannot have been done,” or “where [the error] is grave error which amounts to a denial of a fundamental right of the accused,” or the error has “ ‘resulted in a miscarriage of justice or in the denial to appellant of a fair trial’ ” or where the error is such as to “seriously affect the fairness, integrity or public reputation of judicial proceedings” or where it can be fairly said “the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.”

Id. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)). Prior to engaging in a plain error analysis, we must make “the determination [whether] the instruction complained of constitutes ‘error’ at all.” *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986).

A dangerous or deadly weapon “is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm.” Only “where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury.”

Id. at 120, 340 S.E.2d at 470 (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981); *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978)).

We review the overall jury instruction and not portions in isolation. *State v. Davis*, 349 N.C. 1, 58, 506 S.E.2d 455, 487 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). The trial court charged the jury that the State must prove beyond a reasonable doubt “that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. The broken Arbor Mist bottle is a deadly weapon.” Later in the instructions, the trial court reiterated that the jury was required to find from the evidence beyond a reasonable doubt “that the broken wine bottle is a deadly weapon.” It further instructed “if you do not so find or have a reasonable doubt as to one or more of these things, it will be your duty to return a verdict of not guilty.” Defendant made no request for special instructions on the issue of deadly weapon and no objections to the instructions as given.

“It has long been the law of this state that ‘[w]here the alleged deadly weapon and the manner of its use are of such character as to

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admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring.’ ” *Torian*, 316 N.C. at 119, 340 S.E.2d at 470 (1986) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924); *State v. West*, 51 N.C. (6 Jones) 505 (1859); *State v. Roper*, 39 N.C. App. 256, 249 S. E. 2d 870 (1978)) (emphasis omitted).

There is no “mechanical definition” for “the distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances.” *Id.* at 121, 340 S.E.2d at 471. “[T]he evidence in each case determines whether a certain kind of [weapon] is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death.” *Id.*

Here, the uncontroverted evidence showed that defendant used a 1.5 pint wine bottle made of “thick” glass. Defendant approached Marshall from his “blind side” and struck him hard enough in the head with the wine bottle that it broke upon impact. Defendant’s blows caused cuts to Marshall’s head which required staples and stitches to close the wounds. Defendant continued to strike both Marshall and Morgan with the broken bottle cutting both in the head and face and on Morgan’s arms, legs, and back. The State entered into evidence the broken bottle defendant used but neither it nor photographs of the bottle were included in the record on appeal.

We hold that the evidence amply supported the trial court’s instruction that a broken wine bottle is a dangerous and deadly weapon as a matter of law because, “in the circumstances of its use by defendant here, it was ‘likely to produce death or great bodily harm.’ ” *Id.* at 121-22, 340 S.E.2d at 471 (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)).

VI. Prior Record Level

[4] During sentencing, defendant objected to four of the eleven prior convictions the State presented for determination of defendant’s prior record level. The first of the convictions objected to was a prayer for judgment continued which the trial court counted toward defendant’s points. On the next, defendant contended that he was not provided an attorney and the trial court excluded the conviction. On the remaining two convictions, the convicted perpetrator was Frederick Deon Morgan with a birth date of 26 July 1965 and an

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address at 3656 Cedar Springs Dr. Winston-Salem. Defendant's legal name is Frederick Dean Morgan and he was born on 25 July 1965. The trial court found that the middle name having an "o" instead of an "a" and the birth date being misstated by one day were both clerical errors and counted both convictions toward defendant's prior record level. Defendant appeals only the use of the last two convictions at sentencing.

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.21(c) (2001). The trial court noted in the record that the middle name "Deon" was also stated on the majority of the prior convictions to which defendant admitted. The address of 3656 Cedar Springs appeared on multiple prior convictions to which defendant also admitted. The record reflects that defendant also admitted to convictions under the middle name "Devon" and "Deaon". Based on the fact that defendant had admitted to other convictions under the name of "Deon" with an address of 3656 Cedar Springs, the trial court found "that the only difference in these two files in the '94 and '93 cases are one variance in the date of birth. The court will treat that as a clerical error and therefore the defendant's motion is denied as relates to those two charges."

We find that the State presented a preponderance of the evidence to show that defendant was the same person convicted in the disputed convictions. The trial court did not err in including the two convictions in determining defendant's prior record level.

VII. Aggravating Factors

[5] Defendant contends that the trial court committed plain error in finding as non-statutory aggravating factors that (1) "the defendant beat his wife and the other victim in the presence of the 6 year old child which caused her serious trama stress to this child [sic]" and (2) "a seris [sic] of physical abuse and threats in the 50-B orders culminated in the defendant's assault on both April Warren and Jason Marshall that being a course of conduct." Defendant did not object at trial. We review under a plain error standard.

A. Occurred in Presence of Child

Defendant contends that his commission of the assault in the presence of a minor child was a joinable offense of misde-

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meanor child abuse and may not be used as an aggravating factor. We disagree.

“Any parent of a child less than 16 years of age, . . . , who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class 1 misdemeanor of child abuse.” N.C. Gen. Stat. § 14-318.2(a). There was no evidence presented that defendant knew or should have known that the six-year-old was physically injured or at a substantial risk of being physically injured. Nor was there evidence that any possible actions concerning the child were “not by accident.” Mere presence of the minor child at the assaults does not “amount to an uncharged crime by defendant” as was required in *State v. Mosley*, 93 N.C. App. 239, 241, 377 S.E.2d 554, 555 (1989). This assignment of error is overruled.

B. Course of Conduct

Defendant assigns error to using his course of conduct as an aggravating factor because he pled guilty to the joined offense of violation of the 50-B order. We disagree.

There is no evidence that the trial court used the violation of the 50-B order as the aggravating factor. The prior conduct of defendant, the multiple expired 50-B orders, and the past threats showed defendant's course of conduct and were not part of the joined violation of the 50-B order in force at the time of the assault.

The trial court did not err in finding defendant's course of conduct as an aggravating factor for the purpose of sentencing. This assignment of error is overruled.

VIII. Conclusion

We hold that the trial court did not err in admitting evidence at trial or in denying defendant's motion to dismiss. The trial court properly instructed the jury regarding the wine bottle as a deadly weapon. The trial court did not err by the sentencing of defendant with a prior record level IV to an aggravated sentence.

No error.

Judges McCULLOUGH and CALABRIA concur.

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IN THE MATTER OF: THOMAS DANIEL HUMPHREY, JR.

No. COA02-518

(Filed 18 March 2003)

1. Termination of Parental Rights— jurisdiction—neglect— proceedings in another county

A New Hanover County district court had subject matter jurisdiction to consider a petition to terminate parental rights even though custody issues had been heard in a Wake County district court where petitioner and the child resided in New Hanover County and the New Hanover court determined that the child had been neglected by respondent. N.C.G.S. § 7B-1101.

2. Trials— continuance denied—burden of demonstrating grounds not met

The denial of a motion to continue a termination of parental rights hearing was not an abuse of discretion where respondent failed to meet her burden of demonstrating sufficient grounds for a continuance.

3. Termination of Parental Rights— petition—required statement omitted—not prejudicial

The omission of the statutorily required statement that a petition for termination of parental rights was not filed to circumvent provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act was not prejudicial to respondent. Additionally, there is no authority compelling dismissal solely for omission of this statement. N.C.G.S. § 7B-1104(7).

4. Termination of Parental Rights— neglect—no specific allegation—factual allegations sufficient for notice

The trial court did not err by considering neglect in a termination of parental rights case where there was not a specific allegation of neglect in the petition but the factual allegations were sufficient to put respondent on notice.

5. Termination of Parental Rights— neglect—evidence sufficient

The trial court did not err by finding and concluding that respondent had neglected her child where the evidence was that respondent had limited contact with the child after 1992 and last visited him in 1995, her only contact after 1995 was a birthday

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card in 2001, and she did not contribute to the child's financial support after 1992. Although she was seeking visitation rights in a custody action at the time of the termination proceeding, that alone does not demonstrate that she was attempting to perform her obligations as a parent.

Appeal by respondent from order entered 9 November 2001 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Court of Appeals 16 October 2002.

W.T. Batchelor II, for petitioner-appellee.

Robert C. Slaughter, III for respondent-appellant.

McGEE, Judge.

Thomas D. Humphrey (petitioner) filed a petition on 13 September 2000 in New Hanover County to terminate the parental rights of Anne Wyatt Skok (respondent) to Thomas Daniel Humphrey, Jr. (the child). Respondent filed an answer to the petition and a motion to dismiss on 8 October 2001. Respondent filed a motion to continue the hearing on the petition to terminate parental rights on 19 October 2001. The trial court denied the motion and the hearing commenced on 23 October 2001. Respondent orally moved to dismiss the petition, which the trial court denied at the end of the hearing. The trial court found that respondent had neglected and abandoned the child and concluded that termination of respondent's parental rights to the child were in the best interests of the child. Respondent appeals.

The evidence presented before the trial court tended to show that the child was born to petitioner and respondent on 25 June 1989. After petitioner and respondent separated, petitioner was awarded temporary custody of the child and respondent was awarded visitation in 1992 in Wake County District Court. Petitioner has maintained physical custody of the child since 30 July 1992. Respondent has had limited contact with the child since 1992 and last visited the child on 25 June 1995. Between 1992 and 1995, respondent visited the child an average of once a year and telephoned the child approximately four times. She sent at most four cards or letters to the child over the past seven years. The trial court found that respondent "is not actively pursuing a resumption of her relationship with her son."

Respondent did not seek visitation with the child from 1995 until she filed a contempt motion against petitioner in August 2000 in Wake

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County District Court. Respondent's motion for contempt and request for visitation were denied on 6 August 2001, nunc pro tunc to 30 April 2001. The trial court also ordered respondent to submit to a psychological evaluation, but respondent failed to do so.

At the time of the termination of parental rights hearing the child resided with petitioner and petitioner's wife (stepmother) in New Hanover County. The child's stepmother has a fourteen-year-old daughter with whom the child has a good relationship. There is evidence in the record that the child has a good home life, is performing well in school, and is supportive of his stepmother's plans to adopt him.

[1] Respondent first argues the trial court erred in denying her motion to dismiss the petition to terminate her parental rights because the issues in this case were already under the jurisdiction of the district court in Wake County. Respondent contends the district court in New Hanover County lacked subject matter jurisdiction.

The statute setting forth provisions related to jurisdiction in termination of parental rights cases, N.C. Gen. Stat. § 7B-1101 (2001), states that

[t]he Court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in . . . the district at the time of filing of the petition or motion. . . . Provided, that before exercising jurisdiction under this Article, the court shall find that it would have jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204.

Our Court has stated that “[t]his provision requires a two-part process in which the trial court must first consider whether it has jurisdiction to make a child custody order under N.C. Gen. Stat. § [50A-201] before it can exert the ‘exclusive original’ jurisdiction granted in N.C. Gen. Stat. § [7B-1101].” *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686 (1999) (quoting *In re Leonard*, 77 N.C. App. 439, 335 S.E.2d 73 (1985)). Satisfaction of the first part of the test requires that the district court's exercise of jurisdiction be compatible with the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), codified in N.C. Gen. Stat. Chapter 50A. *In re Bean*, 132 N.C. App. at 366, 511 S.E.2d at 686.

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The UCCJEA provides that the court has jurisdiction to make an initial child custody determination only if North Carolina is the “home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding.” N.C. Gen. Stat. § 50A-201(a)(1) (2001). “It is a generally accepted principle that the courts of the state in which a minor child is physically present have jurisdiction consistent with due process to adjudicate a custody dispute involving that child.” *Lynch v. Lynch*, 302 N.C. 189, 193, 274 S.E.2d 212, 217, *modified and affirmed*, 303 N.C. 367, 279 S.E.2d 840 (1981).

Evidence in the record demonstrates that the child was a resident of North Carolina at the time the petition for termination of parental rights was filed. North Carolina was also the home state of the child at the time the action for child custody was originally filed in 1992 and the record shows that the child has remained a resident of North Carolina subsequently. Additionally, no other state has attempted to assert jurisdiction, original or otherwise, in this case. Accordingly, there is no evidence of a jurisdictional conflict with the court of another state and the district court in New Hanover County could exercise child custody jurisdiction consistent with the UCCJEA.

Respondent cites *In re Greer*, 26 N.C. App. 106, 215 S.E.2d 404 (1975) in arguing that the court which first acquires custody jurisdiction retains it to the exclusion of others. In *Greer*, the trial court in Watauga County entered a child custody award in a divorce and custody proceeding. Approximately six years later, the children began residing with their father in Pitt County, which was not authorized by the child custody order. The district court in Pitt County attempted to assert jurisdiction over the children on the basis that they were neglected. Our Court ruled that the district court in Pitt County could not usurp the jurisdictional authority of the district court in Watauga County because no factual findings were made by the district court in Pitt County to support the conclusion that the children were neglected. We concluded that there was no legal justification for permitting the district court in Pitt County to enter its order.

However, in *Greer* we opined that a sufficient factual basis for establishing that the children were neglected while in Pitt County would have permitted the district court in Pitt County to exercise jurisdiction in the case.

[I]n this case where only the question of custody is involved, if the factual circumstances justified a finding of “neglect,” it is our

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opinion that the District Court, Pitt County, could properly assume jurisdiction and temporary custody of the children for the limited purpose of returning them to the proper custodian or the proper court; and in some cases involving . . . neglected . . . children the District Court where the children are found may assume custody jurisdiction under G.S. 7A-277, *et. seq.*, even where another court has custody jurisdiction under G.S. 50-13.1, *et. seq.*

Id. at 113, 215 S.E.2d at 409.

The holding in *Greer* is distinguishable from the facts in the present case, but we find the dicta of this Court in *Greer* to be persuasive. In the case before us, the original child custody action was filed in district court in Wake County and a temporary custody order was entered on 17 August 1992. The district court in Wake County properly exercised jurisdiction over the custody matter and the child because all parties resided in Wake County at the initiation of the divorce and custody action. Petitioner filed a petition for termination of parental rights on 13 September 2000 in district court in New Hanover County. In granting the petition, the district court in New Hanover County determined that the child had been neglected by respondent and made sufficient findings of fact to support that determination, as discussed hereafter. While Wake County still maintained jurisdiction over the child custody proceeding, the district court in New Hanover County could assume child custody jurisdiction over the child due to its finding that the child was neglected.

Having determined that a district court can exercise jurisdiction consistent with the UCCJEA, we must now determine if the district court in New Hanover County meets the remaining requirements for exercising jurisdiction under N.C.G.S. § 7B-1101. The statute requires that the child reside in or be found in the county where the petition for termination of parental rights is filed. N.C.G.S. § 7B-1101.

The record demonstrates that petitioner was a resident of New Hanover County at the time the petition was filed. The record also shows that the child was residing with petitioner in New Hanover County at the time of the filing of the petition and at the time of the issue of the order terminating respondent's parental rights. Accordingly, the requirement that the child reside in or be found in New Hanover County was satisfied and enabled the district court to exercise jurisdiction pursuant to N.C.G.S. § 7B-1101. This assignment of error is without merit.

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[2] Respondent next argues the trial court erred in denying respondent's motion to continue the 23 October 2001 hearing. Respondent contends that she and her mother were justifiably absent from the hearing and that the hearing should have been continued due to the pending action in Wake County District Court. Since we already have held that the district court in New Hanover County was able to assume jurisdiction in this matter, we will only address respondent's argument that she was justifiably absent from the hearing.

A motion to continue is addressed to the court's sound discretion and will not be disturbed on appeal in the absence of abuse of discretion. Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.

Doby v. Lowder, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984) (citations omitted).

Respondent has failed to demonstrate that a continuance of the hearing was necessary to further substantial justice. Respondent's brief fails to address respondent's absence from the hearing and provides no evidence that would warrant a continuance. Respondent stated that her motion for continuance was partially based on the fact that her mother, a crucial witness, could not attend the hearing, but respondent fails to develop this argument or provide evidence to support this claim. Respondent has failed to meet her burden of demonstrating sufficient grounds for a continuance. The trial court did not abuse its discretion in denying respondent's motion to continue the hearing. This assignment of error is without merit.

[3] Respondent next argues the trial court erred in denying respondent's motion to dismiss the petition to terminate parental rights because the petition failed to meet statutory requirements. Respondent contends the petition failed to state that it had not been filed to circumvent the provisions of Article 2 of Chapter 50A of the North Carolina General Statutes, as required by N.C.G.S. § 7B-1104.

N.C. Gen. Stat. § 7B-1104(7) (2001) states that a petition or motion for termination of parental rights shall state that the petition "has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act." The record shows that petitioner failed to make this statement of fact in the petition he filed in district

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court in New Hanover County on 13 September 2000. However, the trial court made a finding of fact that “[t]he petition did not allege specifically that the petition was not filed to avoid the Uniform Child Custody Jurisdiction and Enforcement Act but did allege the existence of a proceeding in Wake County, North Carolina regarding visitation with this child.” This finding was sufficient to establish that the petition was not filed to circumvent the UCCJEA and to cure petitioner’s error. Additionally, we find no authority that compelled dismissal of the action solely because petitioner failed to include this statement of fact in the petition. While it is a better practice to include the factual statement as stated in the statute, under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced as a result of the omission. This assignment of error is overruled.

[4] Respondent argues the trial court erred in considering the issue of neglect because the petition failed to allege that respondent had neglected the child. Respondent contends that consideration of the neglect issue was unfair because it did not put her on notice that she needed to defend against the allegation of neglect.

N.C. Gen. Stat. § 7B-1104(6) (2001) states that a petition for termination of parental rights shall state “[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.” Factual allegations must be sufficient to put a respondent on notice regarding the acts, omissions, or conditions at issue in the petition. *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002).

In the present case, petitioner’s factual allegations were sufficient to put respondent on notice regarding the issues in the petition. The petition alleged that respondent had not visited the child in the past five years and that respondent had contributed less than \$25.00 to the child’s support since 1992. These factual allegations were sufficient to give respondent notice regarding the issue of neglect and petitioner did not need to specifically allege neglect in the petition. This assignment of error is without merit.

[5] Respondent argues the trial court erred in finding as fact and concluding as a matter of law that respondent neglected and abandoned the child.

On review, this Court must determine whether the trial court’s findings of fact were based on clear, cogent, and convincing evi-

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dence, and whether those findings of fact support a conclusion that parental termination should occur on the grounds stated in N.C. Gen. Stat. § 7A-289.32. So long as the findings of fact support a conclusion based on § 7A-289.32, the order terminating parental rights must be affirmed.

In re Oghenekevebe, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395-96 (1996) (citation omitted). Findings of fact to which a respondent did not object are conclusive on appeal. *In re Wilkerson*, 57 N.C. App. 63, 65, 291 S.E.2d 182, 183 (1982). A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). Accordingly, we limit our review to respondent's argument regarding the trial court's finding and conclusion that the child was neglected.

The trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child. N.C. Gen. Stat. § 7B-1111(a)(1) (2001). N.C. Gen. Stat. § 7B-101(15) (2001) defines, in pertinent part, a neglected juvenile as “[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who has been abandoned.” Abandonment has been defined as

wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

Evidence in the record shows that respondent has not visited the child or requested visitation since 1995. Furthermore, her only contact with the child since 1995 was a birthday card in 2001. The evidence demonstrates that respondent has wilfully refused to perform her obligations as a parent and has withheld her presence, love, care, and opportunity to display filial affection from the child. Respondent has had limited interaction with the child since 1992, visiting with him less than once a year between 1992 and 1995. She has also failed to financially contribute to the support of the child since 1992.

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N.C. Gen. Stat. § 7B-1111(a)(7) (2001) states that parental rights may be terminated on the grounds of abandonment if the parent has abandoned the child for at least six consecutive months immediately preceding the petition. The statute does not impose a six-consecutive-month requirement when the child is classified as neglected due to abandonment. The evidence demonstrates that respondent abandoned the child over a six-year period and has done nothing to fulfill her obligations as a parent. While respondent argues that she is currently seeking visitation rights in the Wake County custody action, this alone does not demonstrate that respondent is attempting to perform her obligations as a parent. Respondent has failed to make any effort towards contacting or supporting the child through visitation, correspondence, or support. The evidence shows that the child has received no parental care or affection from respondent since 1995 and received visitation an average of once per year from 1992 to 1995. Respondent also failed to except to the trial court's finding that she was "not actively pursuing a resumption of her relationship with her son" and to other findings supporting neglect. Thus, these findings become conclusive on appeal. *In re Wilkerson*, 57 N.C. App. at 65, 291 S.E.2d at 183.

The evidence in the record is sufficiently clear and convincing to support the trial court's findings of fact that respondent has neglected the child. These findings of fact support the trial court's conclusions of law and its decision to terminate the parental rights of respondent. This assignment of error is without merit.

We have reviewed respondent's remaining arguments and find them to be without merit.

Affirmed.

Judges WYNN and HUDSON concur.

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BRADLEY BEALL AND ADRIENNE BEALL, PLAINTIFFS v. DAVID BEALL, DEFENDANT

No. COA02-743

(Filed 18 March 2003)

1. Conflict of Laws— custodianship of trust accounts—substantive laws of Florida—procedural laws of North Carolina

Although Florida substantive law applies in an action for fraud, conversion, unfair and deceptive trade practices, and misappropriation regarding defendant father's custodianship of plaintiff children's trust accounts based on the facts that the trusts were made in Florida under the Uniform Transfer to Minors Act and the acts allegedly took place in Florida, the remedial or procedural laws of North Carolina apply because the claim was brought in this state which is defendant's current residence.

2. Collateral Estoppel and Res Judicata— custodianship of minors' trust accounts—different claims—different issues

The trial court erred in an action for fraud, conversion, unfair and deceptive trade practices, and misappropriation regarding defendant father's custodianship of plaintiff children's trust accounts created in Florida by granting summary judgment in favor of defendant father based on either res judicata or collateral estoppel, because: (1) the prior claim was a motion for an accounting arising out of divorce proceedings involving defendant's ex-wife whereas the current claim is for fraud, conversion, unfair and deceptive trade practices, and misappropriation; and (2) defendant did not provide sufficient evidence that the issues raised by the present action were actually raised and litigated in the prior action.

3. Statutes of Limitation and Repose— disability of minority—custodianship of trust account

Plaintiff son's claims for fraud, conversion, unfair and deceptive trade practices, and misappropriation arising out of defendant father's custodianship of plaintiff children's trust accounts created in Florida is barred by the statute of limitations even though plaintiff was under the disability of minority when this action accrued, because: (1) N.C.G.S. § 1-17(a) provides that minors are allowed to bring suit within the three years from the date of their eighteenth birthday, and the last date on which

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plaintiff could have filed his complaint in this action was 23 February 1998; and (2) the summons in this case was not issued until 27 February 1998 and the complaint was not filed until 16 March 1998.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiffs from judgment entered 25 February 2002 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 8 January 2003.

Katherine E. Jean for plaintiffs-appellants.

Law Offices of Johnny S. Gaskins, by Johnny S. Gaskins for defendant-appellee.

LEVINSON, Judge.

Plaintiffs are the children of defendant and his ex-wife, Patricia Beall, and were born 23 February 1977 and 27 November 1978. In 1987 defendant became a custodian for bank accounts and certificates of deposit opened under the Uniform Transfer to Minors Act (UTMA) and belonging to plaintiffs. Defendant and his ex-wife entered divorce proceedings in Florida, their place of residence, on 27 September 1988.

On 7 March 1991, as part of the divorce proceedings, defendant's ex-wife filed a "Motion for Accounting of Children's Money," wherein she requested "a full accounting of the children's money, together with an award of attorney's fees and costs. . . ." On 8 April 1991, the trial court entered an "Order on Motion for Accounting" requiring defendant to produce all records regarding the children's trust assets, to provide those records to his ex-wife, and to transfer all children's assets that he held into proper form under the UTMA.

During 1991 and 1992 defendant's ex-wife made multiple motions for enforcement of prior orders requesting defendant be held in contempt for failing to make the accounting ordered and for unpaid alimony. On 12 December 1991, the trial court found that defendant did not owe unpaid alimony, but on 3 May 1994, the trial court entered an "Order on Motion to Enforce Prior Orders" ordering defendant to pay \$3,337 to defendant's ex-wife as repayment for furnishings, Christmas presents, and children's expenses. This \$3,337 was paid out of UTMA accounts. Although defendant's ex-wife moved for a rehear-

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ing, that motion was denied, and the trial court indicated that its ruling was final.

In their complaint filed 16 March 1998 in Wake County, defendant's current place of residence, plaintiffs argue defendant improperly transferred and misappropriated funds from their trust accounts for which he was custodian. Specifically, they allege constructive fraud, conversion, unfair and deceptive trade practice, and misappropriation, and they request an accounting, constructive trust, and punitive damages. Defendant moved for summary judgment, and after hearing arguments and taking evidence, the trial court granted defendant's motion.

Summary judgment is proper when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (2001); *Coastal Leasing Corp. v. T-Bar Corp.*, 128 N.C. App. 379, 496 S.E.2d 795 (1998). A defendant, as the moving party, bears the burden of showing that no triable issue exists. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). A defendant may meet this burden by showing that the plaintiff cannot surmount an affirmative defense. *Id.* at 63, 414 S.E.2d at 342. Once a defendant has met this burden, the plaintiff must forecast evidence tending to show that a *prima facie* case exists. *Id.*

Defendant contends (1) plaintiffs' action is barred by *res judicata* and *collateral estoppel*, and (2) plaintiff Bradley Beall is barred by the statute of limitations. We turn first to defendant's contention that plaintiffs are barred by *res judicata* and *collateral estoppel*.

[1] First, we note, defendant correctly argues that Florida substantive law applies because the contract creating the children's trusts were made in Florida under UTMA and because the acts alleged took place in Florida. *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988). However, as the claim was brought in this State, defendant's current residence, the remedial or procedural laws of North Carolina apply. *Id.*; *Byrd Motor Lines, Inc. v. Dunlop Tire and Rubber Corp.*, 63 N.C. App. 292, 297, 304 S.E.2d 773, 777 (1983).

[2] The two doctrines of *res judicata* and *collateral estoppel* act to bar the relitigation of issues and rights already resolved. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973). They do not determine the existence or non-existence of a right but serve to bar the remedy provided by such a right. *Id.* Thus, we examine the standards

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necessary to the establishment of *res judicata* and *collateral estoppel* under North Carolina law.

Res judicata is a doctrine of claim preclusion that prevents relitigation of a claim or cause of action between the same parties or their privies. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 436, 349 S.E.2d 552, 561 (1986); see *King*, 284 N.C. 348, 200 S.E.2d 799. It precludes all issues that could or should have been raised in support or defense of the prior claim. *McInnis & Assoc.*, 318 N.C. at 436, 349 S.E.2d at 561. Similarly, *collateral estoppel* is a doctrine of issues preclusion, preventing parties or their privies from relitigating “facts or issues *actually determined* in a previous action based upon a different claim or cause of action.” *Id.*

For *res judicata* to bar plaintiffs’ action defendant must show: (1) the previous suit resulted in a final judgment on the merits, (2) the same cause of action is involved, and (3) both he and plaintiffs were either parties or are in privity with the parties of the prior action. *Id.* at 429, 349 S.E.2d at 557.

Although the parties argued extensively whether defendant’s ex-wife stood in privity with plaintiffs, we need not reach that issue as we, nevertheless, find defendant has not met his burden of establishing the other elements necessary to *res judicata*. Although similar underlying facts to those forming plaintiffs’ basis for the present action may have led defendant’s ex-wife to request the accounting in the prior action, defendant has failed to show the present cause of action is not separate and distinct in kind from the earlier. Whereas the prior claim was a motion for an accounting arising out of divorce proceedings, the present claim is for fraud, conversion, unfair and deceptive trade practice, and misappropriation. There is insufficient evidence that this is the relitigation of that prior cause of action, not a new and distinct claim.

Turning to defendant’s argument that *collateral estoppel* bars plaintiffs’ action, to establish that affirmative defense, defendant must show: (1) the earlier action resulted in a final judgment on the merits, (2) the issue in question is identical to an issue actually litigated in the earlier suit, (3) the judgment on the earlier issue was necessary to that case, and (4) both parties are either identical to or in privity with a party or the parties from the prior suit. *Id.* at 428-29, 349 S.E.2d at 557; *King*, 284 N.C. at 355, 200 S.E.2d at 805.

Here, although the parties again focused primarily on the privity requirement, we need not reach that issue as defendant fails to estab-

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lish *collateral estoppel* because he provides insufficient evidence that the issues raised by the present action were actually raised and litigated in the prior action. See *Reid v. Holden*, 242 N.C. 408, 88 S.E.2d 125 (1955). The prior action argued by defendant was for an accounting of the trust assets, whereas the present action is for fraud, conversion, and unfair and deceptive trade practice. Defendant's ex-wife's motion for accounting requested only "a full accounting of the children's money," and the resulting order provided only for the "production of records," "access to records," and "entitlement to information." Although the trial court in the prior action ordered some monies transferred into and out of the children's trust accounts, this does not establish the issues presently raised were litigated and determined in that action. Rather, because the motion for an accounting was made in conjunction with divorce proceedings, there are alternative reasons the trial court may have ordered the transfer of monies.

Furthermore, as the trust was governed by Florida law, see Fla. Stat. § 710.103 (2001); N.C.G.S. § 33A-2 (2001), which requires custodians to make "records of all transactions with respect to custodial property . . . available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of 14 years," defendant's ex-wife, as a parent of the minor trustees, was entitled to an accounting, apart from any claims of fraud or conversion. Fla. Stat. § 710.114 (2001). Thus, defendant has failed to carry his burden of establishing that the issues currently presented have been previously litigated and determined.

[3] Next, defendant contends plaintiff Bradley Beall's claim is barred by the statute of limitations. This State has consistently held that statutes of limitation are procedural, not substantive. *Boudreau*, 322 N.C. at 335, 368 S.E.2d at 854; *Sayer v. Henderson*, 225 N.C. 642, 643, 35 S.E.2d 875, 876 (1945). Therefore, the applicable statute of limitations is determined under North Carolina law.

Here, plaintiffs' complaint alleges acts which took place from 1987 to 1990, but their complaint was not filed until 16 March 1998, well after the three years allowed. N.C.G.S. § 1-52 (2001). However, N.C.G.S. § 1-17(a) (2001) allows a person under a disability at the time the cause of action accrues to bring the action within the three years after removal of the disability but "no time thereafter." Because plaintiffs were under the disability of minority when their cause of action accrued, they were allowed to bring suit within the three years from

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the date of their eighteenth birthday. G.S. § 1-17(a). As plaintiff Bradley Beall was born 23 February 1977, the last date on which he could have filed his complaint in this action was 23 February 1998, the first business day following 22 February 1998, a Sunday.

Plaintiffs argue this action was commenced within the time allowed because plaintiff Adrienne Beall filed an application for extension of time within which to file the complaint and because plaintiff Bradley Beall's name was listed as a plaintiff on the application. Without regard to whether the application could have acted for plaintiff Bradley Beall, his claim is barred nonetheless. An action may be commenced by "filing a complaint with the court" or by "the *issuance* of a summons" and an order extending permission to file. N.C.G.S. § 1A-1, Rule 3 (2001) (emphasis added). Here, the summons was not issued until 27 February 1998, and the complaint was not filed until 16 March 1998; therefore, plaintiff Bradley Beall's claim is barred. *See Telecasa v. SAS Inst., Inc.*, 133 N.C. App. 653, 655, 516 S.E.2d 397, 399 (1999).

The issue of whether defendant may be obligated to plaintiff for amounts defendant paid pursuant to Florida court orders is an issue not properly before us. N.C.R. App. P. 28. Accordingly, we have not addressed it.

In summary, defendant failed to meet his burden of establishing either *res judicata* or *collateral estoppel*; therefore, the trial court's issuance of summary judgment as to plaintiff Adrienne Beall is reversed. But because plaintiff Bradley Beall's claim is barred by the statute of limitations, the trial court was correct in issuing summary judgment as to him.

Reversed in part, remanded in part.

Judge TIMMONS-GOODSON concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur with that portion of the majority's opinion affirming summary judgment for defendant on the grounds that Bradley Beall's claims are barred by the statute of limitations. I also concur with the majority's determination that Florida law controls the substantive issues and that North Carolina law controls the remedial or proce-

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dural issues at bar. I respectfully dissent from that portion of the majority's opinion that held "[t]he issue of whether defendant may be obligated to plaintiff for amounts defendant paid pursuant to Florida court orders is an issue not properly before us" and which reverses and remands summary judgment against Adrienne Beall on all issues.

I. "Other Like Fiduciary"

I would hold that defendant was entitled to summary judgment to the extent of any funds he paid to Patricia Beall ("Patricia") pursuant to court order or to her on behalf of the children. Plaintiff's legal representative is not required to be the guardian ad litem under Florida Law to receive support. "While it is under the disability of minority, the child's right to support must be enforced by a legal representative, such as a guardian or other like fiduciary, a guardian ad litem or a next friend, but more commonly it is enforced against one parent by an opposing parent, as natural guardian, or by a governmental agency." *Cronebaugh v. Van Dyke*, 415 So.2d 738, 741 (Fla. App. 1982), *disc. rev. denied*, 426 So.2d 25 (Fla. S. Ct. 1983). "[T]he recipient of the child support receives the support monies, not in his own right or for his own benefit, but in trust for the cestui que trust, who is the child." *Id.*

Defendant distributed some, if not all, of the sums plaintiff is seeking to Patricia. Although Patricia was not appointed as the guardian ad litem, she was awarded custody of the children and, under Florida law, was an "other like fiduciary" or "next friend" when she accepted and took possession of the money, not in her own name or for her own benefit but on behalf of her children. This fiduciary status placed Patricia in privity with Adrienne and bars any recovery of those funds.

II. Conclusion

Defendant has shown entitlement to full credit for those funds paid to Patricia on behalf of the children as a matter of law. To hold otherwise would allow plaintiff Adrienne a double recovery. Summary judgment in favor of defendant is proper to the extent of those amounts he paid from the accounts pursuant to a court order or to Patricia on behalf of the children, while Adrienne remained a minor. Adrienne Beall may only pursue her claims to other funds, if any, to which she can prove legal entitlement and which defendant fraudulently converted to his own use.

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LEE WOODBURN, PETITIONER v. NORTH CAROLINA STATE UNIVERSITY,
RESPONDENT

No. COA02-262

(Filed 18 March 2003)

1. Appeal and Error— briefs—motion to strike appendix

A motion to strike an appendix to a brief was granted by the Court of Appeals where the appendix contained various State Personnel Commission and administrative law judge opinions that had not been agreed upon by the parties as part of the record, had not been submitted pursuant to a motion to amend the record, and were not necessary to the resolution of the issues in the case.

2. Administrative Law— dismissal of claim—standard of review—de novo

De novo review was the proper standard for the trial court to use when reviewing an administrative law judge's dismissal of a claim as untimely.

3. Administrative Law— exempt position—employment discrimination claim—no OAH jurisdiction

A university employee in an exempt position bringing a discrimination claim did not have a right to a hearing before the Office of Administrative Hearings. N.C.G.S. § 126-16 (employment discrimination) applies to all state employees without regard to position or status, but that statute neither addresses procedural avenues nor entitles a petitioner to choose a review scheme from which she is otherwise excluded by N.C.G.S. § 126-5. Exempt university employees have available review procedures which begin with university grievance committees and lead to review by a superior court judge and an appellate court.

Appeal by petitioner from order entered 3 December 2001 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 16 October 2002.

McSurely & Osment, by Ashley Osment, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Joyce Rutledge, for respondent-appellees.

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LEVINSON, Judge.

Petitioner (Lee Woodburn) appeals from an order dismissing her petition for a contested case hearing before the Office of Administrative Hearings (OAH). We affirm.

Petitioner was hired by respondent North Carolina State University (the university) in August, 2000, as assistant director of the university's Office of Disability Services for Students. Shortly after accepting the position, petitioner learned that she was pregnant. Due to medical complications from her pregnancy, petitioner missed work for most of October and November, 2000. On 19 December 2000, the university sent petitioner a certified letter informing her that she was being fired, and giving her 30 days notice. Petitioner received the letter on 2 January 2001, and on 16 February 2001, she filed a petition with OAH for a contested case hearing against the university. She alleged that she was terminated by the university without just cause, and that her termination was due to illegal discrimination based on gender and on a handicapping condition (pregnancy). The university moved to dismiss the petition for lack of subject matter jurisdiction, alleging that (1) OAH lacked jurisdiction over petitioner's "just cause" claim, because petitioner was not a career state employee and therefore the "just cause" provisions of N.C.G.S. § 126-35(a) were inapplicable to her, and; (2) OAH lacked jurisdiction over petitioner's discrimination grievance, because it was brought under Article 8 of Chapter 126, from which EPA non-faculty professional positions at the university were expressly exempted.

The Administrative Law Judge (ALJ) dismissed petitioner's "just cause" claim, which is not before this Court. However, the ALJ denied respondent's motion to dismiss the discrimination claim, concluding that Chapter 126 afforded petitioner the right to bring her discrimination claim before the OAH. Respondent then filed a new motion to dismiss petitioner's claim as untimely filed. The ALJ granted this motion, from which petitioner sought review in superior court. Respondent cross-exceptions to the ALJ's denial of its motion to dismiss the discrimination claim. On 3 December 2001, the trial court affirmed the dismissal of petitioner's contested case for lack of subject matter jurisdiction, on the grounds that her OAH petition was untimely. The court also concluded that petitioner's assertion of a right under Article 8 of Chapter 126 to bring a contested case before the OAH was "unavailing," although it did not enter an order expressly ruling on this issue. Plaintiff appealed from the trial court's order, while respondent cross-assigned as error the trial court's fail-

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ure to rule on the issue of OAH jurisdiction over discrimination claims brought by EPA employees. On 13 March 2002, petitioner filed a petition for discretionary review by the North Carolina Supreme Court, seeking to bypass this Court. Her petition was denied on 4 April 2002.

[1] We first address respondent's motion to strike petitioner's appendix. The Record on Appeal was settled 11 February 2002. In April, 2002, petitioner served her brief on respondent, consisting of 35 pages of text, and a 71 page "appendix" containing various SPC and ALJ opinions. On 10 May 2002, respondent filed a motion to strike the appendix. Respondent argues that the petitioner violated N.C.R. App. P. 9 and 28, by filing documents that were neither agreed on by the parties to be part of the record, nor submitted by petitioner to this Court pursuant to a motion to amend the record. We agree. Further, we do not find the materials in the proposed appendix necessary to our resolution of the issues presented herein. Respondent's motion to strike appendix is therefore granted.

Standard of Review

[2] Petitioner appealed to the trial court from the ALJ's pre-hearing dismissal of her claim as untimely. "An order of the ALJ issued pursuant to a written pre-hearing motion granting a party's requested relief for failure of the other party to comply with procedural requirements is a final decision . . . entitl[ing petitioner] to immediate judicial review[.]" *Lincoln Cty. DSS v. Hovis*, 150 N.C. App. 697, 700, 564 S.E.2d 619, 621 (2002). Judicial review of administrative agency decisions is governed by the North Carolina Administrative Procedure Act (APA), Chapter 150B of the N.C. General Statutes. N.C.G.S. § 150B-43 (2001) ("[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision . . ."). N.C.G.S. § 150B-51(b) (2001) authorizes the trial court to reverse or modify an agency's final decision if "substantial rights" of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions were:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;

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- (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 [or] capricious. . . .

N.C.G.S. § 150B-51(b). “The standard of review employed by the reviewing court 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.” *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 129, 560 S.E.2d 374, 379-80 (2002) (citing *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994)). “*De novo* review requires a court to consider the question anew, as if the agency has not addressed it.” *Blalock v. N.C. Dep’t of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001). Under the whole record test, “the reviewing court [must] examine all competent evidence (the ‘whole record’) in order to determine whether the agency decision is supported by ‘substantial evidence.’” *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118). In the instant case, the trial court stated that it was applying *de novo* review, which we conclude was the proper standard of review. We next determine whether the trial court correctly applied *de novo* review.

[3] Petitioner argues that the trial court erred by holding that Article 8 of Chapter 126 of the North Carolina General Statutes is inapplicable to petitioner. We disagree.

Chapter 126 of the General Statutes governs the State Personnel System. The scope of the chapter’s authority is set out in N.C.G.S. § 126-5 (2001), which states that “[t]he provisions of this Chapter shall apply to [a]ll State employees *not herein exempt*.” G.S. § 126-5(a)(1) (emphasis added). The statute further states that:

(c) Except as to . . . Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:

(1) A State employee who is not a career State employee as defined by this Chapter. . . .

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(c1) Except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to. . . .

(8) Instructional and research staff, physicians, and dentists of The University of North Carolina.

N.C.G.S. § 126-5(c)(1) and (c1)(8) (2001).

Petitioner is not a “career state employee,” as the term is defined by N.C.G.S. § 126-1.1 (an employee of the State who is “in a permanent position appointment” and who has held “a position subject to the State Personnel Act for the immediate 24 preceding months”). Further, her position is classified as “instructional and research staff . . . of the University of North Carolina.” Petitioner is therefore exempt from the ambit of Chapter 126 by either of the statutory criteria. Moreover, the university expressly categorizes her position as “EPA” or “exempt from SPA.” Indeed, petitioner concedes her status as an EPA employee, and characterizes the dispositive issue in this case as “whether EPA employees can ever bring contested cases.” We conclude that petitioner’s position, as a university EPA employee, is explicitly exempted from Chapter 126, with the *sole exception* of Articles 6 and 7.

Article 6 of Chapter 126 sets out the State policy regarding discrimination in employment. Petitioner’s claim alleges a violation of a provision of Article 6, N.C.G.S. § 126-16 (2001), which provides in relevant part that “[a]ll State departments and agencies . . . shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition. . . [.]”

Article 6 applies to petitioner and, like any other state employee without regard to position or status, she is entitled to enforce the rights implicated by G.S. § 126-16. However, G.S. § 126-16 neither addresses which procedural avenues are available to particular categories of state employees, nor entitles petitioner to choose a review scheme from which she is otherwise excluded. “ ‘[W]here one statute deals with certain subject matter in particular terms and another deals with the same subject matter in more general terms, the particular statute will be viewed as controlling in the particular circumstances absent clear legislative intent to the contrary.’ ” *Bryant v. Adams*, 116 N.C. App. 448, 457, 448 S.E.2d 832, 836-37 (1994) (quoting *State Ex Rel. Utilities Comm. v. Thornburg*, 84 N.C. App. 482, 353 S.E.2d 413, *disc. review denied*, 320 N.C. 517, 358 S.E.2d 533 (1987)),

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disc. review denied, 339 N.C. 736, 454 S.E.2d 647 (1995). Our Court in *Conran v. New Bern Police Dept.*, 122 N.C. App. 116, 468 S.E.2d 258 (1996) previously held:

N.C.G.S. § 126-5 states in particular terms which employees are covered by Chapter 126. On the other hand, N.C.G.S. § 126-16 . . . address[es] the same subject matter in general terms. Moreover, . . . N.C.G.S. § 126-16 . . . [does not] affirmatively grant[] a remedy to a[n] . . . employee . . . who is not otherwise covered by Chapter 126. *In short, N.C.G.S. § 126-5 controls which employees are subject to Chapter 126.* The petitioner is not within that class of employees.

Id. at 119, 468 S.E.2d at 260 (emphasis added).

We find *Conran* applicable to the present case, and reiterate that the exemptions in N.C.G.S. § 126-5 foreclose petitioner's reliance on any of the provisions in Chapter 126, except for Articles 6 and 7.

Notwithstanding N.C.G.S. § 126-5, petitioner asserts a right to a hearing before the OAH on a provision of Article 8 of Chapter 126, N.C.G.S. § 126-34.1, which states in pertinent part that:

A State employee or former State employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B . . . as to the following personnel actions or issues . . . [a]n alleged unlawful State employment practice constituting discrimination, as proscribed by G.S. 126-36, including . . . termination of an employee . . . on account of the employee's . . . sex, . . . or handicapping condition[.]

N.C.G.S. § 126-34.1(a)(2)(b) (2001). Petitioner essentially argues that, because the statute refers to *state employees* without adding "except those already exempted," that *all* state employees are included. She urges this Court "construe" Article 6, § 126-16, with § 126-34.1(a)(2), and to hold that § 126-34.1 applies to *all* state employees, including those expressly excluded from the purview of Chapter 126. Petitioner's proposed construction of the statute would require us to ignore the plain and definite exclusion of petitioner's job from Chapter 126. This we decline to do. Further, we disagree with petitioner that there is any "inconsistency" between G.S. § 126-34 and G.S. § 126-5; the legislature, having specifically excluded various classes of state employees from all of Chapter 126 except Articles 6 and 7, in N.C.G.S. § 126-5, had no need to repeat the same list of excluded employees in other parts of Chapter 126.

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This Court has previously ruled on this issue, and rejected the position taken by petitioner. In *Hillis v. Winston-Salem State Univ.*, 144 N.C. App. 441, 549 S.E.2d 556 (2001), a non-faculty EPA university employee sought redress for alleged grievances through the OAH. The plaintiff filed a contested case with the OAH, based on G.S. § 126-34.1. The Court noted that N.C.G.S. § 126-5(c1)(8) specifically exempts the “[i]nstructional and research staff . . . of the University of North Carolina” from all “provisions of [Chapter 126 except] Articles 6 and 7” and that, like the present petitioner, the plaintiff’s position was exempt from the SPA. This Court held:

while N.C.G.S. § 126-16 is in Article 6 and therefore is applicable to otherwise exempt University of North Carolina employees, N.C.G.S. § 126-34.1 is in Article 8 and therefore is explicitly not applicable. It follows that OAH lacks jurisdiction to hear a contested case brought under Article 8 by exempt employees of the University of North Carolina[.] . . . As our Court has stated, ‘[i]f the Legislature desired to establish a public policy entitling [UNC faculty] to the protection [of the grievance procedures] of G.S., Chap. 126, it could have done so.’

Hillis at 443-44, 549 S.E.2d at 557 (quoting *Walter v. Vance County*, 90 N.C. App. 636, 641, 369 S.E.2d 631, 634 (1988)). *Hillis* is on point, and controls the resolution of the present case.

Petitioner asks this Court to reverse our decision in *Hillis*. This we may not do. *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, 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.”).

Nor do we agree with petitioner that *Hillis* should be reversed. Petitioner argues that in *Hillis*, this Court “with one fatal stroke” effectively “stripped” employees of their right to a hearing on “discrimination in the workplace,” and “transformed the substantial rights guarded by Article 6 for a quarter of a century to a mirage[.]” Petitioner’s assertions ignore the review procedures available to her as an EPA employee of the university. These include: (1) a hearing before a University grievance committee; (2) opportunity to respond in writing to the Chancellor’s preliminary decision; (3) appeal from the Chancellor’s decision to the Board of Trustees of NCSU; (4) appeal to Board of Governors from the Board of Trustees; (5) judicial

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review by a superior court judge; and (6) appeal to this Court. Thus, it is apparent that a university EPA employee is not without recourse in the event of discrimination.

We conclude that, because N.C.G.S. § 126-5(c1)(8) expressly exempts petitioner from all of Chapter 126 except Articles 6 and 7, that the trial court did not err by holding that Article 8 of Chapter 126 does not apply to her. This assignment of error is overruled.

Petitioner also argues that the trial court erred by concluding that she had not timely filed her contested case claim. However, as we conclude that petitioner had no right to a contested case hearing before the OAH, the issue of the timeliness of her petition need not be addressed.

We hold that the OAH does not have jurisdiction over employees whose positions or departments are statutorily excluded from its reach. Because petitioner's position as an EPA employee of the University of North Carolina is exempt from the SPA, Article 8 of Chapter 126 is inapplicable to her, and OAH has no subject matter jurisdiction to consider her contested case.

For the reasons discussed above, the order entered by the trial court affirming the ALJ's dismissal of her contested case claim is

Affirmed.

Judges McGEE and HUDSON concur.

IWTMM, INC., d/B/A MAST LONG TERM CARE, PLAINTIFF v. FOREST HILLS REST HOME, JUDY B. TEW, MAGNOLIA LANE HEALTHCARE, INC., AND MAGNOLIA LANE, LLC, DEFENDANTS

No. COA02-731

(Filed 18 March 2003)

1. Contracts— requirements—description of purchasing terms—consideration

Both the consideration and the description of purchasing terms were sufficient in a requirements contract to supply pharmaceuticals to a rest home.

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[156 N.C. App. 556 (2003)]

2. Contracts—breach—interpretation of related agreements—12(b)(6) motion

Whether to treat related agreements as one contract should not have been considered under a motion to dismiss for failure to state a claim.

Appeal by plaintiff from order filed 7 February 2002 by Judge Evelyn W. Hill in Vance County Superior Court. Heard in the Court of Appeals 18 February 2003.

Warren, Perry & Anthony, P.L.L.C., by Sue E. Anthony, for plaintiff appellant.

The Law Firm of Hutchens & Senter, by Rudolph G. Singleton, Jr., for defendant-appellees Forest Hills Rest Home and Magnolia Lane Healthcare, Inc.

BRYANT, Judge.

IWTMM, Inc. (plaintiff), doing business as Mast Long Term Care, appeals an order entered 7 February 2002 dismissing its complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

On 17 September 2001, plaintiff filed a complaint against Forest Hills Rest Home (Forest Hills), Judy B. Tew, Magnolia Lane Healthcare, Inc., and Magnolia Lane, LLC (collectively defendants)¹ alleging breach of contract. The complaint stated in pertinent part:

7. The [p]laintiff entered into a contract with Forest Hills on or about March 1, 1999. . . .

8. The duration of the parties' contract is for three (3) years from April 1, 1999.

9. By letter dated April 27, 2001, and written by Judy B. Tew, the [d]efendants, Magnolia Lane Healthcare, Inc. and Forest Hills, indicated that they would "no longer need" [plaintiff's] services

10. . . . Forest Hills . . . has, in fact, failed and refused to do business with . . . [p]laintiff since May 1, 2001.

1. Plaintiff subsequently filed a voluntary dismissal without prejudice as to Judy B. Tew and Magnolia Lane, LLC.

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11. The cancellation and termination of the contract by . . . [d]efendants is a breach of the parties' contract.

12. . . . Defendants have also breached the parties' contract as follows:

a. . . . Defendants have failed and refused to continue to do business with . . . [p]laintiff, as provided in the contract and, specifically, to obtain their pharmaceuticals, drugs, supplies and equipment from . . . [p]laintiff.

b. . . . Defendants have failed and refused to reimburse . . . [p]laintiff for the value of certain equipment (a drug cart and a fax machine) provided to them by . . . [p]laintiff.

Attached to the complaint were a copy of the parties' contract and the 27 April 2001 letter from Judy B. Tew, president of Magnolia Lane Healthcare, Inc., addressed to plaintiff. The contract consists of two separate agreements: a vendor-pharmacist agreement and a consultant-pharmacist agreement. Plaintiff's allegations pertain solely to the vendor-pharmacist agreement, which reads in pertinent part:

I. The pharmacy [(plaintiff)] . . . agrees to provide, furnish and supply pharmaceuticals, drugs, supplies and equipment to the home [(Forest Hills)] or to the patients therein upon the following terms and conditions.

. . . .

IV. The facility [(defendants)] hereby agrees to order all those pharmaceuticals[,] including prescriptions and supplies, for individual patients not commonly stocked in the facility from the pharmacy. In the event that any patient exercises his or her rights under the law to request purchase of such items from alternate supplier, the facility and pharmacy hereby agree to honor such requests only if such items are supplied in accordance with the drug distribution system currently provided by the pharmacy and currently utilized by the facility, and only if the alternate supplier can guarantee maintenance of the same quality and continuity of supplies and service as that provided by the pharmacy under this agreement.

. . . .

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VI. The pharmacy agrees to bill each patient in conformity with the usual and proper method of billing required or accepted under the respective reimbursement or payment plans. . . .

. . . .

X. The parties agree that this contract will extend for three (3) years from . . . April 1, 1999. . . . [T]his agreement shall remain in effect for its full term.

XI. Pharmacy and [f]acility agree that in the event the [f]acility cancels for any reason this agreement[,] the [f]acility hereby agrees to reimburse the [p]harmacy for the drug dispensing equipment and any other equipment or supplies furnished by the [p]harmacy at their depreciated value at the time of cancellation. . . .

XII. The facility and the pharmacy agree that this contract automatically renews every three (3) years upon its expiration date unless notification is furnished in writing by either party ninety (90) days prior to expiration. In the event this contract terminates by its own terms, or another pharmaceutical supply company presents a competing offer to the facility during the existence of this contract, the pharmacy hereby reserves the right and the facility correspondingly agrees to allow the pharmacy the right to match any and all competing offers to provide pharmaceutical supplies. If the pharmacy presents a comparable situation to other offers, the facility hereby agrees to extend or preserve the term of this contract with the pharmacy at the amount and terms bid by the pharmacy.

Under the terms of the second agreement, the consultant-pharmacist agreement, plaintiff was also responsible for the general supervision of the facility's pharmaceutical services. With respect to termination, this agreement stated it could be "terminated by either party provided that ninety (90) days written notice prior to expiration [was] given to the other party."

The letter attached to the complaint stated:

This letter is to give you notice that I will no longer need your services effective 90 days from today. I will be glad to purchase the Med Cart and Fax Machine at a depreciated rate as we discussed this morning. I will continue to order my stock items from you until my 90[-]day notice expires.

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On 16 November 2001, defendants moved to dismiss the complaint pursuant to Rule 12(b)(6). Following a hearing on the motion during which defendants argued there was no contract because the agreement lacked consideration and was too vague as to the purchasing terms and, in the event a contract had been formed, defendants had complied with the ninety-day notice provision required for termination, the trial court dismissed plaintiff's breach of contract claim.

The issues are whether: (I) the vendor-pharmacist agreement is insufficient to form a contract because it lacks consideration and specificity and (II), if it does constitute a contract, plaintiff stated a sufficient claim for breach thereof.

I

In ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the trial court determines "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). The elements of a breach of contract claim are: "(1) existence of a valid contract and (2) breach of that contract." *Poor v. Hill*, 138 N.C. App. 19, 29, 530 S.E.2d 838, 845 (2000).

Specificity of Contract Terms

[1] At the 12(b)(6) hearing, defendants argued the vendor-pharmacist agreement did not form a valid contract because it contained only vague purchasing terms. The provision that lies at the heart of defendants' argument is the sentence obligating defendants to order from plaintiff those pharmaceuticals for defendants' patients "not commonly stocked in the facility." In its brief to this Court, defendants claim it is "the silence as to the identity and amount of pharmaceuticals to be ordered" that leaves the contract invalid. In support of their position, defendants rely on the general principle that "[t]o be enforceable, the terms of a contract must be sufficiently definite and certain, and a contract that 'leav[es] material portions open for future agreement is nugatory and void for indefiniteness,'" *Miller v.*

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Rose, 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000) (citations omitted). Defendants, however, have overlooked two crucial factors. First of all, our law permits the use of requirements contracts, which are agreements to supply the other party to the contract with as much of the ordered good as needed by the purchaser. *Roanoke Properties v. Spruill Oil Co.*, 110 N.C. App. 443, 448, 429 S.E.2d 752, 755 (1993) (“valid requirements contracts . . . are recognized by our Courts and our Legislature”); *Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 228, 324 S.E.2d 626, 629 (1985) (“[defendant’s] testimony that he would buy everything plaintiff supplied so long as plaintiff would sell to him and his company is evidence of an output and requirements contract”); *see also Coal Co. v. Ice Co.*, 134 N.C. 574, 47 S.E. 116 (1904) (enforcing contract pursuant to which the plaintiff agreed to sell the defendant all the coal that may be required by the defendant during a specified time period). In this case, that means defendants obligated themselves to buy and plaintiff to sell as much of the pharmaceuticals as necessary to fill the requests of defendants’ patients for pharmaceuticals not commonly stocked in the pharmacy.

The second and more important factor is that the parties’ agreement for the sale of drugs in this case is governed by the North Carolina Uniform Commercial Code (N.C. UCC). *See* N.C.G.S. § 25-2-102 (2001) (“applies to transactions in goods”); N.C.G.S. § 25-2-105(1) (2001) (“[g]oods’ means all things . . . which are movable at the time of identification to the contract for sale”); *see also Parks v. Alteon, Inc.*, 161 F. Supp. 2d 645, 648-49 (M.D.N.C. 2001) (distinguishing *Batiste v. Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977), in which this Court held a physician’s prescription for medicine did not constitute a sale of goods, and holding that a drug manufacturer’s sale of drugs to a plaintiff would fall within the purview of the N.C. UCC); *Foyle by McMillan v. Lederle Labs.*, 674 F. Supp. 530 (E.D.N.C. 1987) (standing for the proposition that the sale of drugs is governed by the N.C. UCC where the court determined that a claim for breach of implied warranty of merchantability would lie against a pharmaceutical drug manufacturer whose product was used by a plaintiff-purchaser). Under the N.C. UCC, the failure to omit certain material terms will not invalidate the contract as courts are permitted to read into the contract good faith requirements. *See* N.C.G.S. § 25-2-204(3) (2001) (“[e]ven though one or more terms are left open[,] a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy”); *Varnell v. Henry M.*

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Milgrom, Inc., 78 N.C. App. 451, 453, 337 S.E.2d 616, 618 (1985) (applying “the ‘good faith’ obligation for output contracts in G.S. 25-2-306(1)” of the N.C. UCC). With respect to requirements contracts, the N.C. UCC states: “A term which measures the quantity by . . . the requirements of the buyer means such actual . . . requirements as may occur in good faith . . .” N.C.G.S. § 25-2-306(1) (2001). As such, no definite amount needed to be stated in the vendor-pharmacist agreement.

Finally, although the pharmaceuticals to be supplied are only identified as those “not commonly stocked” by defendants, this description makes them capable of being identified by an offer of proof at trial. See *Koltis v. N.C. Dep’t of Human Resources*, 125 N.C. App. 268, 271, 480 S.E.2d 702, 704 (1997) (to be binding it is sufficient that the terms are capable of being made definite and certain by proof); N.C.G.S. § 25-1-103 (2001) (“[u]nless displaced by [the N.C. UCC], the principles of law and equity . . . shall supplement its provisions”). We further note that the parties operated under the agreement for approximately two years without experiencing any difficulty in identifying the goods to be sold. Consequently, we deem the description of the pharmaceuticals to be supplied by plaintiff sufficient.

Consideration

At the hearing, defendants also argued the vendor-pharmacist agreement between the parties lacked consideration. The agreement did not state any price terms with respect to the pharmaceuticals to be supplied; however, consideration need not consist of a promise to pay money for goods or services. Instead, it can take the shape of mutual promises to perform some act or to forbear from taking some action. John N. Hutson, Jr. & Scott A. Miskimson, *North Carolina Contract Law* § 3-6, at 170 (2001). In this case, the consideration for the parties’ agreement consisted of plaintiff’s promise to supply defendants with certain pharmaceuticals and defendants’ counter-promise to stock plaintiff’s products at its pharmacy and to sell them to its patients. Accordingly, the agreement does not fail for either lack of consideration or specificity.

II

[2] Defendants next contend that, in the event the contract is deemed to be valid, they did not breach the vendor-pharmacist agreement

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because the letter attached to plaintiff's complaint indicates compliance with the ninety-day notice provision required for termination of the agreement. The terms of the vendor-pharmacist agreement, however, do not provide for termination at any time so long as a ninety-day notice is given. Instead, the agreement states the contract will automatically renew "every three (3) years upon its expiration date unless notification is furnished in writing by either party ninety (90) days prior to expiration." The only provision that is compatible with defendants' interpretation of the contract is found in the consultant-pharmacist agreement, which, in the last paragraph,² allows for termination of the contract "by either party provided that ninety (90) days written notice prior to expiration is given to the other party." The question thus remains whether to treat the two agreements as one contract with the provisions of each to be read in conjunction with one another or as two separate and independent contracts. The first interpretation, which, from a review of the transcript, appears to be the one adopted by the trial court, would allow for a reading into the vendor-pharmacist agreement the right granted at the end of the consultant-pharmacist agreement to terminate the contract at any time with a ninety-day notice. On the other hand, the second interpretation is consistent with plaintiff's reading of the two agreements and, if accepted, would lead to a finding that defendants did in fact breach the contract. How to properly interpret the contract, however, is a factual issue not appropriate for consideration under a 12(b)(6) challenge. As the complaint and its attachments do not allow for a conclusion "beyond a doubt" that plaintiff failed to state a claim upon which relief could be granted, this matter must be remanded for further proceedings. *Block*, 141 N.C. App. at 277-78, 540 S.E.2d at 419.

Reversed and remanded.

Judges HUNTER and ELMORE concur.

2. This paragraph stands out because it does not follow the format of the previous paragraphs and unlike the other paragraphs is not numbered.

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[156 N.C. App. 564 (2003)]

MICHAEL C. NORTON AND NANCY L. NORTON, PLAINTIFFS v. SMC BUILDING, INC.; LAKE BADIN ASSOCIATES, A VIRGINIA GENERAL PARTNERSHIP; COUNTY OF MONTGOMERY, NORTH CAROLINA; AND CHARLES SHUFFLER, DEFENDANTS

No. COA02-394

(Filed 18 March 2003)

**Immunity— sovereign—negligent building inspection—
waiver—building code—liability insurance**

The trial court did not err in a negligence action resulting from defendant county's alleged negligent building inspection of plaintiffs' residence by granting summary judgment as a matter of law in favor of defendant county based on sovereign immunity, because: (1) even though plaintiffs contend that N.C. Bldg. Code § 109.1 operates as a waiver of defendant's sovereign immunity, § 109.1 has no application to the present case when plaintiffs have not asserted a claim against the building inspector or any other county employee or official; (2) even though plaintiffs contend the county waived sovereign immunity under N.C.G.S. § 153A-435 through its purchase of liability insurance, the disputed exclusionary provision in the county's liability insurance encompasses the construction defects plaintiffs allege resulted from the county's negligent building inspection; and (3) plaintiffs cannot avoid the exclusionary provision by characterizing their alleged injury as something other than property damage, and even if it were not property damage, it would not have been a claim for which the county could have waived immunity through the purchase of insurance.

Appeal by plaintiffs from order entered 20 December 2001 by Judge Howard R. Greenson, Jr., in Montgomery County Superior Court. Heard in the Court of Appeals 22 January 2003.

Moser, Schmidly, Mason & Roose, by Stephen S. Schmidly and Jason G. Goins, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., and Mark A. Davis, for defendant-appellee Montgomery County.

MARTIN, Judge.

Plaintiffs brought this action alleging claims for breach of contract, breach of warranty, and fraud against defendant SMC Building,

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Inc. ("SMC"), and for negligence against defendants Lake Badin Associates, Charles Shuffler, and County of Montgomery ("County"). In their amended complaint, plaintiffs alleged they purchased property in the Old North State Club at Uwharrie Point in Montgomery County from defendant Lake Badin Associates for the purpose of building a retirement home, and upon the recommendation of Lake Badin Associates, plaintiffs entered into a contract with defendant SMC to construct a home on the property. According to the complaint, plaintiffs were not advised that SMC was not licensed as a general contractor or that SMC had a history of poor construction practices.

Plaintiffs alleged that on 9 December 1997, defendant County issued a building permit and subsequently performed inspections of the footings and foundation of plaintiffs' home. Although the footings and foundation failed inspection, plaintiffs alleged the County's building inspector, Phil Henley, did not document reasons for the failure or give plaintiffs notice thereof. Plaintiffs also alleged that in April or May 1998 the County negligently allowed framing work to begin without determining that the detected flaws had been repaired so as to meet the requirements of the State Building Code ("the Code").

In June 1998, defendant Charles Shuffler, an engineer, also made inspections and provided the County with a letter stating that the construction met the Code. Plaintiffs, who did not receive a copy, alleged that the letter was not appropriately sealed with Shuffler's professional seal and that the County violated its duty to plaintiffs by allowing construction to continue without either obtaining a properly sealed letter from Shuffler or conducting a re-inspection itself. In a later letter, Shuffler amended his report to indicate that some defects remained and required repair to meet the Code. Plaintiffs alleged the County failed to take steps to ensure that the necessary repair took place.

In October 1998, when the construction was 75 percent complete, plaintiffs noticed that no permits or inspection reports were posted on site. Despite assurances from SMC that all inspections and repairs had been performed, plaintiffs inquired with Henley about the inspection status on 6 November 1998. According to the complaint, Henley stated that he had accepted the reports from Shuffler as proof of compliance even though he had no evidence at that time that the repairs recommended by Shuffler had been completed. Plaintiffs then met with Shuffler on site on 11 November 1998 to determine whether the repairs had been made, but Shuffler allegedly made only an exterior

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visual inspection. Plaintiffs alleged the County negligently accepted a letter from Shuffler stating the repairs had been completed even though it knew a visual inspection was not sufficient to determine compliance and that further inspections had not been made. Plaintiffs terminated SMC and hired a new builder to complete construction.

Plaintiffs alleged the County had “specific knowledge” that SMC had numerous problems and Code violations on other projects in the past but did not take reasonable action to determine that SMC constructed plaintiffs’ home in compliance with the Code. Nevertheless, the County issued a certificate of occupancy on 18 March 1999. Upon occupying the residence, plaintiffs discovered other defects in construction. Although the County claimed to have performed a final inspection in connection with the certificate of occupancy, plaintiffs alleged that it conducted either no inspection or a negligent one. Plaintiffs also alleged defendant County had purchased liability insurance providing coverage for plaintiffs’ claims.

Defendant County filed an answer in which it denied the material allegations of the complaint and asserted affirmative defenses, including sovereign immunity. Defendant County thereafter moved for summary judgment, based on sovereign immunity. Plaintiffs appeal from the order granting the motion for summary judgment and dismissing their claim against defendant County.

Plaintiffs assign error to the trial court’s order granting summary judgment in favor of defendant Montgomery County. Plaintiffs assert (1) G.S. § 143-138 and Section 109.1 of Volume 7 of the State Building Code operate as a waiver of sovereign immunity in this case and (2) the County waived sovereign immunity through its purchase of liability insurance for the damages sustained by plaintiffs.

Summary judgment is properly granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2002). In deciding a motion for summary judgment, the trial court must view the evidence presented by the parties in the light most favorable to the non-movant. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 565 S.E.2d 140 (2002).

The common law doctrine of sovereign immunity generally protects states and their political subdivisions, such as county govern-

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ments, from suit for damages for tort liability based on performance of governmental functions. *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652, *reh'g denied*, 352 N.C. 157, 544 S.E.2d 225 (2000). However, under G.S. § 153-435(a), a county may waive the defense of sovereign immunity through the purchase of liability insurance. N.C. Gen. Stat. § 153A-435(a) (2002). In such cases, a county's liability is limited to those damages covered by the insurance purchased. N.C. Gen. Stat. § 153A-435(b) (2002). "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983).

Plaintiffs first argue that, by adoption of the State Building Code and specifically § 109.1 of Volume 7, the General Assembly has waived the sovereign immunity of county governments with respect to suit for negligent building inspections. In support of this argument, plaintiffs point to G.S. § 153A-352, which describes as one of the duties of county inspection departments the task of enforcing state and local law relating to "the construction of buildings." N.C. Gen. Stat. § 153A-352(1) (2002). Further, plaintiffs note that G.S. § 143-138(e) applies the Code throughout the State of North Carolina. N.C. Gen. Stat. § 143-138(e) (2002). Plaintiffs assert specifically that § 109.1 of Volume 7 of the Code, as applied by these statutes, constitutes an implied waiver of sovereign immunity. Section 109.1 states in pertinent part:

Relief from personal responsibility. The building official or the building official's authorized representative, acting in good faith and without malice in the discharge of his duties shall not render himself personally liable for any damage that may accrue to persons or property as a result of any act or by reason of any act or omission in the discharge of his duties. Any suit brought against the building official or employees because of such an act or omission performed in the enforcement of this code shall be defended by the jurisdiction until final determination and any judgment thereof shall be assumed by the jurisdiction.

N.C. Bldg. Code, Vol. VII, Residential § 109.1 (1997).

We note initially that Section 109.1 addresses the personal liability of building officials or their employees or representatives in suits brought against the official or employees. Plaintiffs have not asserted a claim against building inspector Henley or any other

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County employee or official. Thus, § 109.1 appears to have no application to the present case. The provision does not expressly waive sovereign immunity and, in the absence of a clear indication of a contrary intent by the General Assembly, we decline to imply such a waiver. *Guthrie, supra*. Other than G.S. § 153A-435, plaintiffs have not directed us to, nor have we found, any statutory authority for waiver of a governmental unit's sovereign immunity against tort liability or of any intent by the General Assembly to delegate to the North Carolina Building Code Council the authority to waive it. Thus, we reject plaintiffs' argument that § 109.1 operates as a waiver of defendant County's sovereign immunity.

Plaintiffs also argue the trial court erred in granting summary judgment to the County because the County waived sovereign immunity through its purchase of liability insurance providing coverage for the claims asserted by plaintiffs. The parties agree that, at all times relevant to this case, the County was a participant in the North Carolina Counties Liability and Property Insurance Pool Fund. Subsection A of Section V of the County's Coverage Contract with the Fund contained the following provision:

2. Public Officials Coverage.

The Fund will pay on behalf of the Participant or a Covered Person, or both, all sums which the Participant or Covered Person shall become legally obligated to pay as money damages because of any civil claim or claims brought against the Participant or a Covered Person arising out of any Wrongful Act of any Covered Person acting in his capacity as a Covered Person(s) of the Participant and caused by the Covered Person while acting in his regular course of duty.

Subsection G of the contract lists the following exclusion to the public officials coverage:

This coverage does not apply to any claim as follows: . . .

5. for loss, damage to or destruction of any tangible property, or the loss of use thereof by reason of the foregoing;

The County asserts that this exclusion excludes coverage for plaintiffs' claim, therefore, the contract does not constitute a waiver of sovereign immunity. *Doe v. Jenkins*, 144 N.C. App. 131, 547 S.E.2d 124 (2001). Citing cases holding that claims for costs of repair to real

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property due to negligent construction are not covered under an insured contractor's property damage coverage, plaintiffs argue that because their claims are for cost of repair and construction defects, they are not claims for "property damage" and do not fall under the exclusion. See *Hobson Construction Co., Inc. v. Great American Ins. Co.*, 71 N.C. App. 586, 322 S.E.2d 632 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985); *Reliance Ins. Co. v. Mogavero*, 640 F. Supp. 84 (D. Md. 1986).

The cases cited by plaintiffs are inapposite to the present case and we reject their arguments that claims for damages due to defective conditions in structures which occur due to negligence on the part of building inspectors are not claims for "loss, damage to, or destruction of . . . tangible property, or the loss of use thereof by reason of the foregoing."

The meaning of language used in an insurance contract is a question of law for the Court, as is the "construction and application of the policy provisions to the undisputed facts." If the language in an exclusionary clause contained in a policy is ambiguous, the clause is "to be strictly construed in favor of coverage." If such an exclusion is plainly expressed, it is to be construed and enforced as expressed.

Daniel v. City of Morganton, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997) (citations omitted). "Ambiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language. Non-technical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 816-17 (1999) (citations omitted), *disc. review denied*, 351 N.C. 350, 542 S.E.2d 205 (2000).

The words used in the exclusionary provision at issue here are non-technical and there is no evidence or assertion that they were intended to have a special meaning. According to Webster's New Collegiate Dictionary, "damage" is "loss or harm resulting from injury to person, property, or reputation." *Webster's New Collegiate Dictionary*, 5th Ed. (1977). Likewise, the American Heritage Dictionary defines "damage" as "[h]arm or injury to property . . ., resulting in loss of value or the impairment of usefulness." *American Heritage Dictionary of the English Language*, 4th Ed. (2000). The

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disputed exclusionary provision is not ambiguous and, when construed and enforced according to its plain meaning, it clearly encompasses the construction defects plaintiffs allege resulted from the County's negligent building inspection.

We also reject plaintiffs' attempt to avoid the exclusion by characterizing their alleged injury as something other than property damage on the basis of the nature of the damages which they seek to recover. Cost of repair is but one measure of potential damages for injury to real property, not a basis for defining the injury itself. *Plow v. Bug Man Exterminators, Inc.*, 57 N.C. App. 159, 290 S.E.2d 787, *disc. review denied*, 306 N.C. 558, 294 S.E.2d 224 (1982). Moreover, if plaintiffs' claim was not one for property damage of some kind, as they argue to avoid the exclusionary provision, it would not have been a claim for which the County could have waived immunity through the purchase of insurance. In pertinent part, G.S. § 153A-435 authorizes a county to waive sovereign immunity by insuring itself against "liability for . . . negligent . . . damage to person or property." N.C. Gen. Stat. § 153A-435(a) (2002) (*emphasis added*). The trial court correctly determined that defendant County was entitled to judgment as a matter of law.

Affirmed.

Judges HUDSON and STEELMAN concur.

TUONG DINH DOAN, PLAINTIFF V. HA NGUYEN DOAN, DEFENDANT

No. COA02-257

(Filed 18 March 2003)

1. Child Support, Custody, and Visitation— support—monthly ice skating expenses

The trial court abused its discretion in a child support case by finding that the parties' minor child had monthly ice skating expenses of \$752.00, and the case is remanded to the trial court for entry of a finding on the amount of defendant's monthly skating expenses which are supported by competent evidence.

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2. Child Support, Custody, and Visitation— support—extraordinary expenses—ice skating

The trial court did not abuse its discretion in a child support case by classifying the ice skating expenses of the parties' minor child as extraordinary expenses under the child support guidelines.

3. Costs— attorney fees—child support case

The trial court did not err in a child support case by awarding attorney fees under N.C.G.S. § 50-13.6 to defendant wife based on its finding that defendant did not have sufficient means to defray the cost of the action and that plaintiff husband's action was frivolous.

Appeal by plaintiff from order entered 8 October 2001 by Judge Paul Gessner in Wake County District Court. Heard in the Court of Appeals 10 February 2003.

Williams & McNeer, PC, by T. Miles Williams, for plaintiff-appellant.

Cheshire Parker Schneider Bryan & Vitale, by Kimberly W. Bryan, for defendant-appellee.

MARTIN, Judge.

Plaintiff, Tuong Dinh Doan, and defendant, Ha Nguyen Doan, were married on 28 May 1988 and separated 27 February 1998. They had one child, Victoria, who was born 12 September 1990. On 29 May 1998, plaintiff initiated this action seeking custody of Victoria and the setting of child support and visitation. Defendant counterclaimed for child custody and support. On 21 June 1999, the district court entered its initial order in the matter awarding sole custody of the child to defendant, and decreeing that plaintiff pay retroactive and prospective child support, one-half of all expenses incurred in the child's involvement in ice skating, and defendant's attorney's fees. The court made extensive findings in the order regarding the parties' respective incomes, the child's involvement in ice skating, and plaintiff's refusal to be involved in the child's life, despite defendant's requests that he take an interest in his daughter.

Plaintiff appealed from the 21 June 1999 order. By opinion filed 19 December 2000, this Court remanded the matter for the entry of findings of fact as to (1) whether the child's ice skating expenses consti-

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tute an “extraordinary expense” within the meaning of the North Carolina Child Support Guidelines (“the guidelines”), or are instead expenses justifying a deviation from the guidelines; and (2) whether defendant has sufficient means with which to pay her attorney’s fees. See *Doan v. Doan*, 141 N.C. App. 149, 541 S.E.2d 525 (2000) (unpublished, COA99-1460).

On remand, the district court did not take additional evidence and entered an order on 8 October 2001 in which it made findings of fact, including that (1) defendant incurs monthly expenses of \$752.00 for the child’s ice skating and that these expenses should be apportioned between the parties as extraordinary expenses under the guidelines; and (2) defendant was required to pay her attorney’s fees with her separate property and does not have sufficient means to pay those fees. Accordingly, the trial court concluded “the facts and circumstances of this case are appropriate to justify and warrant the inclusion of extraordinary expenses in the child support calculation,” and that defendant “has acted in good faith in this action . . . and has insufficient means to pay her own attorney fees and is entitled to the payment of attorney fees from [p]laintiff.” The district court concluded as further support for the award of fees that plaintiff had instituted a frivolous action. Plaintiff appeals.

I. Skating Expenses

[1] Plaintiff first maintains the court below erred in finding that the child’s monthly ice skating expenses amounted to \$752.00 per month, as there was insufficient evidence to support such an amount. We are constrained to agree.

“The amount of a trial court’s child support award will not be disturbed on appeal except upon a showing of abuse of discretion.” *Cauble v. Cauble*, 133 N.C. App. 390, 395, 515 S.E.2d 708, 712 (1999). Nevertheless, this Court must review whether the trial court’s findings are supported by competent evidence. *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001).

In this case, the district court made a finding that defendant incurred monthly expenses of \$752.00 for the child’s skating. Although the order does not contain findings as to what expenses are accounted for in this amount, the court found in its initial 21 June 1999 order that defendant had monthly expenses of \$221.00 for the child’s skating lessons and \$390.00 for ice time, and yearly expenses of \$800.00 for competitions, \$400.00 for costumes, and \$500.00 for

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new skates, thereby totaling \$752.00 per month. However, there is no evidence in the record which could support a finding that defendant's skating expenses for the child amounted to \$752.00 monthly.

The relevant testimony established that the child spends approximately 3 to 4 hours per week skating at a cost of \$6.50 per hour, and that she skates twice on the weekends at a cost of \$5.00 per three hours, for an approximate monthly total of \$144.00 for ice time. The evidence also establishes that the child takes private lessons twice a week at a cost of \$32.00 per week, totaling \$128.00 per month for lessons. The record also indicates that defendant paid for the child to attend a one-time week-long skate camp at a cost of \$180.00. Although there was testimony that the child had participated in and would continue to participate in competitions, there was no evidence regarding the cost to defendant for her participation. The only testimony regarding the child's costumes was that defendant had made the child a costume herself, but there was no evidence as to what that costume had cost defendant, nor as to whether defendant had purchased any costumes. While there was testimony that the child was flat-footed and would need special skates in the future, there was no evidence presented as to the cost of skates.

This evidence is insufficient to support the trial court's determination that defendant's monthly skating expenses totaled \$752.00. Although defendant is correct in asserting that the trial court has wide discretion in the determination of extraordinary expenses, there must nevertheless exist some evidence to support the court's determination. Accordingly, we must again remand this issue to the district court for entry of a finding on the amount of defendant's monthly skating expenses which is supported by competent evidence. On remand, the court may take additional evidence as necessary to make a properly supported determination of the issue. *See Guilford County Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 401 S.E.2d 659, *disc. review denied*, 329 N.C. 496, 407 S.E.2d 533 (1991).

[2] Plaintiff next argues the district court erred in classifying the child's ice skating expenses as extraordinary expenses under the child support guidelines. Plaintiff argues the court abused its discretion in making this determination because the court initially determined in its 21 June 1999 order that the skating expenses were not extraordinary expenses, and because those type of expenses are not extraordinary within the meaning of the guidelines. The guidelines allow the trial court to "make any adjustments for extraordinary

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expenses and order payments for such term and in such manner as the Court deems necessary.” N.C. Ann. Rule 36 (2002). The guidelines list as examples of extraordinary expenses medical expenses, counseling expenses, expenses for attending special or private schools, and transportation expenses.

We first disagree with plaintiff that, because the court had determined in its 21 June 1999 order that the expenses were not extraordinary under the guidelines, it was an abuse of discretion for the court to find, in the order from which plaintiff now appeals, that such expenses were extraordinary expenses. Because the district court was directed to reconsider the issue on remand and find as fact whether the expenses were extraordinary within the meaning of the guidelines, it was not only entitled to reconsider the issue, but was required to do so. As to plaintiff’s contention that the court failed to make sufficient findings as to why it “changed its mind,” the incorporation of adjustments for extraordinary expenses in a child support order “does not constitute deviation from the Guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the Guidelines.” *Biggs v. Greer*, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581-82 (2000). Therefore, the trial court need not make specific findings regarding the child’s needs or the parents’ ability to pay with regard to extraordinary expenses. *Id.* at 298, 524 S.E.2d at 582.

We also disagree with plaintiff’s assertion that the skating expenses are not the type of expenses contemplated as extraordinary by the guidelines. The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its sound discretion. *Id.* at 298, 524 S.E.2d at 581. This Court has previously held that the language of the guidelines “contemplate[s] that the list of extraordinary expenses . . . is not exhaustive of the expenses that can be included.” *Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). The court noted that “‘historically our trial courts have been granted wide discretionary powers concerning domestic law cases,’ ” and concluded that in light of this discretionary standard of review, the trial court’s inclusion of the child’s summer camp expenses as an extraordinary expense was not an abuse of discretion. *Id.* at 549, 442 S.E.2d at 359 (citation omitted).

In this case, the evidence of record establishes that the child is devoted to ice skating of her own accord and derives great pleasure

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from it, that the child has a unique talent for ice skating and has both the drive and physical potential to become an Olympic-caliber skater, and that the monetary costs associated with the child's skating are high for a person of defendant's financial status. In light of this evidence, we cannot hold that the trial court abused its discretion in classifying the child's skating expenses as extraordinary under the guidelines. These assignments of error are overruled.

II. Attorney's Fees

[3] Plaintiff next assigns as error the district court's award of attorney's fees to defendant, arguing there was insufficient evidence to support its findings that defendant did not have sufficient means to defray the cost of the action and that plaintiff's action was frivolous. G.S. § 50-13.6, governing the award of attorney's fees in actions for custody and support of minor children, provides:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2003). "Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980). Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded. *Id.*

It is true, as plaintiff argues, that the statute has been interpreted as requiring that the court specifically make two findings of fact: (1) the party seeking the award of fees was acting in good faith; and (2) that party has insufficient means to defray the expense of the suit.

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Burr v. Burr, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002). However, in this case, we need not reach plaintiff's argument that the district court's findings on this issue were unsupported by the evidence, because the trial court also found as justification for an award of attorney's fees that plaintiff's initiation of this custody and support action was "without merit, baseless and frivolous."

In its initial order, the district court made several relevant findings of fact, including that after the parties' separation, plaintiff instructed the child not to contact him and showed no interest in the child, despite defendant's repeated requests that he visit the child; that from the time of the parties' separation until the hearing of plaintiff's case, plaintiff had not seen or visited the child, called her, acknowledged her birthday, met with her teachers, or otherwise become involved with her school; that plaintiff had repeatedly refused visitation opportunities; that plaintiff consistently placed his own interests ahead of the best interests of the child; that plaintiff had not contributed money for various expenses incurred by the child, including skating and medical expenses; and that plaintiff had not paid child support since September 1998 and owes retroactive support. In the order on appeal, the trial court also found that plaintiff had refused to pay for any ice skating expenses, and had not paid the retroactive expenses ordered by the 21 June 1999 order.

These findings are amply supported by the evidence. Under G.S. § 50-13.6, the trial court had authority and discretion to award attorney's fees as appropriate under the circumstances due to the frivolous nature of plaintiff's action. The court's findings support its legal conclusion that an award of attorney's fees was appropriate. In so holding, we reject plaintiff's argument that as the child's father, he had a statutory right to initiate a custody action, and thus, it could not have been frivolous. While we agree plaintiff has a statutory right to seek custody, this right does not signify that any such action can never be deemed frivolous. Plaintiff also argues his action cannot be found frivolous because that portion of G.S. § 50-13.6 providing that the trial court may award fees based on such a finding applies only to support actions. However, plaintiff's action here includes a claim for support, and the trial court's findings on this issue apply equally to that claim as to the claim for custody. These arguments are overruled.

In summary, the trial court did not abuse its discretion in determining that the child's ice skating expenses constitute an extraordinary expense within the guidelines, but must make findings of

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fact on remand supported by specific competent evidence as to the appropriate amount of those expenses. The order on appeal is otherwise affirmed.

Affirmed in part; reversed in part, and remanded.

Chief Judge EAGLES and Judge GEER concur.



NORRIS BROTHERTON AND WIFE, EDITH BROTHERTON, PLAINTIFFS v. THE POINT ON NORMAN, LLC AND ESP ASSOCIATES, P.A., DEFENDANTS

No. COA02-668

(Filed 18 March 2003)

1. Unfair Trade Practices— lakefront real estate sales—size of lot changed

Evidence that plaintiffs were misled into thinking that they were buying a lot with more lakefront footage than they ultimately received was sufficient for an unfair and deceptive trade practices claim to survive a motion for a directed verdict.

2. Damages— sale of real estate—evidence sufficient

The evidence of damages in the sale of lake front real estate was sufficient to survive a motion for a directed verdict for defendants on an unfair and deceptive trade practices claim.

Appeal by plaintiffs from order entered 29 October 2001 by Judge Clarence E. Horton, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 12 February 2003.

Raymond A. Warren for plaintiffs-appellants.

Homesley, Jones, Gaines, Dudley, McLurkin & Donaldson, PLLC, by Elise B. Mclurkin, for defendant-appellee.

TYSON, Judge.

Norris Brotherton and his wife, Edith, (“plaintiffs”) appeal from the grant of directed verdict in favor of The Point on Norman, LLC (“The Point”) on the issue of unfair and deceptive trade practices. We reverse and remand for trial.

BROTHERTON v. POINT ON NORMAN, LLC

[156 N.C. App. 577 (2003)]

I. Background

This is the second appeal of this case to this Court. In *Brotherton v. Point on Norman, LLC*, 141 N.C. App. 734, 542 S.E.2d 712 (2001) (unpublished) (“*Brotherton I*”), plaintiffs appealed the grant of a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001). We held the trial court correctly granted the motion to dismiss plaintiffs’ claim of breach of contract against The Point and all claims against ESP Associates. We further held that plaintiffs’ allegations were sufficient to survive a Rule 12(b)(6) motion for their claim of unfair and deceptive trade practices by The Point and reversed and remanded on that issue. *Brotherton I*.

At trial, plaintiffs presented the following evidence: During the summer of 1998, The Point sought to sell various lots in its new subdivision located near Lake Norman. John Touchberry, a sales associate for the Point, encouraged plaintiffs to participate in a “Lot Draw” for selection of a lot. At the insistence of Touchberry, plaintiffs traveled to the property and walked over multiple lots to find lots which appealed to them. On Lot 31 of Phase 1B (“Lot 31”), plaintiffs found corner stakes and building pad stakes from which they determined the size, direction, and area of the lot. Lot 31 was plaintiffs’ first choice. Plaintiffs also selected other suitable lots in the event Lot 31 was unavailable.

The Point sold the subdivision lots through a lottery system. On 19 September 1998, The Point held a gala and “Lot Draw” for parties who had purchased tickets for \$1,000 per ticket. Plaintiffs attended and received number 89 which allowed them to be the eighty-ninth party to select a lot for purchase. Lot 31 was still available and plaintiffs selected it to purchase. Plaintiffs, under protest, initialed the sales contract showing they had received documentation not actually provided to them.

After the Lot Draw, plaintiff visited Lot 31 “many, many times” and testified that the stakes on the corners of the lot remained in the same locations as when plaintiffs walked the lots prior to the lottery. In mid-October, plaintiffs observed that the stakes had been relocated that resulted in a loss of approximately thirty-five feet of lakefront. The Point refused to convey plaintiffs the property as originally staked.

The Point provided plaintiffs with a septic tank permit which showed Lot 31, that contained 41,905 square feet. After contracting to

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purchase Lot 31 and in reliance of The Point's representations of the larger area of the lot, plaintiffs began the process to build their dream home on the lot. Plaintiffs purchased supplies, rented storage space, and obtained house plans for the lot.

With the change of the boundary lines, the area of the lot was reduced to 39,804 square feet. Plaintiffs testified that due to the reduction in the lot size, they could not build the house according to the plans on Lot 31. After plaintiffs presented their evidence, The Point moved for and was granted a directed verdict. Plaintiffs appeal.

II. Issue

Plaintiffs contend the trial court erred in granting a directed verdict in favor of The Point at the close of plaintiffs' evidence.

III. Directed Verdict

Defendant's motion for a directed verdict should only be granted at the close of the plaintiff's evidence when plaintiff is given the benefit of every reasonable inference to be drawn from the evidence and the evidence is: (1) taken as true, (2) regarded in a light most favorable to the plaintiff, and (3) "insufficient to support a verdict in the plaintiff's favor." *Atlantic Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 163-64, 398 S.E.2d 641, 643 (1990), *disc. rev. denied*, 328 N.C. 569, 403 S.E.2d 506 (1991). "The party moving for a directed verdict bears a heavy burden in North Carolina. The court should deny a motion for directed verdict when there is more than a scintilla to support plaintiffs' prima facie case." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923, *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998).

"An unfair and deceptive trade practice claim requires plaintiffs to show: (1) that defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) plaintiffs were injured thereby." *Id.* at 574, 495 S.E.2d at 923. The parties concede that defendant's practice was "in or affecting commerce." *Id.* This Court previously held that plaintiffs' allegations, taken as true, are sufficient to allege a claim for unfair and deceptive trade practices. *Brotherton I.* This Court also held that "this claim is one in tort and not on the contract. Therefore, the rule that all prior negotiations and representations are merged into the writing does not apply." *Brotherton I.*

A. Unfair and Deceptive Trade Act or Practice

[1] Plaintiffs contend they submitted sufficient evidence for a jury to find that "defendant[] committed an unfair or deceptive act or prac-

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tice.” *Edwards*, 128 N.C. App. at 574, 495 S.E.2d at 923. Plaintiffs need not show a deliberate act of deceit or bad faith to prevail. *Id.* at 575, 495 S.E.2d at 924. Plaintiffs must show “the act ‘possessed the tendency or capacity to mislead or created the likelihood of deception.’” *Id.* at 574, 495 S.E.2d at 924 (quoting *Forsyth Memorial Hospital v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 170 (1992), *disc. rev. denied*, 333 N.C. 344, 426 S.E.2d 705 (1993)). Further, “[a] party is guilty of an unfair act or practice when it engages in conduct; which amounts to an inequitable assertion of its power or position.” *Id.*

This Court reviewed plaintiffs’ allegations and determined plaintiffs’ sufficiently alleged a claim of unfair and deceptive trade practices:

Plaintiffs have alleged that defendant misled them into thinking they were receiving a larger lot. Allegedly, defendant made a representation through boundary stakes that the lot consisted of thirty-five more feet of waterfront than the property actually contained. Additionally, defendant did not give the plaintiffs a plat with the actual boundary lines at the time of the contract signing. According to the plaintiffs, defendant’s representatives told them it would deliver the plat later. Defendant’s representatives took this action although defendant Point on Norman had filed the plat with the Iredell County Register of Deeds two days earlier. Further, plaintiffs acted on these representations by making plans to build a residence on the lot.

Brotherton I.

Reviewed in a light most favorable to plaintiffs, plaintiffs presented sufficient evidence of each element of an unfair or deceptive act or practice by defendant, particularly in light of this Court’s prior holding that the allegations were sufficient to state such claim.

Ms. Brotherton testified that Touchberry, a sales associate for The Point, told plaintiffs to go walk the property. He told them “to be sure that [they] go out there ahead of time and look at—walk over several lots.”

Plaintiffs asked for a copy of plats for multiple lots including Lot 31. Touchberry provided plats for all of the lots plaintiffs requested, except Lot 31. Plaintiffs again specifically requested and were not provided a plat for Lot 31. Despite repeated requests, plaintiffs did not receive the plat for Lot 31 until October 1998, after they had exe-

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cuted their contract to purchase. The Point filed a plat with Iredell County on 18 September 1998, one day prior to the lottery and two days prior to the signing of the contract.

Ms. Brotherton testified that she was required to initial the contract after she informed defendant that she did not agree with what she was signing. The sales contract that plaintiffs initialed stated:

Purchaser acknowledges that it has received, read, understood and agreed to each of the documents listed below (which documents are incorporated herein by reference) and that Purchaser will be bound by the provisions thereof; as further evidence of its receipt from Seller of such documents, Purchaser has initialed on the line corresponding to each document:

(a) Plan for the Offering of Memberships in The Point Lake & Golf Club (the "Club Membership Plan")

(b) Plan of Development and Subdivision Disclosure Statement (the "Plan of Development")

(c) Declaration of Covenants, Conditions and Restrictions for The Point (as amended, supplemented and assigned from time to time, the "Declaration")

(d) Architectural and Landscape Guidelines for The Point (as amended and supplemented from time to time, the "Guidelines")

(e) Annual Budget of The Point Owners Association, Inc. (the "POA")

(f) Copy of Map Book 31, Page 50 (Plat for Lot #31, recorded at the Iredell County Register of Deeds) (the "Map")

Mrs. Brotherton testified that neither she nor her husband were provided any of the documents listed until after they initialed the contract. When she asked for the documents, she was told that she would get them after she signed. When she asked for a copy of the plat, a representative of The Point stated they would provide it "later." After she balked initially, she was told by Art Raymond, defendant's agent, to "initial it or leave."

Plaintiffs presented evidence that they went to the lot "many, many times" after closing and that the location of the stakes on the property had not changed. The Point argued that the change in the stakes occurred through the actions of the independent contractor over whom they had no control and whose actions could not be

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imputed to them. However, plaintiffs presented evidence that ESP Associates, PA, the surveying company, was “asked to re-stake the lot corner of 31 and 32” on the orders of The Point. ESP changed the stakes only at the direction of and after demand by The Point.

The Point provided plaintiffs with a septic tank permit for Lot 31 which represented the area as 41,905 square feet, the same area shown by the location of the original stakes. The lot offered to plaintiffs was 39,804 square feet, the area after the corner stakes were moved.

Plaintiffs’ evidence showed that The Point misled plaintiffs into thinking they were receiving a larger lot with thirty-five additional feet of lakefront. The Point’s representations arose from the boundary stakes, the septic tank permit, and defendant’s requirement that plaintiffs walk the property and see it for themselves. The Point failed to provide plaintiffs with a plat showing the recorded boundary lines at the time of the contract signing. The plat had been recorded and was specifically requested by plaintiffs. The Point inequitably asserted its power when it required plaintiffs to sign and initial the sales contract prior to plaintiffs’ receipt and review of documents referenced therein, despite plaintiffs’ request for those documents and The Point being in possession of the documents. In the light most favorable to plaintiffs, this evidence is sufficient for the jury to determine whether The Point engaged in unfair and deceptive acts or practices.

B. Damages

[2] Defendant argues that plaintiffs failed to show actual damages. To recover on unfair and deceptive trade practices, plaintiffs must show they “suffered actual injury as a proximate result of defendants’ misrepresentations.” *Edwards*, 128 N.C. App. at 574, 495 S.E.2d at 923. “Plaintiffs’ actual injury can include the (1) purchase price plus interest and closing costs; (2) loss of the use of specific and unique property; and (3) loss of the appreciated value of the property.” *Id.* at 575, 495 S.E.2d at 924.

Plaintiffs presented evidence that, in reliance upon defendant’s representations and unfair and deceptive acts, they (1) lost money they spent on plans and supplies for the home that could not be built on the reduced Lot 31, (2) incurred storage charges, (3) lost the use of the specific and unique property, and (4) lost the use of the \$25,500 down payment for the lot.

FREEMAN v. PACIFIC LIFE INS. CO.

[156 N.C. App. 583 (2003)]

In its brief, The Point argues that “[a] review of the Complaint will very clearly show that the Plaintiffs-Appellants have failed to plead that they have been injured in any respect by any act of the Defendant-Appellee.” This Court previously held that the complaint was sufficient to allege a cause of action for unfair and deceptive trade practices. The complaint included an allegation of actual damages. Plaintiffs presented sufficient evidence of actual damages to survive defendant’s motion for a directed verdict.

IV. Conclusion

Plaintiffs presented sufficient evidence to support a claim for unfair and deceptive trade practice by The Point, especially in light of this Court’s previous holding that the allegations in the complaint were sufficient to state a claim. The trial court erred in granting The Point’s motion for a directed verdict at the end of plaintiffs’ evidence.

Reversed and remanded.

Judges McCULLOUGH and CALBRIA concur.

ROBERT A. FREEMAN, III, AND STEPHEN L. BARDEN, III, AS TRUSTEES OF THE KENNETH WILSON TRUST, AND KENNETH WILSON, PLAINTIFFS V. PACIFIC LIFE INSURANCE COMPANY, DEFENDANT

No. COA02-634

(Filed 18 March 2003)

1. Constitutional Law— full faith and credit—class action—notice

A Kentucky judgment was entitled to full faith and credit where the Kentucky court found that the defendant in a class action suit had provided the required notice, even though the plaintiff in this North Carolina action allegedly did not receive actual notice.

2. Class Actions— full faith and credit—every member not listed—judgment not ambiguous

A Kentucky judgment in a class action suit against an insurance company was not inherently ambiguous, and was entitled to full faith and credit, where the order did not list every member of

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[156 N.C. App. 583 (2003)]

the class but set out the types of insurance policies affected and certified as part of the class.

3. Class Actions— foreign judgment—authentication

A Kentucky class action was properly authenticated through the affidavit of an attorney.

Appeal by plaintiffs from judgment entered 7 March 2002 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 12 February 2003.

Ball Barden & Bell, P.A., by Stephen L. Barden, III and Thomas R. Bell, Jr., for plaintiffs-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Stephen J. Grabenstein, for defendant-appellee.

TYSON, Judge

I. Background

On 25 January 1994, Kenneth Wilson (“Wilson”) purchased a “flexible premium adjustable” life insurance policy (“policy”) on his life with a death benefit of \$4,000,000.00 from Pacific Life Insurance Company (“defendant”). The policy is owned by an insurance trust with Robert A. Freeman III (“Freeman”) and Stephen L. Barden III (“Barden”) serving as named Trustees.

Defendant’s agent told Wilson that if he paid an initial sum of \$1,044,015.00 for the policy and made 60 consecutive monthly payments of \$8,765.00, the policy reserves would service the policy until Wilson attained the age of 92. The agent in selling the policy further represented that, as a “vanishing premium” policy, no further premium payments would be required to maintain a death benefit of \$4,000,000.00.

Wilson paid the sixty monthly premiums, but continued to receive premium due notices from defendant. Wilson asked his agent why further premium notices were sent, and was informed that defendant would only maintain the agreed-upon death benefit through age 69 and that the earlier representation was an “illustration.” Defendant’s letter to Wilson, dated 19 November 1999, restated defendant’s position as previously expressed by the agent.

On 2 December 1999, Freeman received a letter informing him that Wilson’s policy received a credit as a result of a class action suit

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known as *Ace Seat Cover Co., Inc. et al. v. Pacific Life Insurance Company*. According to plaintiffs, this was the first time they became aware of the class action, filed during April of 1997 in Kentucky. The class action included owners of a “vanishing premium” policy sold by defendant. The Kentucky Court ordered a proposed settlement to be sent to all policy holders (1) to inform them of the proposed settlement and the details of the fairness hearing, and (2) to inform each policy owner of the right to opt out of the class action, if notice was given no later than 24 September 1998.

The notice included a release stating that class members who failed to “opt out” could not institute proceedings against defendant relating to “Released Transactions” defined as “the marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation, retention, administration, servicing or replacement . . . of the Policies.” “Policies” are defined as, “all whole life, universal life and/or variable life insurance policies issued during the period January 1, 1982 through December 31, 1997.”

Plaintiffs testified that they never received this notice. Defendant contends that its records show that notice was mailed to the Kenneth Wilson Trust at Freeman’s address. Wilson never received any notice, although he had received monthly premium notices at his address for over five years. Defendant contributed \$15,770.47 to the accumulated value of Wilson’s policy, as a result of the class action settlement.

Plaintiffs filed the present action requesting damages for breach of contract and unfair and deceptive trade practices, and asking for a declaratory judgment regarding the terms of the policy’s coverage. Defendant moved for summary judgment on the basis that plaintiffs’ suit was barred by the class action. The trial court granted defendant’s motion. Plaintiffs appeal.

II. Issues

The issue is whether the trial court erred in entering summary judgment against plaintiffs on the basis: (1) the Kentucky order precluded their suit and (2) the notice given was sufficient as a matter of law.

III. Standard of Review

“[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-*

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Terminix Co. v. Zuring Ins. Co., 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

IV. Preservation of Error

Plaintiffs contend that the trial court erred in granting summary judgment for defendant and argue that: (1) an issue of fact exists whether defendant complied with due process requirements and the notice provisions of the Kentucky court's order and (2) the Kentucky judgment is not entitled to full faith and credit because: (a) procedural requirements have not been met, (b) the record is facially incomplete, (c) the record of the proceedings is ambiguous, and (d) plaintiffs did not receive actual notice of the Kentucky proceedings.

Defendant argues that plaintiffs preserved only one of these errors for appeal. Plaintiffs contended in their motion in opposition to summary judgment only that defendant did not comply with the notice provisions of the Kentucky order. Errors not preserved for appeal are not properly reviewable by this Court. N.C. R. App. P. 10(b) (2002). Because the trial court based its grant of summary judgment on the application of the Full Faith and Credit Clause to the Kentucky judgment and this issue is threshold, we address this question pursuant to our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure.

V. Full Faith and Credit Clause

[1] The trial court in granting summary judgment, in effect, held that the Full Faith and Credit clause mandates the judgment be given the same effect in North Carolina that it has in Kentucky. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. Const. Art. IV, § 1. "[T]he judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." *Underwriters Assur. v. North Carolina Life*, 455 U.S. 691, 704, 71 L. Ed. 2d 558, 570 (1982) (internal quotations omitted).

The Full Faith and Credit clause only requires the foreign judgment be given the same force and effect it enjoys in the state where rendered. The law of the rendering court is reviewed to determine whether the judgment is valid. See *Marketing Systems v. Realty Co.*, 277 N.C. 230, 234, 176 S.E.2d 775, 777 (1970). "[T]he judgment from the rendering court must be deemed to have satisfied

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certain requisites of a valid judgment before full faith and credit will be granted to it.” *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983).

VI. Kentucky Law

Plaintiffs contend that the Kentucky judgment is not entitled to full faith and credit because plaintiff did not receive “actual notice” of the proceedings. Plaintiffs further contend that the issue of notice is for North Carolina courts, citing *White v. Graham*, 72 N.C. App. 436, 325 S.E.2d 497 (1985).

We find *White* distinguishable. The plaintiff in *White* received a petition for divorce, that also requested that the Texas court divide the marital property fairly. *White*, 72 N.C. App. at 440, 325 S.E.2d at 501. Plaintiff had executed a property settlement contract, whose only executory provisions were those which provided for plaintiff’s support. *Id.* at 440-41, 325 S.E.2d at 501. Those provisions were valid and binding under both Texas and North Carolina law. *Id.* at 441, 325 S.E.2d at 501. Because “[u]nder Texas law, a property division decree could not affect a valid support agreement, . . .” this Court held that plaintiff lacked notice that the Texas proceedings would involve contractual support obligations. *Id.* Although the discussion over notice cited North Carolina authority, whether notice was sufficient rested upon the Court’s analysis of Texas law. *Id.* at 440-41, 325 S.E.2d at 501.

Substantive questions of law “are controlled by the law of the place—the *lex loci*; whereas matters of procedure are controlled by the law of the forum—the *lex fori*.” *Childress v. Motor Lines*, 235 N.C. 522, 524, 70 S.E.2d 558, 560 (1952). Although North Carolina is the forum for the current suit, the validity of the judgment to bar the current action must be reviewed according to the laws of Kentucky.

Kentucky’s notice requirements for class actions is set forth in Ky. Rev. Stat. Ann. CR 23.03(2) (2001): “[i]n any class action . . . , the court shall direct to the members of the class the *best notice practicable* under the circumstances, including individual notice to all members who can be identified through reasonable effort.” (Emphasis supplied).

The Kentucky court found the “best notice practicable” was to mail notice to all affected policy owners and to publish the notice in newspapers in every state as well as other national newspapers. Defendants presented evidence in the form of affidavits and exhibits

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to show that they complied with the notice requirement ordered by the court.

The Kentucky court presiding over the *Ace Seat Cover* class action, specifically found as fact that jurisdiction was proper and that defendant had provided the required notice. Our state Supreme Court has stated that “the second court’s scope of review concerning the rendering court’s jurisdiction is very limited.” *Boyles*, 308 N.C. at 491, 302 S.E.2d at 793. Viewing the evidence in the light most favorable to the plaintiffs, defendant sufficiently complied with the notice provisions to require that the Kentucky judgment be accorded full faith and credit. Plaintiffs’ allegations that they did not receive actual notice are irrelevant to the effect of the judgment upon them. The evidence shows and the trial court found that defendant complied with the notice requirements, even though plaintiffs did not allegedly receive actual notice. Defendant mailed the notice to the name and address of the owner listed in the policy application, and had no knowledge it was not received. Defendant was not required by the statute or the court order to contact both Wilson as the insured and Freeman, trustee for the policy-owner trust.

[2] Plaintiffs also argue that the Kentucky judgment is incomplete, ambiguous, and not entitled to full faith and credit. Plaintiffs cite no authority to support their argument that the incomplete record of the foreign judgment at a summary judgment hearing prohibits the trial court from giving it full faith and credit. Plaintiffs contend that ambiguity in the record should prevent according the judgment full faith and credit, relying upon *White v. Graham*, *supra*.

An elementary North Carolina rule in the interpretation of judgments is that the pleadings, issues and other circumstances of the case must be considered. *Coach Co. v. Coach Co.*, 237 N.C. 697, 76 S.E.2d 47 (1953); *Berrier v. Commissioners*, 186 N.C. 564, 120 S.E. 328 (1923). . . . And if a judgment is subject to two interpretations, the court will adopt that one which makes it harmonize with the applicable law. *Alexander v. Brown*, 236 N.C. 212, 72 S.E.2d 522 (1952).

White, 72 N.C. App. at 441, 325 S.E.2d at 501. The alleged ambiguity questions whether the policy at issue was included in the class certification. Plaintiffs contend that the absence of a copy of the policy in evidence and the fact that the Kentucky class certification does not specifically define whether plaintiffs’ policy is affected makes the judgment ambiguous. We disagree.

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The Kentucky order sets out the types of policies affected and certified as part of the class. The Kentucky court was not required to list every member of the class. Evidence in the record shows: (1) the defendant found the affected policies, (2) plaintiffs' policy was an affected policy, and (3) defendant gave the policy owners, including Freeman, the notice required by the judge presiding over the class action. We find nothing inherently ambiguous about the Kentucky class certification to preclude according the judgment full faith and credit.

North Carolina courts entertain attacks on foreign judgments on the grounds of lack of jurisdiction, fraud, or public policy issues. *Courtney v. Courtney*, 40 N.C. App. 291, 295-96, 253 S.E.2d 2, 4 (1979). We hold that the Kentucky court had jurisdiction and that plaintiffs produced no evidence showing fraud or contravention of public policy.

VII. Authentication

[3] Plaintiffs argue that the *Ace Seat Cover* judgment was not authenticated pursuant to 28 U.S.C. § 1738, which governs when judicial proceedings should be given full faith and credit, because it lacks the seal of court, attestation by the clerk, and certificate by the judge. Defendant admits that it did not comply with the requirements of 28 U.S.C. § 1738, but contends that § 1738 is not the exclusive manner to authenticate an out-of-state judgment in North Carolina.

We agree that 28 U.S.C. § 1738 is not the exclusive means to authenticate an out-of-state judgment to be accorded full faith and credit. See *Murphy v. Murphy*, 581 P.2d 489, 492 (Okla. Ct. App. 1978), *Donald v. Jones*, 445 F.2d 601, 606 (5th Cir.), cert. denied, 404 U.S. 992, 30 L. Ed. 2d 543 (1971). Rule 44(c) of the N.C. Rules of Civil Procedure states that official records may be authenticated "by any method authorized by any other applicable statute or by the rules of evidence at common law." Here, the judgment was authenticated through the affidavit of attorney Scott Auby. *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, 199-200, 494 S.E.2d 774, 781, disc. review denied, 348 N.C. 71-2, 505 S.E.2d 868-70 (1998).

Plaintiffs argue that defendant did not comply with the Uniform Enforcement of Foreign Judgments Act ("UEFJA") adopted by North Carolina in N.C.G.S. § 1C-1701. The UEFJA is also not the exclusive means by which to enforce a foreign judgment and its applicability to

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the issues at bar is questionable. The UEFJA “provides one method whereby plaintiffs may seek the enforcement in North Carolina of judgments from other states.” *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 300, 429 S.E.2d 435, 436 (1993) (citing N.C.G.S. §§ 1C-1701 to -1708 (1991)). The UEFJA applies where a “Judgment Creditor” is attempting to affirmatively enforce a “Foreign Judgment” in our state. *See* N.C.G.S. §§ 1C-1701 to -1708 (2001). At bar, defendant is not seeking action on the judgment but rests on it as a bar to plaintiff’s claims. This assignment of error is overruled.

VIII. Conclusion

We hold that the Kentucky judgment is entitled to full faith and credit. Plaintiffs are barred by the language in the release order portion of the judgment from maintaining this action. The trial court’s grant of summary judgment in favor of defendant is affirmed.

Affirmed.

Judges McCULLOUGH and CALABRIA concur.

MRI/SALES CONSULTANTS OF ASHEVILLE, INC., PLAINTIFF V.
EDWARDS PUBLICATIONS, INC., DEFENDANT

No. COA02-542

(Filed 18 March 2003)

1. Jurisdiction— long arm—employee search

Jurisdiction was authorized under North Carolina’s long-arm statute where defendant hired plaintiff to find candidates for jobs, plaintiff’s only office is in North Carolina, plaintiff’s employees used equipment in that office to search for and locate candidates to be a web pressman at defendant’s Michigan plant, and a letter memorializing the terms of service said that plaintiff would be performing its services in North Carolina. N.C.G.S. § 1-75.4(5).

2. Jurisdiction— long arm—consent

It was not necessary to determine whether a long-arm statute comported with due process where defendant consented to jurisdiction through a letter confirming plaintiff’s terms of service.

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[156 N.C. App. 590 (2003)]

Appeal by defendant from order entered 20 February 2002 by Judge Earl J. Fowler in Buncombe County Superior Court. Heard in the Court of Appeals 29 January 2003.

Walter A. Dinteman, President, for plaintiff appellee.

Biggers & Hunter, PLLC, by William T. Biggers, for defendant appellant.

TIMMONS-GOODSON, Judge.

Edwards Publications, Inc. ("defendant") appeals from an order of the trial court granting North Carolina courts in personam jurisdiction. For the reasons stated herein, we affirm the order of the trial court.

MRI/Sales Consultants of Ashville, Inc. ("plaintiff") is a North Carolina corporation with its principal place of business in Buncombe County, North Carolina. Defendant is a corporation incorporated under the laws of the State of Iowa, and registered to do business in the States of Wyoming, Michigan and South Carolina. Defendant's principal place of business is Seneca, South Carolina.

Plaintiff is a recruiting firm, specializing in locating candidates to fill positions in the publishing and printing industries. On 25 January 2001, Michael Gibson ("Gibson"), an account executive employed with plaintiff, made an unsolicited telephone call from North Carolina to defendant in South Carolina. Gibson contacted Steven Edwards ("Steven"), vice-president of defendant's corporation. Gibson offered to assist defendant in locating personnel to fill positions at defendant's corporation, specifically the newspaper division. As a result of the telephone conversation, Jerry Edwards ("Edwards") gave plaintiff a job search assignment for six positions, none of which were located in North Carolina. Following the telephone conversation in which plaintiff was given the job search assignments, a letter was mailed to defendant confirming the agreement between the parties, establishing service fees and creating deadlines.

On 15 February 2001, Edwards contacted plaintiff seeking assistance in finding a web pressman to work in defendant's Michigan plant. Following the conversation, defendant was again mailed a confirmation letter which contained the following provision:

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. . . .

Because we will be performing our services in the State of North Carolina, its laws would be applicable to our relationship, and its court would have jurisdiction over both of us.

. . . .

If these terms do not reflect your understanding of our agreement, please call us immediately. Unless we provide you with a modifying letter, we will rely on your acceptance of referrals from us as establishing that you have accepted these terms.

. . . .

The job assignment to find a web pressman for the Michigan plant is the underlying action of the matter before this Court.

On 7 March and 12 March 2001, plaintiff made arrangements for a telephone interview between a candidate from New Hampshire and the management of defendant's Michigan plant. As a result of the telephone interview, plaintiff made arrangements, at defendant's expense, for the candidate to travel from New Hampshire to visit the Michigan facility. On 19 March 2001, plaintiff was notified by defendant that an offer had been made to the candidate. Following the notification, plaintiff mailed an invoice to defendant's headquarters in South Carolina. The candidate accepted the offer and was employed by defendant as a web pressman. In May 2001, plaintiff called defendant concerning the unpaid invoice for locating a web pressman to work at defendant's Michigan facility. On 15 June 2001, defendant advised plaintiff that the web pressman had been terminated and that defendant did not intend to pay the invoice.

On 18 June 2001, plaintiff brought suit against defendant in the District Court of Buncombe County, North Carolina, seeking damages. In response to plaintiff's complaint, defendant filed a motion to dismiss under North Carolina General Statutes § 1A-1, Rule 12(b)(2) for lack of personal jurisdiction. Defendant pursued the motion on the following grounds: (1) defendant is a corporation organized and existing under the laws of the State of Iowa; (2) defendant is not doing business in North Carolina; and (3) defendant has never done business in the State of North Carolina so as to invoke the jurisdiction of the North Carolina courts. The trial court denied defendant's

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motion and found that personal "jurisdiction does in fact exist" over defendant. From this order, defendant appeals.

The dispositive issue before this Court is whether the trial court erred in denying defendant's motion to dismiss for lack of personal jurisdiction. For the reasons stated hereafter, we affirm the order of the trial court.

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). We note that the trial court's order is devoid of any findings of fact. Where no findings are made, proper findings are presumed, and the role of the appellate court is to review the record for competent evidence to support these presumed findings. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

The question of whether the trial court has personal jurisdiction over a nonresident defendant involves a twofold determination. *Fraser v. Littlejohn*, 96 N.C. App. 377, 381, 386 S.E.2d 230, 233 (1989). First, the trial court must determine whether the North Carolina long-arm statute allows jurisdiction over the defendant. *Id.* If so, the trial court must then determine whether the exercise of this power comports with the due process requirements of the Fourteenth Amendment. *Id.* The burden is on the plaintiff to establish that one of the statutory grounds for jurisdiction is applicable. *Stallings v. Hahn*, 99 N.C. App. 213, 215, 392 S.E.2d 632, 633 (1990). The long-arm statute "is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process." *DeArmon v. B. Mears Corp.*, 67 N.C. App. 640, 643, 314 S.E.2d 124, 126 (1984), *reversed on other grounds*, 312 N.C. 749, 325 S.E.2d 223 (1985).

[1] We first address the issue of statutory authority. Defendant contends that since the underlying matter concerns a job located in Michigan and a candidate from New Hampshire, the North Carolina courts do not have personal jurisdiction. Defendant, however, misapprehends the statutory requirement for a court to invoke personal jurisdiction over a defendant. North Carolina's long-arm statute provides for in personam jurisdiction in the following actions:

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. . . .

(5) Local Services, Goods or Contracts.—In any action which:

a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant . . . to pay for services to be performed in the State by the plaintiff;

or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant

. . . .

N.C. Gen. Stat. § 1-75.4(5)(d) (2001).

In the instant case, the services provided by plaintiff were sufficient to bring defendant under the jurisdiction of the North Carolina court. The record reveals that (1) defendant employed plaintiff to locate candidates to fill available job positions within defendant's corporation, (2) plaintiff's only office is physically located in North Carolina, and (3) from that office plaintiff's employees used desk, chairs, telephones, computers and other equipment physically located in North Carolina, to search for and locate candidates presented to defendant for the position of web pressman at defendant's Michigan facility. Furthermore, the terms of the services to be provided by plaintiff were memorialized in a confirmation letter mailed to defendant, in which plaintiff states "we will be performing our services in North Carolina." The record is devoid of evidence that defendant did not agree with the terms expressed in the confirmation letter. The record shows that by accepting candidates from plaintiff, defendant accepted the terms of the confirmation letter and promised to pay for services to be performed in North Carolina by plaintiff. Pursuant to North Carolina's long-arm statute, services provided by plaintiff were sufficient to bring defendant under the jurisdiction of the North Carolina court.

[2] Having concluded that personal jurisdiction is authorized by the long-arm statute, we now turn to the issue of due process. *See Fraser*, 96 N.C. App. at 381, 386 S.E.2d at 234. "When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of

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statutory authority collapses into one inquiry—whether defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process.” *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999). However, it is not necessary to conduct the two-step determination when a party has validly consented to the jurisdiction of a court. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14, 85 L. Ed. 2d 528, 540 n.14 (1985) (stating that due process is not offended by the enforcement of a consent to jurisdiction provision that is obtained through free negotiations and is not unreasonable or unjust).

In the case at bar, the language in the confirmation letter clearly states that plaintiff will be performing services “in the State of North Carolina, its laws would be applicable to our relationship, and its courts would have jurisdiction over both of us.” Typically, contracting parties use three types of provisions to avoid litigation concerning jurisdiction and governing law: (1) forum selection; (2) consent to jurisdiction; and (3) choice of law. *Corbin Russwin, Inc. v. Alexander's Hdwe., Inc.*, 147 N.C. App. 722, 726, 556 S.E.2d 592, 596 (2001).

The first type, the choice of law provision, names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated.

The second type, the consent to jurisdiction provision, concerns the submission of a party or parties to a named court or state for the exercise of personal jurisdiction over the party or parties consenting thereto. By consenting to the jurisdiction of a particular court or state, the contracting party authorizes that court or state to act against him.

A third type, a true forum selection provision, goes one step further than a consent to jurisdiction provision. A forum selection provision designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship.

Johnston County v. R. N. Rouse & Co., 331 N.C. 88, 92-93, 414 S.E.2d 30, 33 (1992) (citations omitted).

“Due to the varying language used by parties drafting these clauses and the tendency to combine such clauses in one contractual

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provision, the courts have often confused the different types of clauses.” *Id.* at 93, 414 S.E.2d at 33. The following guidance has been supplied by one commentator who recognized the confusion faced by many courts:

(1) A typical forum-selection clause might read: “[B]oth parties agree that only the New York Courts shall have jurisdiction over this contract and any controversies arising out of this contract.”

(2) A . . . “consent to jurisdiction” clause[] merely specifies a court empowered to hear the litigation, in effect waiving any objection to personal jurisdiction or venue. Such a clause might provide: “[T]he parties submit to the jurisdiction of the courts of New York.” Such a clause is “permissive” since it allows the parties to air any dispute in that court, without requiring them to do so.

(3) . . . A typical choice-of-law provision provides: “This agreement shall be governed by, and construed in accordance with, the law of the State of New York.”

Id. (non-numbered alterations in original).

Here, we are concerned with a consent to jurisdiction clause. The confirmation letter states that the laws of North Carolina will “be applicable to [the] relationship, and its courts [will] have jurisdiction over both [plaintiff and defendant].” This provision is similar to the consent of jurisdiction example supplied in *Johnston County*. The confirmation letter further states that plaintiff will “rely on [defendant’s] acceptance of referrals . . . as establishing that [defendant] accept[s] [the] terms [of the letter].” Therefore, it is not necessary for this Court to determine whether the long-arm statute comports with due process requirements, because defendant consented to the jurisdiction of the North Carolina court. We conclude that the trial court’s order properly supports its conclusion that personal jurisdiction did exist over defendant.

The order of the trial court is hereby

Affirmed.

Judges TYSON and LEVINSON concur.

PASS v. BECK

[156 N.C. App. 597 (2003)]

BENJAMIN FRANKLIN PASS, PLAINTIFF v. JACQUELINE ODETTE BECK, DEFENDANT

No. COA02-669

(Filed 18 March 2003)

1. Child Support, Custody, and Visitation— visitation—delay determining best interests of child

The trial court did not abuse its discretion in a child custody case by delaying determination of the best interests of the child regarding visitation by the father pending a recommendation from a psychologist, because there was minimal contact between the father and the minor child as of that time.

2. Child Support, Custody, and Visitation— visitation—child not a product of forcible rape

The trial court did not abuse its discretion in a child custody case by finding as fact that the minor child was not a product of forcible rape but was from consensual intercourse, because: (1) the trial court found that plaintiff father, who denied the allegation, was a credible witness; (2) the trial court also found credible plaintiff's witnesses who corroborated plaintiff's testimony and stated that the parties appeared to be involved in a sexual relationship and were planning on getting married; and (3) the trial court found defendant mother's testimony to not be credible in part based on cell phone records indicating that she initiated contact with plaintiff around the time of the alleged assault and for two months thereafter, defendant was seen around and with plaintiff on his property, and she continued to accept paychecks from the parties' business.

3. Child Support, Custody, and Visitation— visitation—best interests of child—safety of child

The trial court did not abuse its discretion in a child custody case by determining the best interest of the child is promoted by visitation with plaintiff father even though defendant mother contends the trial court did not adequately consider her concerns for the safety of her child, because the trial court determined there was no act of domestic violence, the child was not a product of rape, and no other safety concerns were raised.

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Appeal by defendant from orders entered 26 November 2001 and 28 March 2002 by Judge J.H. Corpening in New Hanover County District Court. Heard in the Court of Appeals 12 February 2003.

Lea, Clyburn & Rhine, by James W. Lea, III, for plaintiff-appellee.

Virginia R. Hager and Michelle D. Reingold, for defendant-appellant.

CALABRIA, Judge.

Defendant appeals orders entered 26 November 2001 and 28 March 2002 granting defendant primary custody of, and plaintiff visitation with, the parties' minor child. The November order also denied defendant's petition to terminate plaintiff's parental rights and dismissed defendant's complaint for a domestic violence protective order. A hearing on these actions was held on 4 June, 5 June, 30 July and 31 July 2001 in the New Hanover County District Court, the Honorable Judge J.H. Corpening ("Judge Corpening") presiding.

In the 26 November 2001 order, Judge Corpening found the following facts pertinent to this appeal. The parties were involved in a personal and business relationship from the mid-1980s until 1994. In 1994, the parties ceased contact. Sometime thereafter, the parties resumed their relationship. In 1996, plaintiff and defendant again began working together at plaintiff's business, they re-titled real estate in their joint names, and plaintiff gave defendant stock in his business. By late 1997, defendant had become "extremely dissatisfied with the way the Plaintiff conducted his business . . . [and] was attempting to hire an attorney with regard to her perceived legal problems." On 24 December 1997, defendant sought counseling from Family Services regarding "verbal, emotional and financial abuse from the Plaintiff." Defendant returned for additional counseling on 29 December 1997 and 6 January 1998. Defendant alleged that in early January 1998, plaintiff raped her, and the minor child was thereby conceived. The court found as fact:

the reports of the assault during [January 1998] are not believable based on the lack of credibility of the Defendant and the credibility of the Plaintiff and his witnesses, in light of the financial disputes existing between the parties and the actions of the Defendant in the previous year arranging for ownership in both the business of the Plaintiff and the parties' real estate.

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The court found defendant was not credible, in part, because she maintained contact with plaintiff for two months following the alleged assault. Moreover, although defendant had professed herself to be a virgin, the court found “by the greater weight of the evidence that [defendant] in fact engaged in sexual contact in the form of both oral sex and sexual intercourse with the Plaintiff prior to January of 1998.” The court found defendant’s statements regarding her virginity “placed her in a position to fabricate a story about being assaulted or raped when it was learned that she had become pregnant.”

The court found plaintiff and his witnesses credible. Plaintiff testified he did not rape defendant, but that they were involved in a consensual sexual relationship. Plaintiff’s witnesses testified they saw plaintiff and defendant in situations that corroborated plaintiff’s testimony. The court found as fact that when plaintiff and defendant fought, defendant became “extremely angry, using harsh language” and plaintiff was “very passive and rarely argumentative,” and noted the credible “testimony does not support Defendant’s contentions that he would or had violently assaulted her.” Based on these findings, the court found as fact that “[t]he birth of the minor child was not a product of forcible rape, but consensual intercourse.” The court then concluded as a matter of law that “Defendant has failed by the greater weight of the evidence to establish that the birth of this child was a product of forcible rape.”

Regarding custody, the court concluded that “both parties are fit and proper persons to have the joint care, custody and control of the minor child with the Defendant having primary custody and the Plaintiff having secondary custody.” The court ordered that the parties share custody, with plaintiff being entitled to visitation. The court ordered “no contact” until the parties met with a psychologist, who would submit a report to the court with a recommended graduated visitation schedule. On 28 March 2002, the court, having received a recommended schedule from the psychologist, concluded as a matter of law that it was in the best interest of the child to follow the visitation schedule set forth by the psychologist and delineated in the order.

Defendant appeals both orders alleging the trial court erred by (I) failing to make findings of fact and conclusions of law in the November order that contact between the minor child and plaintiff was in the best interests of the minor child; and (II) finding the minor child was not conceived as a result of rape; and (III) finding in the

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March order that it was in the best interest of the minor child to have visitation with plaintiff.

We note, at the outset, “[i]t is well settled that the trial court is vested with broad discretion in child custody cases.” *McConnell v. McConnell*, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002). “A ruling committed to a trial court’s discretion 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).

I. November Order: Best Interests Determination

[1] Defendant asserts the trial court erred, in the 26 November 2001 order, by not finding as fact or concluding as a matter of law that visitation between the minor child and plaintiff was in the best interests of the child. Defendant argues that “[p]resumably, then, the trial court never considered what is in the best interest of the minor child.” However, the transcript reveals Judge Corpening specifically dictated: “the order of custody will read as follows: At this time both parents are fit and proper persons to have custody of this child. It is in the child’s best interests for the mother to have [] primary custody.” Judge Corpening delayed a determination as to the best interests of the child regarding visitation with her father, instead he required a psychologist to make recommendations to the court regarding visitation.

“Visitation rights orders, along with other matters related to child custody are governed by the standard of ‘promot[ing] the interest and welfare of the child.’” *Rawls v. Rawls*, 94 N.C. App. 670, 676, 381 S.E.2d 179, 183 (1989) (quoting N.C. Gen. Stat. 50-13.2 (b) (1987)). In *Rawls*, as in the case at bar, the court found it was in the best interests of the child for the mother to exercise primary custody and the father was a fit and proper person to exercise visitation rights. Due to the minimal contact between father and child as of that time, the court, in both *Rawls* and this case, sought the expertise of a third-party professional to assist in the determination of the best interests of the child with regards to visitation. Upon receiving that assistance, the court in this case, in the 28 March 2002 order, made findings of fact supporting the conclusion of law that “[i]t is in the best interest of the minor child that visitation be facilitated between [the child and her father] in accordance with the schedule [recommended by the psychologist].” Since the trial court did conclude that visitation was in the child’s best interests, and the findings of fact support that con-

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clusion, we hold the trial court did not abuse its discretion in delaying determination of the best interests of the child regarding visitation pending a recommendation from a psychologist.

II. November Order: Finding of fact

[2] Defendant asserts the trial court abused its discretion by finding as fact that the minor child was “not a product of forcible rape, but consensual intercourse.” We disagree.

‘In child custody cases, where the trial judge has the opportunity to see and hear the parties and witnesses, the trial court has broad discretion and its findings of fact are accorded considerable deference on appeal. So long as the trial judge’s findings of fact are supported by competent evidence, they should not be upset on appeal.’

Westneat v. Westneat, 113 N.C. App. 247, 250, 437 S.E.2d 899, 900-01 (1994) (quoting *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983)). Therefore, “the trial court’s findings of fact are conclusive if there is evidence to support them, even though the evidence might sustain a finding to the contrary.” *Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996).

In the case at bar there is competent evidence supporting the trial court’s finding of fact that “the birth of the minor child was not a product of forcible rape, but consensual intercourse.” Plaintiff testified:

Q: Frank, [defendant] has testified, I think, that she was assaulted by you she told the Sheriff’s Department that the 12th; she’s testified it was either the 6th, 7th, or 8th, that’s my recollection. That’s four different dates she said. On any one of those days did you ever forcefully assault this person that you thought you were going to marry or rape her in any way?

A: No, I have not.

The court found as fact that plaintiff was a credible witness. The court also found credible plaintiff’s witnesses who, corroborating plaintiff’s testimony, testified that plaintiff and defendant appeared to be involved in a sexual relationship and were planning on getting married. The witnesses further testified the relationship was volatile and described “the arguments of the parties as being extremely one sided with the Defendant becoming extremely angry, using harsh language towards the Plaintiff to the point that she would spit in his

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face.” The court found “[t]his testimony does not support Defendant’s contentions that [plaintiff] would or had violently assaulted her.” Moreover, the court found defendant was not credible, in part, because cell phone records indicate she initiated contact with plaintiff around the time of the assault and for two months thereafter, she was seen around and with plaintiff on his property, and she continued to accept paychecks from the business. Since the trial court found plaintiff and his corroborating witnesses credible and defendant not credible, we are bound to conclude the trial court’s decision is not manifestly unsupported by reason and does not constitute an abuse of discretion.

We note, however, that although there is competent evidence supporting the trial court’s finding of fact, the order was replete with troubling findings. Most disturbing are the findings of the court supporting the conclusion that defendant was not credible. The court based its finding, in part, on symptoms of defendant’s alleged post traumatic stress disorder (“PTSD”). An expert in PTSD, who testified defendant suffered from the disorder, testified that “[i]ndividuals who go through a traumatic event . . . experience a period of being in shock where one does not know their surroundings, so it’s not surprising that an individual would not remember the exact date [of the traumatic event].” Although no other experts testified, and the expert was not discredited on this point, and the court made no finding indicating the expert was not credible, the court nevertheless found defendant’s allegations of rape were not credible because she “indicated at least four different dates upon which the rape may have occurred.” Moreover, the court considered defendant not to be credible because, immediately after the assault, she did not seek medical care, make a police report, photograph her bruises, and only told her best friend and her mother. Despite these findings, we are bound by the standard of review, and in this case cannot hold the trial court’s decision was the result of an abuse of discretion.

III. March Order: Best Interests Determination of Visitation

[3] Defendant asserts the trial court abused its discretion by determining the best interest of the child is promoted by visitation with plaintiff because of defendant’s concerns for the safety of her child. In determining best interests, “the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly.” N.C. Gen. Stat. § 50-13.2(a) (2001). Defendant argues the trial

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court did not adequately consider defendant's concerns for safety of her child. We disagree. The court, in dismissing the complaint for a domestic violence protective order, specifically determined defendant had failed to establish domestic violence occurred and had no reason to fear plaintiff. Since the court determined that there was no act of domestic violence, that the child was not a product of rape, and no other safety concerns were raised, we cannot find the court abused its discretion by ordering visitation between the minor child and her father.

Affirmed.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. MICHAEL J. SHEPHERD

No. COA02-449

(Filed 18 March 2003)

1. Prisons and Prisoners— injury to prisoner by jailer—sufficiency of evidence—keeper of the jail—bailiff

The trial court did not err by denying defendant's motion to dismiss the charge of injury to prisoner by jailer even though defendant contends he was not the keeper of the jail within the meaning of N.C.G.S. § 162-55, because defendant, acting as a courtroom bailiff, would be considered the keeper of a jail when: (1) bailiffs have the same custody, care, and keeping obligation as the jailers do who work in the actual jail; and (2) defendant was certified by the State as a detention officer which is synonymous with a jailer.

2. Prisons and Prisoners— injury to prisoner by jailer—jury instruction—keeper of the jail

The trial court did not abuse its discretion in an injury to prisoner by jailer case by instructing the jury concerning the definition of the keeper of a jail, because: (1) the trial court properly denied defendant's request for a specific instruction since the requested instruction erroneously indicated that, in order to be found guilty of injury to prisoner by jailer, defendant must be either the sheriff or the person appointed by the sheriff to be the

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keeper of the jail; (2) the keeper of a jail includes those persons charged with the care, custody, and maintenance of prisoners, and the trial court's initial instructions correctly informed the jury of the applicable law; and (3) the trial court's responses to jury inquiries provided clarity.

Appeal by defendant from judgment entered 26 September 2001 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 23 January 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Mary S. Mercer, for the State.

Randolph and Fischer, by J. Clark Fischer, for defendant-appellant.

HUNTER, Judge.

Michael J. Shepherd ("defendant") appeals from a conviction of injury to prisoner by jailer. Defendant assigns error to the trial court's denial of his motion to dismiss the charge of injury to prisoner by jailer because defendant asserts that he was not "the keeper of a jail" within the meaning of N.C. Gen. Stat. § 162-55 (2001) since he was a courtroom bailiff. Defendant also contends the trial court erred in its instructions to the jury regarding the definition of "the keeper of a jail." We hold that defendant, acting as a bailiff, would be considered "the keeper of a jail" within the meaning of N.C. Gen. Stat. § 162-55 and thus, the trial court properly denied defendant's motion to dismiss. We additionally conclude the jury was properly instructed concerning the definition of "the keeper of a jail." Therefore, we find no error.

The evidence at trial tended to show that defendant was formerly employed in the custody division of the New Hanover County Sheriff's Department. On 22 September 2000, defendant was working as a bailiff in the courthouse. Captain David Stevenson ("Captain Stevenson"), the chief jailer for the New Hanover County Jail, testified that a bailiff's duties include the care and custody of inmates who are taken to the courthouse from the jail. Therefore, according to Captain Stevenson, bailiffs operate as jailers in the courthouse. The State offered into evidence the Cape Fear Community College's certificate of completion of the detention officer certification course by defendant. Captain Stevenson testified that it is required that a jailer or detention officer be certified by the State as a detention officer.

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According to Captain Stevenson, a detention officer is synonymous with a jailer. Captain Stevenson explained that a bailiff is a jailer because there are holding facilities in the courthouse and a bailiff has the same custody, care and keeping obligation as the jailers do who work in the actual jail. Bailiffs have occasion to go to the detention centers in the courthouse to take inmates into the courtroom for trial or to testify in a case. In addition, bailiffs' duties require them to go to the jail to pick up inmates for transport to court. Captain Stevenson stated that defendant was charged "with the care, custody and safekeeping of anyone assigned to him, any inmate that might be in our custody."

Nathaniel Edward Arter ("Arter"), an inmate, testified at trial that on 22 September 2000, when he returned from court, he observed defendant talking to two other inmates, Cecil Moore ("Moore") and William Bruce ("Bruce"), in the vestibule outside of Arter's jail cell. Approximately a minute after defendant left the cell block, a blanket was thrown over Arter's head and Arter was beaten by Moore and Bruce.

Bruce testified that on 22 September 2000, defendant promised Bruce that if Bruce beat Arter up, he would get Bruce whatever he wanted, which Bruce assumed meant cigarettes or something like that. Bruce admitted beating Arter and pled guilty to an assault charge. In addition, Jeffrey Scott Penny ("Deputy Penny"), a deputy sheriff with the New Hanover County Sheriff's Department, testified that defendant responded, "[y]ou damn right I did it[,]" when questioned about the Arter incident.

A jury found defendant guilty of injury to prisoner by jailer. Defendant was given a forty-five day suspended sentence and twelve months supervised probation. Defendant appeals.

I.

[1] Defendant initially contends the trial court erred in denying his motion to dismiss the charge of injury to prisoner by jailer because defendant asserts that he was not "the keeper of a jail" since he was a courtroom bailiff and thus, the provisions of N.C. Gen. Stat. § 162-55 did not apply to his alleged misconduct. We disagree.

When reviewing a motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814

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(1990). The evidence must be viewed in the light most favorable to the State. *State v. Smith*, 121 N.C. App. 41, 44, 464 S.E.2d 471, 473 (1995).

Defendant was charged with and convicted of the offense of injury to prisoner by jailer in violation of N.C. Gen. Stat. § 162-55, which provides: “If *the keeper of a jail* shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a Class 1 misdemeanor.” N.C. Gen. Stat. § 162-55 (emphasis added). Defendant cites N.C. Gen. Stat. § 162-22 (2001) in support of his argument that he was not “the keeper of a jail” within the meaning of N.C. Gen. Stat. § 162-55. N.C. Gen. Stat. § 162-22 states, “[t]he sheriff shall have the care and custody of the jail in his county; and *shall be, or appoint, the keeper thereof.*” N.C. Gen. Stat. § 162-22 (emphasis added). Defendant argues that this provision supports his interpretation that N.C. Gen. Stat. § 162-55 applies only to the officer at the head of the jail’s command structure—the sheriff, or whoever the sheriff appoints to be the keeper of the jail. In addition, defendant asserts that the use of the word “the” prior to “keeper of a jail” demonstrates that N.C. Gen. Stat. § 162-55 was intended to apply to a single person, i.e., the individual who was in charge of the detention facility at issue.

We first note that there are very few cases citing N.C. Gen. Stat. § 162-55, and no cases in which our Courts have determined whether a “bailiff” would constitute “the keeper of a jail” within the meaning of N.C. Gen. Stat. § 162-55. Therefore, this case presents an issue of first impression.

In construing statutes, Courts must “seek to give effect to the legislative intent, which may be discerned by consideration of the *purpose* of the statute, ‘the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory construction.’” *State v. Gaines*, 332 N.C. 461, 469, 421 S.E.2d 569, 572 (1992) (quoting *State v. Tew*, 326 N.C. 732, 738, 392 S.E.2d 603, 607 (1990)). Moreover, it is fundamental in statutory construction that “criminal laws must be strictly construed and any ambiguities resolved in favor of the defendant.” *State v. Gentry*, 135 N.C. App. 107, 111, 519 S.E.2d 68, 71 (1999).

It appears that the General Assembly’s intent in passing N.C. Gen. Stat. § 162-55 was to provide for the safekeeping and humane treatment of prisoners, since the initial bill passed in 1795, which is

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remarkably similar to the current statute, was entitled “Bill to Provide for the Safe-Keeping and Humane Treatment of Persons in Confinement.” *Letchworth v. Gay*, 874 F. Supp. 107, 108 (E.D.N.C. 1995). Since the General Assembly’s intent in enacting the statute was to protect prisoners from their custodians, “the keeper of a jail” must be construed to include those persons charged with the care, custody, and maintenance of prisoners. In the instant case, we note there was testimony that bailiffs have the same custody, care and keeping obligation as the jailers do who work in the actual jail. Evidence was also admitted showing that defendant was certified by the State as a detention officer, and according to Captain Stevenson, a detention officer is synonymous with a jailer. Captain Stevenson further testified that defendant was charged “with the care, custody and safekeeping of anyone assigned to him, any inmate that might be in our custody.” Therefore, defendant, acting as a bailiff, would be considered “the keeper of a jail” within the meaning of N.C. Gen. Stat. § 162-55. Accordingly, the trial court was proper in denying defendant’s motion to dismiss the charge of injury to prisoner by jailer.

II.

[2] Defendant next argues the trial court erred in its instructions to the jury regarding the definition of “the keeper of a jail.”

At the outset, the choice of instructions given to a jury “is a matter within the trial court’s discretion and will not be overturned absent a showing of abuse of discretion.” *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). In addition, “[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance.” *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). Additional instructions may be given “to respond to jury inquiries, to correct an erroneous instruction, to clarify an ambiguous instruction, or to instruct the jury on law which should have been included in the original instructions.” *State v. Clegg*, 142 N.C. App. 35, 45, 542 S.E.2d 269, 276, (citing N.C. Gen. Stat. § 15A-1234(a) (1999)), *appeal dismissed and disc. review denied*, 353 N.C. 453, 548 S.E.2d 529 (2001).

Defendant submitted to the court the following request for jury instruction:

The Defendant request[s] that as a supplement to the Pattern Jury Instructions for the crime of injury to prisoner by jailer, the

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court instruct the jury that in order to find that the defendant is “the keeper of the jail” within the context of the statutory language in N.C.G.S. § 162-55, in accordance with N.C.G.S. § 162-22 which states that “the sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof.” Therefore, we are requesting instruction that: In order to find that the Defendant was the keeper of the jail, you must find that he was either the sheriff or was the person appointed by the sheriff to be the keeper of the jail.

The trial court denied defendant’s request and instructed the jury as follows, in pertinent part:

The Defendant has been charged with injury to a prisoner by a jailer. Now I charge that for you to find the Defendant guilty of this offense, the State must prove four things beyond a reasonable doubt: First, that the Defendant was the keeper of a jail; second, that the victim was a prisoner committed to his custody; third, that the Defendant caused injury to be done to the victim; and fourth, that he did this contrary to law. Directing and causing other prisoners to beat the victim would be contrary to law.

During deliberations, the jury asked the following questions: (1) “In role of a bailiff, where does his role begin and end? Who is under bailiff’s custody?” (2) “Was prisoner committed to Shepherd’s custody?” and (3) “Definition between jailer and bailiff.” The court answered question (1) by stating:

[A] prisoner is under a bailiff’s custody when the bailiff has the duty, either alone or together with other deputies, to maintain the imprisonment of the prisoner.

So again, for the purpose of this trial, a prisoner or prisoners, are in the custody of a bailiff when the bailiff has as one of his duties, either alone or together with other deputies, the responsibility to maintain the imprisonment of the prisoner. So if it’s part of the bailiff’s responsibility to maintain the imprisonment of a prisoner or prisoners, they’re under the bailiff’s custody.

The court refused to answer question (2) and advised the jury that they must answer that question from the evidence. Finally, as to question (3), the court advised the jury that “a bailiff is a jailer when a prisoner is in his custody, or when prisoners are in his custody. So again, a bailiff is a jailer when, as a part of his duties, he is maintaining the imprisonment of a prisoner or prisoners.” After answering the jury’s

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inquiries, the trial court allowed the jury to resume deliberations but soon called them back into the courtroom to hear the following additional instruction:

I didn't want to leave you with the impression that a prisoner can be in the custody of a jailer where the jailer had as his duties the maintaining of the imprisonment of some other prisoners and not that particular prisoner. But in order to—in order for a prisoner to be in the custody of a jailer, then it has to be the jailer's responsibility to—or part of his responsibility to maintain the imprisonment of that particular prisoner.

We conclude the trial court did not err in its instructions to the jury regarding the definition of “the keeper of a jail.” The trial court properly denied defendant's request for a specific instruction since the requested instruction erroneously indicated that in order to be found guilty of injury to prisoner by jailer the defendant must be either the Sheriff or *the person* appointed by the sheriff to be the keeper of the jail. As determined in section I, “the keeper of a jail” includes *those persons* charged with the care, custody, and maintenance of prisoners. We additionally conclude the trial court's initial instructions correctly informed the jury of the applicable law. Moreover, the court's responses to the jury's inquiries provided clarity. Therefore, we find no error in the trial court's instructions concerning the definition of “the keeper of a jail.”

No error.

Judges McGEE and CALABRIA concur.

CITY OF WILSON, PLAINTIFF V. TONY EARL HAWLEY, DEFENDANT

No. COA02-889

(Filed 18 March 2003)

1. Appeal and Error— preservation of issues—motion in limine—failure to object at trial

Although defendant property owner contends the trial court erred in a condemnation proceeding by denying his motion in limine regarding his statement to a real estate appraiser concerning

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the value of the property, this assignment of error is overruled because defendant waived his right to appellate review by failing to object to this testimony at trial.

2. Eminent Domain— value and potential use of property

The trial court did not err in a condemnation proceeding by refusing to allow defendant property owner's testimony concerning the value and potential uses of his property, because: (1) defendant did not make an offer of proof of the testimony he intended to offer; (2) defendant failed to cite authority in support of the admissibility of his purported testimony as required by N.C. R. App. P. 28(b)(5); and (3) there was no evidence by defendant of taking any steps toward potential and future uses prior to the date of the taking.

3. Eminent Domain— comparative sales and listings

The trial court did not abuse its discretion in a condemnation proceeding by allowing plaintiff city to offer evidence of comparative sales and listings of other properties in order to show the basis of a real estate appraiser's determination of value of the condemned property where the sales the appraiser considered all occurred within four years of the taking in this case; the listings were dated within one year of the taking; and the sales comparables were in close proximity to the condemned property.

4. Eminent Domain— valuation—motion to set aside verdict—credibility of witnesses—weight of evidence

The trial court did not abuse its discretion in a condemnation proceeding by denying defendant property owner's motion to set aside the verdict even though the jury verdict was vastly lower than the values given by three of the four valuation witnesses, because the credibility of witnesses and the weight of the evidence are solely for the jury to determine.

Appeal by defendant from judgment entered 4 February 2002 by Judge Cy A. Grant, Sr. in Wilson County Superior Court. Heard in the Court of Appeals 19 February 2003.

Rose, Rand, Orcutt, Cauley, Blake & Ellis, P.A., by James P. Cauley, III and Susan K. Ellis, for plaintiff-appellee.

Farris & Farris, P.A., by Robert A. Farris, JR., Joseph N. Quinn, Jr. And Thomas J. Farris, for defendant-appellant.

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TYSON, Judge.

Tony Earl Hawley (“defendant”) appeals from a jury award of \$358,000.00 as just compensation from the City of Wilson (“Wilson”) as damages resulting from the condemnation of a portion of defendant’s property. We find no error.

I. Background

On 11 October 1999, Wilson condemned approximately 142.76 acres of defendant’s 320.43 acre farm for the Buckhorn Reservoir Expansion Project. Wilson deposited \$293,660 with the clerk of court which was disbursed to defendant on 18 October 1999. After the taking, defendant’s remaining property consisted of approximately 62 acres of cleared land and 115 acres of woodland.

Prior to trial, defendant filed a motion in limine to suppress prior statements made by defendant concerning the property’s value during a meeting with Wilson’s appraiser. The trial court ruled that defendant’s statements were admissible. Wilson filed and was granted a motion in limine to suppress testimony regarding potential future uses of the property.

Defendant testified that 105 of the acres condemned by Wilson were planted with sweet potatoes at the time of taking. He estimated the value of the unharvested sweet potatoes at \$275,000. Defendant testified that sweet potato farming was the highest and best use of the land at the time of taking and that he was using it for that purpose. Defendant attempted to testify to other potential and future uses, but the trial court sustained Wilson’s objection.

Defendant opined that the fair market value of the 320 acre tract immediately before condemnation was \$6,472,000. He arrived at this value by stating that the cleared land was worth \$30,000 per acre and the woodland was worth \$2,000 per acre. He estimated fully grown trees to be worth \$4,000 per acre. The trees on the condemned property were only “half grown” and defendant estimated their value at \$2,000 per acre. To arrive at the price of \$30,000 per acre for the cleared land, defendant testified, “[M]y daddy told me when I was growing up, the value of land is what you can make off of it for 20 years.” He approximated the annual net profit from the sweet potatoes grown on the cleared land at \$1,500 per acre and multiplied that sum by twenty years to arrive at \$30,000 per acre.

Defendant believed that only 62 acres of residual cleared land would be usable because flooding from the project would kill trees

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located in the woodland acres. He testified that the value of the land after the taking would be \$1,860,000, or \$30,000 per acre for the 62 acres. Defendant testified that the value of the land taken was \$4,618,000. On cross-examination and without objection, defendant admitted that he sold tracts of farm land within a ten-mile radius of the condemned property for \$2500 per acre to \$3300 per acre in August of 1999.

Donald Scott Johnson, a real estate appraiser, testified for Wilson and stated his opinion of value of the condemned land. Mr. Johnson testified that he (1) used the "sales comparison approach," (2) considered not only property actually sold, (3) but also considered the listing prices for properties in and around the county in 1999 and 2000. Johnson focused on properties comprised of 100 to 300 acres located within Wilson County and in surrounding counties.

Johnson testified that the sales prices ranged from \$1,000 per acre to \$2,500 per acre and that listing prices ranged from \$1,400 to \$5,000 per acre. Johnson met defendant on the property and testified, without objection, that defendant told him "Don't come back in here with numbers like 15- or \$2,000 an acre. This is 3500- or \$4,000-an-acre land." Johnson opined that the value of defendant's property immediately prior to taking was \$640,900, roughly \$2,000 per acre, and \$355,300 after the taking. Johnson estimated the value of the property taken by Wilson to be \$285,600.

The jury found \$358,000 to be just compensation for defendant's condemned property. The trial court credited the verdict by the deposit amount previously disbursed to defendant and entered judgment in favor of defendant in the amount of \$64,340 plus interest.

II. Issues

Defendant contends the trial court erred in (1) denying his motion in limine regarding defendant's statement to Johnson, (2) refusing to allow defendant's testimony concerning the value and potential uses of his property, (3) allowing plaintiff to offer evidence of sales and listings of other properties remote in time and location to the condemned property, and (4) denying defendant's motion to set aside the verdict as being contrary to the evidence.

III. Statement to Johnson

[1] Defendant contends that testimony concerning his statements to Johnson is inadmissible under Rule 408 of the North Carolina

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Rules of Evidence and that the trial court erred by denying his motion in limine.

Although defendant filed and the trial court ruled on the motion in limine, defendant failed to object at trial to the admission of Johnson's testimony. "The rule is that '[a] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to that evidence at the time it is offered at trial.'" *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, cert. denied, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)). Defendant failed to object to this testimony at trial and waived his right to appellate review of the trial court's denial of the motion in limine. *Id.* This assignment of error is overruled.

III. Potential Use of Property

[2] Defendant asserts that the trial court erred in "preventing Defendant from testifying as to the value of the subject property and the potential uses for it." Defendant did not make an offer of proof of the testimony he intended to offer. This Court cannot speculate concerning what defendant's testimony might have been. Further, defendant cited no authority in support of the admissibility of his purported testimony as required by N.C. R. App. P. 28(b)(5) (2002).

Our Supreme Court stated:

In condemnation proceedings the determinative question is: In its condition on the day of the taking, what was the value of the land for the highest and best use to which it would be put by owners possessed of prudence, wisdom, and adequate means? "The owner's actual plans or hopes for the future are completely irrelevant." Such aspirations being "regarded as too remote and speculative to merit consideration."

State v. Johnson, 282 N.C. 1, 24, 191 S.E.2d 641, 657 (1972) (quoting 4 Nichols, *The Law of Eminent Domain* § 12.314 (3rd ed. 1971)). Although it is proper for an owner to present evidence of "the condition of the property, its surroundings and all the uses to which the land was adapted, it [is] not competent to prove by the owner the uses to which he had intended to devote it." *Id.* If an owner has taken steps prior to the date of taking to adapt his land for future uses, the future uses to which the land is adapted are admissible. See *Town of Hillsborough v. Crabtree*, 143 N.C. App. 707, 547 S.E.2d 139, disc. rev. denied, 354 N.C. 75, 553 S.E.2d 213 (2001).

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Here, both defendant and Johnson agreed that the present highest and best use of the property was as a sweet potato farm. There is no evidence by defendant of taking any steps toward potential and future uses prior to the date of the taking. The trial court properly sustained objections to questions regarding defendant's potential use of the land. This assignment of error is overruled.

IV. Comparative Sales

[3] Defendant asserts that the trial court erred in allowing (1) Wilson to cross-examine defendant regarding the purchase prices of the tracts the condemned property comprised when the purchases occurred thirteen to fifteen years prior to the taking and (2) Johnson to use a comparative sales approach for determining the value of the property when the comparative values were remote in time and location.

A. Defendant's purchase prices

Defendant testified that he retained no independent recollection of many of the sales prices for the property when he originally purchased the property. The trial court issued a subpoena for defendant to search his records for the price he paid for the various properties and return to court to allow continued cross-examination. Defendant failed to object to either the issuance of the subpoena or the subsequent questioning regarding defendant's purchase prices. Defendant has waived appellate review of these questions by failing to object. N.C. R. App. P. 10(b)(1).

B. Comparative values

Johnson testified that he relied on a comparative sales analysis to arrive at his opinion that the property's value was approximately \$2,000 per acre. Johnson used actual sales dating from January 1996 through September 1999 throughout Wilson County. He also used the listing prices for property in that county and adjacent counties to determine a ceiling price in the area. The sales prices ranged from \$1,000 to \$2,500 per acre and the listing prices ranged from \$1,400 to \$5,000 per acre. The comparative properties were located inside and outside of the county, on and off of major highways, and all properties contained approximately 100 to 300 acres. Defendant was provided the opportunity to cross-examine Johnson regarding these values and to present rebuttal witnesses to show the value of land in the area.

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“Expert witnesses, including real estate appraisers, must be given wide latitude in formulating and explaining their opinions as to value.” *Department of Transp. v. Tilley*, 136 N.C. App. 370, 375, 524 S.E.2d 83, 87, *disc. rev. denied*, 351 N.C. 640, 543 S.E.2d 868, *cert. denied*, 531 U.S. 878, 148 L. Ed. 2d 129 (2000). The sales Johnson considered all occurred within four years of the date of taking, and the listings were dated within one year of the condemnation. The transcript does not sufficiently show the distances of the sales comparables from where the condemned property was located, other than the properties were “in close proximity.”

The prejudice here, if any, would not have come from his statement that the asking prices were a part of the general information upon which he based his opinion. The question is whether the fact that these prices were a part of his general knowledge and he did not exclude them from his considerations required the rejection of his opinion. The answer is No. . . . “An integral part of an expert’s work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion.” This statement appears to describe the manner in which [the appraiser] arrived at the opinions he expressed. It was not error for the court to permit him to detail the facts upon which he based his opinions.

Highway Comm. v. Helderman, 285 N.C. 645, 655-56, 207 S.E.2d 720, 727-28 (1974).

We hold that the trial court did not abuse its discretion in allowing Wilson to introduce evidence of both comparative sales and listing prices of other properties to show the basis of the real estate appraiser’s determination of value of the condemned property. This assignment of error is overruled.

V. Motion to set aside the verdict

[4] Defendant asserts the trial court erred in denying his motion to set aside the verdict on the grounds the jury verdict was vastly lower than the values given by three of the four valuation witnesses and because of the alleged errors at the trial. The jury’s verdict was closer to Johnson’s valuation, although three of defendant’s witnesses

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were of the opinion that the value of the property was over four million dollars. The credibility of witnesses and the weight of the evidence are solely for the jury to determine. *Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953). As we have found no error in the trial, we hold the trial court did not abuse its discretion in denying defendant's motion to set aside the verdict. This assignment of error is overruled.

VI. Conclusion

The trial court did not err by admitting defendant's statements to Johnson, in preventing defendant from testifying as to potential use of the property, in allowing plaintiff to offer evidence of sales and listings and in denying defendant's motion to set aside the verdict.

No error.

Judges McCULLOUGH and CALABRIA concur.

IN THE MATTER OF THE ESTATE OF: EDISON BRYAN LOWE, DECEASED

No. COA02-934

(Filed 18 March 2003)

1. Discovery— admissions—extension of time after 30 days

The trial court did not abuse its discretion by granting a motion for the extension of time to answer a request for admissions five months after the request was served (which, in effect, allowed the withdrawal of admissions that had been deemed admitted after thirty days).

2. Wills— revocation—implied—subsequent letter—insufficient

The trial court did not err by not giving a jury instruction on revocation of a will where the purported revocation was a formally executed letter which stated that the testator had not written a will and would do so only with certain family members present. The writing cannot be considered a will because it made no attempt to devise the testator's property, it is not a codicil because it does not attempt to explain, modify, or revoke a will, and the letter is not sufficient evidence of an implied revocation

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because it was not expressly inconsistent with any provision expressed in the will.

Appeal by caveators from judgment entered 28 December 2001 by Judge Clifton W. Everett, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 19 February 2003.

Carter, Archie, Hassell & Singleton, L.L.P., by Sid Hassell, Jr., for propounder-appellee.

Alexy, Merrell, Wills & Wills, L.L.P., by Windy H. Rose, for caveators-appellants.

TYSON, Judge

I. Background

Edison Bryan Lowe (“testator”) died on 15 November 2000. On 28 December 2000, Howard E. Clayton, Jr. (“propounder”) submitted a writing dated 5 November 1999 to the Clerk of Court, purporting to be the Last Will and Testament of testator. Propounder was named as the primary beneficiary and executor under the will.

Testator’s nephews, Eugene Lowe, Russell Lowe, and Bryan Lowe, collectively (“caveators”), filed a caveat on 17 January 2001. Caveators served a request for admissions upon propounder on 8 May 2001, and filed the request on 10 May 2001. Propounder served answers to the request along with a motion for extension of time on 3 October 2001. On 2 November 2001, the trial court granted an extension of time for propounder. The facts at issue were tried before a jury on 10 December 2001.

Caveators contended: (1) the will was procured by the undue influence of propounder, (2) testator had revoked the will through a later writing, and (3) they are entitled to the estate of testator through the laws of intestate succession. Caveators presented a purported revocation in the form of a writing dated 21 July 2000, signed by testator and attested by two witnesses which stated, in part, that testator had never “written a will.”

Caveators also supported their theory of revocation of the will by introducing a power of attorney executed by testator in favor of propounder on 27 July 2000. This power of attorney was revoked less than a month later on 25 August 2000. Both the power and revocation thereof were recorded at the office of the Register of Deeds. On 14

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September 2000, testator signed a notice that he would only execute legal documents if he first consulted with his cousin, J. Arden Williams or nephew, Eugene P. Lowe. This notice was also recorded on 20 September 2000. Despite caveators' request, no instruction regarding revocation of the will was given to the jury.

The jury found that the purported will (1) met the requirements for a valid attested will, (2) was not procured by undue influence, and (3) was the will of testator. The will was probated by the trial court on 2 January 2002.

II. Issues

The issues are whether the trial court erred in (1) granting propounder's motion for extension of time to answer caveators' request for admissions or allowing withdrawal of the admissions and (2) denying caveators' request for a jury instruction on revocation.

III. Motion for Extension of Time

[1] Our standard to review whether the trial court erred in granting a motion for extension of time is abuse of discretion. *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 635-37, 248 S.E.2d 887, 891-92 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E.2d 34 (1979).

Propounder moved for an extension of time to answer the request for admissions. Caveators argue that propounder had conclusively admitted all of the requests by not answering pursuant to N.C. Rule of Civil Procedure 36(b) at the time he moved for an extension. Rule 36(b) states that “[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” N.C. Rule of Civil Procedure 36(a) explains “[t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter[.]”

When propounder requested an extension of time on 3 October 2001, the request was already deemed admitted since it was served 8 May 2001, almost five months earlier and not answered within 30 days thereafter. Propounder's motion for extension of time was more appropriately a motion to withdraw his admissions.

The trial court may permit withdrawal of or amendment to an admission “when the presentation of the merits of the action will be

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subscribed thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.” N.C. R. Civ. P. 36(b) (2002). The grant or denial of a motion to withdraw an admission is discretionary with the trial court. *Interstate Highway Express v. S & S Enterprises, Inc.*, 93 N.C. App. 765, 768, 379 S.E.2d 85, 87 (1989) (quoting *Whitley v. Coltrane*, 65 N.C. App. 679, 681, 309 S.E.2d 712, 715 (1983)).

In *Interstate*, the trial court entered summary judgment for the plaintiff and denied defendants’ request to withdraw their admissions. *Id.* at 767, 379 S.E.2d at 86. Defendants argued that the trial court erred by “not requiring plaintiff to present evidence that withdrawal or amendment would prejudice it in maintaining its action.” *Id.* at 768, 379 S.E.2d at 87. This Court held that Rule 36 gave the trial judge the discretion to allow or deny withdrawal of admissions and that in the exercise of its discretion, the trial court need not consider whether the withdrawal would prejudice the plaintiff. *Id.* at 769, 379 S.E.2d at 87.

The case at bar is distinguishable. Defendant was allowed to withdraw the admissions and file answers to the request. We find the language and deference given to the trial judge’s discretion by this Court to be binding. See *Williams v. Jennette*, 77 N.C. App. 283, 290, 335 S.E.2d 191, 196 (1985); *Whitley v. Coltrane*, 65 N.C. App. 679, 309 S.E.2d 712 (1983). We cannot find that the trial judge abused his discretion by, in effect, allowing propounder’s withdrawal by granting the extension of time. If the request was deemed admitted, caveators’ case may have been stronger, but we cannot hold that a different result would have been reached. This assignment of error is overruled.

III. Instruction on Revocation

[2] “While the court is not required to give the instruction in the exact language of the request, if request be made for a specific instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance.” *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956).

Caveators contend that the trial court erred by not giving a jury instruction on revocation of a will where there was supporting evidence. The primary evidence supporting revocation consisted of a writing dated 21 July 2000 which stated:

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I, Edison Lowe, being of sound mind do here by (sic) state that I have not written a will. This the 21 day of July 2000. Further, if I do decide to write a will, I will do so with a family member or legal representative (sic) present and file it in the proper way.

N.C.G.S. § 31-5.1 (2001) states “[a] written will, or any part thereof, may be revoked . . . [b]y a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills.” The statute also recognizes physical revocation by or through the testator by means of burning, tearing, canceling, obliterating, or destroying the will with intent to revoke. N.C.G.S. § 31-5.1 (2001). N.C.G.S. § 31-3.3 requires for a valid attested written will: (1) testator’s signature, either signed personally or at the direction of the testator and in the testator’s presence, (2) signification to attesting witnesses that the instrument is that of the testator, either by signing in the presence of the witnesses or acknowledging to them his signature previously affixed, either of which may be done separately, and (3) the signatures of two attesting and competent witnesses who sign in the presence of the testator.

The purported revocation makes no attempt to devise testator’s property, and cannot be considered a subsequent will. The letter is not a codicil because it does not attempt to explain, modify, or revoke a will. The writing is a “subsequent writing” executed with the formalities of testator’s signature and two attesting witnesses. Caveators argue that the inconsistency raised by the writing indicates an intent to revoke the prior will.

The writing bears the testator’s signature and is witnessed by Michael Whitley and Romane Blount. Both witnesses were employees at Pungo District Hospital where testator was admitted as a patient at the time of the writing. Both Michael and Romane testified that they saw testator sign the letter, but neither remembers the other witness being present in the room.

Assuming the testimony of the witnesses is true and both witnessed testator sign the letter, the issue is whether the inconsistency between the later dated letter and the will is sufficient evidence of implied revocation to warrant a jury instruction.

“A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking

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clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law." *In re Will of Wolfe*, 185 N.C. 562, 565, 117 S.E. 805-06 (1923). "To be effective the language of the revocatory instrument must evince a present intent on the part of the testator to revoke the prior will or codicil." McLaughlin and Bowser, *Wiggins North Carolina Wills*, § 93 (4th ed. 2000). Where there is no express language but inconsistencies exist between a prior will and a later will or codicil, courts attempt to construe them together. *Id.* at § 94. However, if a later will disposes of the estate in a manner completely different from the earlier will, the first will is revoked. *Id.*

If a codicil contains no express revocation clause, the codicil's terms must be so inconsistent with those of the will to exclude any inference other than the testator changed his intention in order for the codicil to revoke any portion of a will. *Yount v. Yount*, 258 N.C. 236, 239, 128 S.E.2d 613, 616 (1962).

In *Yount*, the testator had named two persons as co-executors in his will. *Id.* at 237, 128 S.E.2d at 615. In his codicil, testator substituted a different executor for one of those listed in the will. *Id.* The individuals listed in the codicil were held to be the executors testator intended to serve. *Id.* at 241, 128 S.E.2d at 617. This Court held that the codicil revoked the prior designation of executors in the will. *Id.* at 240, 128 S.E.2d at 617.

Here, the writing is quite distinguishable from the codicil in *Yount*. The executed writing does not make reference to a prior will, but just states that the testator has "not written a will." The statement, while inconsistent with the fact that testator had executed a prior will, is not expressly inconsistent with any provision expressed in the will.

We find no case precedent in North Carolina or other jurisdictions where a subsequent writing declaring testator has "not written a will" was considered to be a revocation of a prior will.

Caveators point to other outside facts, including (1) testator's revocation of power of attorney in favor of propounder, (2) testator's statement to Angelina Lowe that he needed to discuss making a will, and (3) the recorded statement that he would consult one of the caveators or another person before he would execute any legal document in support of their contention that the writing revoked the prior will. These facts were offered to the jury, and should only be consid-

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ered where something on the face of the letter warrants the testamentary meaning caveators seek to attribute to the writing. *See Davis v. King*, 89 N.C. 441, 446 (1883).

After considering all of the evidence, the trial court found insufficient evidence to support a jury instruction on will revocation. Had testator devised his property in a different manner through the letter or expressly stated an intention to revoke the prior will, sufficient evidence would exist to require a jury instruction on revocation. This assignment of error is overruled.

No error.

Judges McCULLOUGH and CALABRIA concur.

SUE WOMBLE LOY, PLAINTIFF V. JOSHUA BRANDON MARTIN AND
KENNETH MARTIN, DEFENDANTS

No. COA02-540

(Filed 18 March 2003)

1. Damages— award of one dollar—contrary to evidence

The trial court did not abuse its discretion by granting a new trial on the issue of damages in an automobile negligence case where the court found that the jury's award of one dollar was contrary to the evidence and inadequate and the court's finding was supported by the evidence. Moreover, the trial court specifically stated that the issues of damages and negligence were not so intertwined that the entire verdict was tainted, and there was no evidence of a compromise verdict.

2. Motor Vehicles— family purpose doctrine—evidence sufficient

The family purpose doctrine was established in an automobile accident case where defendants admitted in their answer that they lived as father and son at the same residence, that the father owned the vehicle driven by the minor son at the time of the accident, and the son was driving the vehicle with the father's permission.

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3. Evidence— expert opinion—speed of vehicles

An accident reconstruction expert's opinion about the speed of the vehicles in an accident was correctly excluded where the expert did not see the accident.

Appeal by defendants from judgment entered 20 October 1999 and an order entered 9 November 1999 by Judge J. B. Allen, Jr., and from a judgment entered 12 December 2001 by Judge David Q. LaBarre in Chatham County Superior Court. Heard in the Court of Appeals 30 January 2003.

Benjamin Spence Albright for plaintiff-appellee.

Moss, Mason & Hill, by Matthew L. Mason, for defendant-appellee United States Fidelity and Guaranty Company.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for defendant-appellants.

HUNTER, Judge.

Joshua Brandon Martin (“defendant Joshua”) and Kenneth Martin (“defendant Kenneth”) (collectively “defendants”), having been found liable for injuries incurred by Sue Womble Loy (“plaintiff”) as the result of a motor vehicle accident, appeal the trial court’s (1) grant of plaintiff’s motion for a partial new trial on the issue of damages; (2) denial of defendant Kenneth’s motion for directed verdict; and (3) refusal to allow defendants’ expert witness to offer opinion testimony regarding the speeds of the vehicles at the time of impact. We affirm for the reasons stated herein.

On 6 November 1996, the vehicles driven by plaintiff and defendant Joshua collided on Highway 54 in Alamance County, North Carolina. The accident occurred at approximately 6:50 a.m. and resulted in injuries to both parties.

Plaintiff filed a complaint on 17 December 1997 alleging the accident and her resulting injuries were caused by defendant Joshua’s negligence. Plaintiff also alleged that such negligence was imputed on defendant Kenneth as the owner of the “household purpose vehicle” driven by defendant Joshua, defendant Kenneth’s minor son, at the time of the accident. Defendants answered and cross-claimed seeking recovery from plaintiff for defendant Joshua’s medical expenses and pain and suffering. Defendants subsequently dismissed their cross-claim.

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The case was tried before a jury on 4 October 1999. At trial, plaintiff testified that defendant Joshua suddenly drove onto Highway 54 from a side road. Additionally, Larry Strickland (“Strickland”), an eyewitness at the accident scene, testified that he saw defendant Joshua run a stop sign and skid into the roadway in front of plaintiff, causing the accident. Strickland further testified that he encountered no visibility problems at the time of the accident and considered plaintiff’s speed to be appropriate for the weather conditions. Trooper Floyd T. Wright of the North Carolina Highway Patrol also testified at the trial and fully corroborated the testimony of plaintiff and Strickland.

Defendant Joshua testified that he could not recall how the accident occurred because his injuries had caused him to lose all memory of the events. Thus, defendants offered the testimony of David McCandless (“McCandless”), an expert in the field of accident reconstruction, to testify on their behalf. Plaintiff’s counsel objected to portions of McCandless’ testimony and, the trial court refused to allow McCandless to share his opinion with the jury regarding the speed of the vehicles prior to impact.

At the conclusion of all the evidence, defendant Kenneth motioned for directed verdict on all claims against him. The motion was denied. Thereafter, the jury returned a verdict finding defendant Joshua negligent and awarded plaintiff recovery from defendants in the amount of one dollar.

Plaintiff immediately filed a Motion for a Partial New Trial, asking the trial court to set aside that portion of the jury verdict relating to damages. In turn, defendants replied by asking that the jury verdict be upheld or, in the alternative, the entire verdict be set aside because “[t]he issues of liability and damages [were] so intertwined that any alleged error taint[ed] the entire verdict.” The trial court granted plaintiff’s motion. Defendants appealed to this Court.

Following our remand of the case to the trial court as interlocutory, the issue of damages was retried before a jury on 29 October 2001. The jury returned a verdict of \$50,000.00 in favor of plaintiff. Once again, defendants appeal.

I.

[1] By defendants’ first assignment of error they argue the trial court erred in granting plaintiff a partial new trial on the issue of damages. We disagree.

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Rule 59 of the North Carolina Rules of Civil Procedure allows for the granting of a new trial to all or any of the parties and on all or part of the issues in an action. *See* N.C. Gen. Stat. § 1A-1, Rule 59 (2001). A new trial may be granted for any of the following causes or grounds:

- (1) Any irregularity by which any party was prevented from having a fair trial;
- (2) Misconduct of the jury or prevailing party;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
- (5) Manifest disregard by the jury of the instructions of the court;
- (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
- (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
- (8) Error in law occurring at the trial and objected to by the party making the motion, or
- (9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59(a)(1)-(9). Furthermore, our Supreme Court has recognized that a trial court can exercise its discretion by granting a partial new trial solely on the issue of damages. *See Housing, Inc. v. Weaver*, 305 N.C. 428, 441, 290 S.E.2d 642, 650 (1982). In such an instance, the question is not whether the appellate court would have ruled differently, but whether the ruling constituted a manifest abuse of discretion.¹ *Id.*

1. This question is what distinguishes the present case from defendants' reliance on *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974). In *Robertson*, the trial court had denied "plaintiff's motion for a partial new trial on grounds that the jury's verdict of liability but no damages was inconsistent and contrary" to the court's instructions; thus, on appeal this Court was asked to determine whether to grant a new trial on all issues or solely on the issue of damages. *Housing, Inc.*, 305 N.C. at 441, 290 S.E.2d at 650. Here, like in *Housing, Inc.*, a partial new trial only on the issue of damages had already been granted thereby limiting our review to whether the trial court abused its discretion in doing so.

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In the present case, the court found, in part, that the jury's award to plaintiff of one dollar in damages was contrary to the evidence and inadequate. The court's finding was supported by uncontroverted evidence establishing defendant Joshua's negligence. Also, there was little to no evidence establishing that plaintiff was contributorily negligent, especially in light of (1) defendant Joshua not remembering the events surrounding the accident, and (2) Strickland's unbiased testimony supporting plaintiff's claim. Finally, the court found, and the evidence at trial tended to show, that "plaintiff incurred medical bills relating to the accident in the sum of \$13,118.75." Thus, the trial court's decision to set aside the jury's award of damages did not constitute an abuse of discretion.

In the alternative, defendants argue that if this Court concludes the trial court acted properly in setting aside the jury award, then the court abused its discretion by not allowing a new trial on all issues of liability. Defendants contend that plaintiff's recovery of one dollar likely indicates a compromise verdict whereby the issues of negligence, contributory negligence, and damages were so inextricably interwoven by the jury that allowing only a partial trial on damages was unjust. However, defendants' contention regarding a compromise verdict is unsupported by the evidence and based purely on speculation. The trial court specifically stated in its order that "[t]he issues submitted to the jury [were] not so intertwined that the entire verdict [was] tainted and there was sufficient evidence for the jury to properly find as they found on the first two issues." This finding, as well as the other evidence previously mentioned, further indicate there was no abuse of discretion by the trial court. Defendants' first assignment of error is overruled.

II.

[2] By their second assignment of error, defendants argue the trial court erred in not granting defendant Kenneth's motion for directed verdict. Specifically, defendants contend that plaintiff failed to establish that the vehicle driven by defendant Joshua in the accident was a "family purpose" vehicle. We disagree.

"Under the family purpose doctrine, the owner or person with ultimate control over a vehicle is held liable for the negligent operation of that vehicle by a member of his household." *Byrne v. Bordeaux*, 85 N.C. App. 262, 264, 354 S.E.2d 277, 279 (1987). It "is essentially a means for establishing liability of responsible parties on a theory of *respondeat superior* whereby the responsible party is the

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principal and the party actively negligent is agent.” *Carver v. Carver*, 310 N.C. 669, 680, 314 S.E.2d 739, 746 (1984). A plaintiff may recover under the doctrine by showing:

(1) [T]he operator was a member of the family or household of the owner or person with control and was living in such person’s home; (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) that the vehicle was being so used with the express or implied consent of the owner or person in control at the time of the accident.

Byrne, 85 N.C. App. at 264-65, 354 S.E.2d at 279.

The evidence and admissions by defendants established the applicability of the family purpose doctrine to the case *sub judice*. In their answer, defendants admitted (1) they lived as father and son at the same residence; (2) defendant Kenneth owned the vehicle driven by defendant Joshua at the time of the accident; and (3) defendant Joshua was driving the vehicle with the permission of defendant Kenneth. There was no evidence offered at the trial to dispute defendants’ earlier admissions. Thus, the trial court properly denied defendant Kenneth’s motion for directed verdict.

III.

[3] By defendants’ final assignment of error they argue McCandless should have been allowed to offer his expert opinion to the jury regarding the speed of the vehicles at the time of impact. We disagree.

The admissibility of expert testimony is within the sound discretion of the trial court and will not be overruled absent an abuse of discretion. *Griffith v. McCall*, 114 N.C. App. 190, 194, 441 S.E.2d 570, 573 (1994). Rule 702 of the North Carolina Rules of Evidence allows an expert witness to testify in the form of an opinion if that expert’s “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001). Nevertheless, “[o]ur Court has held that ‘with respect to the speed of a vehicle, the opinion of a[n] . . . expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene.’” *Marshall v. Williams*, 153 N.C. App. 128, 135, 574 S.E.2d 1, 5 (quoting *Hicks v. Reavis*, 78 N.C. App. 315, 323, 337 S.E.2d 121, 126 (1985)), *appeal dismissed and disc. review denied*, 356 N.C. 614, 574 S.E.2d 683 (2002).

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Here, defendants sought to offer the expert opinion of McCandless regarding the speed of each vehicle at the time of impact. Yet, McCandless' expert opinion was (1) based solely on his view of the accident scene months after the collision, and (2) of no assistance in establishing the exact locations where the vehicles came to rest. Without having personally observed the accident, McCandless' opinion testimony was clearly inadmissible pursuant to North Carolina case law. *See id.* Although defendants contend several other jurisdictions hold otherwise, we are bound by a prior decision of another panel of this Court that addressed the same issue and has not been overturned. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, we conclude the trial court did not abuse its discretion in excluding McCandless' opinion testimony with respect to the speeds of the vehicles.

Accordingly, for the aforementioned reasons, the trial court did not abuse its discretion in (1) granting plaintiff a partial new trial on the issue of damages; (2) denying defendant Kenneth's motion for directed verdict; and (3) preventing McCandless from offering opinion testimony regarding the speeds of the vehicles at the time of impact.

Affirmed.

Judges McGEE and CALABRIA concur.

CARL G. IVARSSON, JR., CARL A. BARRINGTON, JR., EDWARD THOMAS BRADY, LARRY J. MCGLOTHLIN, GEORGE J. FRANKS, IV, PAUL F. HERZOG, JACK E. CARTER, JOANNA SHOBER, RAY COLTON VALLERY, JAMES R. PARISH, COY E. BREWER, JR., ROBERT L. COOPER, AND ALLEN W. ROGERS, PLAINTIFFS V. THE OFFICE OF INDIGENT DEFENSE SERVICES AND THE COMMISSION OF INDIGENT DEFENSE SERVICES, DEFENDANTS

No. COA02-36

(Filed 18 March 2003)

**Constitutional Law— North Carolina—separation of powers—
appointment of counsel for indigent criminal defendants**

The Indigent Defense Services Act, which created the Office of Indigent Defense Services (IDS) and granted IDS the power to appoint and compensate attorneys who represent indigent crimi-

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nal defendants, does not violate the separation of powers provision of the North Carolina Constitution, N.C. Const. art. I, § 6. Although trial court judges have traditionally appointed counsel for indigent defendants in this state, no provision of the state constitution commits the power and responsibility of appointing and compensating attorneys for indigent criminal defendants to any particular branch of state government, and the judiciary retains its inherent power to supervise and discipline the attorneys who appear before it.

Appeal by plaintiffs from judgment entered 10 September 2001 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 January 2003.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for plaintiff-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Marshall Dayan and Seth Jaffe, amicus curiae.

EAGLES, Chief Judge.

Plaintiffs appeal from an order denying summary judgment for plaintiffs and granting summary judgment for defendants. After careful review of the record, briefs and arguments of counsel, we affirm.

The evidence tends to show the following. Plaintiffs are attorneys practicing in the Cumberland County area. Plaintiffs challenge the constitutionality of the Indigent Defense Services Act of 2000, enacted as G.S. § 7A-498 *et seq* (2001). This legislation was enacted by the General Assembly in 2000 and took effect on 1 July 2001. The Indigent Defense Services Act created the Office of Indigent Defense Services (“IDS”). The legislation granted IDS the power to appoint and compensate attorneys who represent indigent criminal defendants. The Indigent Defense Services Act was based upon the recommendations of the American Bar Association and the North Carolina General Assembly Study Commission on Indigent Defense.

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Defendant IDS is operated by the Commission on Indigent Defense Services (“Commission”). Various officials and lawyer groups have the power to appoint members to the Commission, including the Governor, the Chief Justice of the Supreme Court, the Speaker of the State House of Representatives, the President Pro Tempore of the State Senate, the North Carolina Academy of Trial Lawyers, the North Carolina Public Defenders Association, the North Carolina State Bar, the North Carolina Bar Association, the North Carolina Association of Black Lawyers, and the North Carolina Association of Women Lawyers. Immediately after the Commission was formed, it initiated a new system for the appointment of counsel for indigent defendants accused of capital crimes. Now IDS appoints attorneys for capital defendants and creates and maintains standards for those attorneys. This IDS appointment system replaces the previous practice of attorney appointments being made by trial judges. At first, trial courts continued to appoint attorneys to represent indigent defendants who were charged with non-capital offenses. The IDS plans were to begin appointing attorneys for non-capital defendants as well, after further study of the judiciary’s appointment system. Indeed, we take judicial notice that appointment of counsel in non-capital cases by IDS has commenced since the briefs were filed in this appeal.

Plaintiffs filed this lawsuit in June 2001, claiming that the Indigent Defense Services Act and the creation of the IDS were unconstitutional. Plaintiffs and defendants both moved for summary judgment. The trial court denied plaintiffs’ motion but allowed defendants’ motion for summary judgment. Plaintiffs appeal.

Plaintiffs contend that the creation of IDS violates the North Carolina Constitution’s central principle of separation of powers. We disagree.

Article I, § 6 of the Constitution of North Carolina mandates that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” The power of the judicial branch of government is outlined as follows:

The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-

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ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

N.C. Const. Art IV, § 1.

Traditionally in North Carolina trial court judges have appointed counsel for indigent defendants. Plaintiffs argue that the appointment of an attorney for an indigent defendant is both the power and responsibility of the judicial branch. Plaintiffs state that the Constitution of the United States, in addition to the Constitution of North Carolina, requires trial judges to insure that defendants are appropriately represented by qualified counsel. According to plaintiffs, that responsibility cannot be fulfilled by the creation of the IDS.

In order to show that an act of the General Assembly is unconstitutional, plaintiffs face a heavy burden of persuasion. “[E]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). “[I]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Baker*, 330 N.C. at 338, 410 S.E.2d at 891 (quoting *County of Fresno v. State of California*, 268 Cal. Rptr. 266 (Cal. App. 5 Dist. 1990)). “[T]his Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute.” *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997). Here, plaintiffs failed to meet their burden to show that the Indigent Defense Services Act was constitutionally unsound.

A violation of the separation of powers required by the North Carolina Constitution occurs when one branch of state government exercises powers that are reserved for another branch of state government. These violations have occurred several times in the history of our state. See *State ex rel. Wallace v. Bone and Barkalow v. Harrington*, 304 N.C. 591, 286 S.E.2d 79 (1982) (holding that members of the General Assembly could not concurrently hold membership on the Environmental Management Commission, an executive branch agency, without violating the separate power of executive branch); *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981) (allowing the General Assembly to make rules of practice and procedure for the state’s appellate courts would violate the separation of powers, because those powers were reserved for the Supreme Court by Art.IV,

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§ 13(2) of the Constitution of North Carolina); and *Person v. Watts*, 184 N.C. 499, 115 S.E.2d 336 (1922) (granting a taxpayer's request that the judiciary force the collection of taxes on stockholder income would violate the legislature's constitutional control over the power of taxation). Each of these cases dealt with the exercise of a power by one branch of government when the power was specifically outlined by the state constitution as belonging to another branch.

Here, no provision of the state constitution exists that commits the power and responsibility of appointing and compensating attorneys for indigent criminal defendants to any particular branch of the state government. Although a specific and exclusive grant of power to appoint counsel is not explicitly given in the North Carolina Constitution, a branch of state government may also have inherent powers that are protected from encroachment by the separation of powers clause. These "inherent powers" have been defined as those powers "belonging to [a branch] by virtue of its being one of three separate, coordinate branches of the government." *In re Alamance County Court Facilities*, 329 N.C. 84, 93, 405 S.E.2d 125, 129 (1991). The inherent powers of the judicial branch are the powers which are "essential to the existence of the court and the orderly and efficient exercise of the administration of justice." *Beard v. The N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987); see *State v. Rorie*, 348 N.C. 266, 270, 500 S.E.2d 77, 80 (1998).

Plaintiffs contend that the appointment of counsel for indigent defendants lies within the inherent powers of the judiciary. We disagree. Our history has established that the power held by the North Carolina judiciary in attorney-client matters is that of supervision rather than selection. The trial court has the inherent power to regulate attorney conduct. "This power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice." *Gardner v. N.C. State Bar*, 316 N.C. 285, 287, 341 S.E.2d 517, 519 (1986). The inherent power of the judiciary to discipline attorneys for misconduct is shared concurrently with the North Carolina State Bar. See *Gardner*, 316 N.C. at 288, 341 S.E.2d at 519. However, the judiciary holds the power to supervise, punish and regulate the attorneys that appear before it. See *Alamance County*, 329 N.C. 84, 405 S.E.2d 125 (1991); *Beard*, 320 N.C. 126, 357 S.E.2d 694 (1987); *Gardner*, 316 N.C. 285, 341 S.E.2d 517 (1986); *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962); *Swenson v. Thibaut*, 39

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N.C. App. 77, 250 S.E.2d 279 (1978), *disc. review denied by* 296 N.C. 740, 254 S.E.2d 181 (1979).

In contrast to the judiciary's vigilant regulation and supervision of attorneys, the judiciary does not routinely select counsel for non-indigent individuals appearing before it. Most litigants, whether involved in civil or criminal matters, retain and arrange to compensate their own attorneys privately. A significant number of litigants appear pro se to represent themselves. Under the previous system, the judiciary only stepped into the selection process when there was a complete absence of counsel in a criminal matter involving an indigent defendant. This judicial intervention was necessitated by its supervision power because the complete absence of counsel is the ultimate form of attorney inadequacy. *See United States v. Cronin*, 466 U.S. 648, 658-59, 80 L. Ed. 2d 657, 667-68 (1984) ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel."). In such situations, the power to appoint a defense attorney fell to the trial judiciary by default as part of its power to ensure a fair trial to criminal defendants, rather than as a power inherent to that branch of government. *See Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L. Ed. 2d 799, 805 (1963) ("Not only [precedent] but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). The responsibility of fulfilling the constitutional requirement that an attorney should be provided for indigent criminal defendants is not relegated to the judiciary by any federal or North Carolina case. If another part of state government undertakes the responsibility of appointing and compensating counsel, the judicial branch will continue to function as it currently does, with the primary emphasis on interpretation of the law and supervision of the performance of all counsel to assure the adequate representation of criminal defendants.

Under the proposed system, the judiciary's ability to supervise the attorneys before it will remain. If an attorney appointed by IDS provides inadequate or ineffective counsel or violates court rules, the trial court retains the power to punish, remove or replace him. Because the judiciary retains the inherent power to supervise and discipline the attorneys before it, the legislation at issue here is not inconsistent with the separation of powers doctrine mandated by the North Carolina Constitution. Accordingly, we hold that there is

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no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. For the reasons stated above, we affirm.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. JAMES MICHAEL HENSLEY, DEFENDANT

No. COA02-520

(Filed 18 March 2003)

1. False Pretense— obtaining property—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses involving a caliper that was pawned by defendant and that belonged to the company where defendant previously worked, because: (1) the evidence at trial was sufficient to establish that the company where defendant worked owned the pawned caliper that was etched on the back with the name of the company and had a serial number corresponding to the company's inventory computer system; and (2) subsequent evidence failed to reconcile how defendant, a delivery driver without access to production equipment, would have legitimate possession of the caliper.

2. Sentencing— habitual felon—ineffective assistance of counsel—cruel and unusual punishment

The trial court did not err in an obtaining property by false pretenses case by sentencing defendant as an habitual felon, because: (1) defendant's attack on the use of his 1982 conviction is ineffective as a collateral attack on the prior conviction when his argument does not equate to a failure to appoint counsel, but rather that counsel procured by defendant provided ineffective assistance by failing to appear; (2) reliance on a nineteen-year-old conviction as a predicate for habitual felon status was not unconstitutional infliction of cruel and unusual punishment when the General Assembly enacted provisions limiting the use of older convictions only in certain classes of habitual offense statutes not including N.C.G.S. § 14-7.4; and (3) the sentence imposed in

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this case under the habitual felon laws was not so grossly disproportionate so as to result in constitutional infirmity.

Appeal by defendant from judgment entered 11 October 2001 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 30 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State.

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

CALABRIA, Judge.

James Michael Hensley (“defendant”) worked as a driver for Turnamics, Inc. (“Turnamics”) from February 2000 until his termination in May 2000. In his employment, defendant delivered items for Turnamics.

When a piece of equipment, a caliper, was located at Westside Pawn (“Westside”), Turnamics filed a report with the Asheville Police Department. The missing caliper, valued at ninety to one hundred dollars, was used to measure parts during production. Detective Wally Welch (“Welch”) of the Asheville Police Department investigated the caliper pawned on 27 July 2000 at Westside. Etched on the back side of the pawned caliper was a number along with the words “Turnamics, Inc.” The pawn ticket, for twenty dollars, was signed by both the defendant and the pawnbroker. Defendant was taken into custody at the Asheville Police Department. After Welch read defendant his Miranda rights, defendant stated he understood those rights and signed a waiver of rights. Thereafter, defendant gave a written statement concerning the caliper and was later arrested.

Defendant was indicted by a grand jury in Buncombe County on 6 August 2001 for embezzlement, two counts of obtaining property by false pretenses involving knives, one count of obtaining property by false pretenses involving a caliper, and larceny by an employee. All five charges were consolidated for trial, and defendant pled not guilty. Defendant was also separately charged as a habitual felon.

This case came to trial in the Superior Court of Buncombe County on 10 October 2001, the Honorable Dennis J. Winner presiding. At the close of the State’s case, the trial court granted defendant’s motion to dismiss the charges of embezzlement and larceny by an employee. The trial court also dismissed both counts of obtaining

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property by false pretenses involving knives due to defects in the indictments.

On 11 October 2001, in bifurcated trials, the jury found defendant guilty of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100 (2001) and guilty of the status of habitual felon in violation of N.C. Gen. Stat. § 14-7.1 (2001). Defendant received a sentence of 90 to 117 months. Defendant appeals.

Defendant asserts the trial court erred by (I) denying the motion to dismiss and (II) sentencing defendant to 90 to 117 months imprisonment as a habitual felon.

I. Motion to Dismiss

[1] Defendant first asserts the trial court erred in denying the motion to dismiss because the evidence was insufficient to support the conviction of obtaining property by false pretenses. Defendant contends no witness was able to identify the caliper as the property of Turnamics, therefore a required element of the charge has not been proved.

“A motion to dismiss on the ground of sufficiency of the evidence raises . . . the issue ‘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. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). “The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). “The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence.” *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). Evidence may be direct, circumstantial, or both. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

The elements of the crime of obtaining property by false pretenses are “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Defendant contends that the State did not demonstrate that the caliper belonged to someone else

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(namely Turnamics), and the jury did not have sufficient evidence of the first element. We disagree.

The evidence produced at trial was sufficient to establish that Turnamics owned the pawned caliper. Magdalene Black, operations manager at Turnamics, was familiar with the records and computer inventory system Turnamics utilizes for tracking equipment, including calipers, used to manufacture parts and products. She identified the caliper pawned at Westside because it was etched on the back with the name "Turnamics, Inc." and a serial number corresponding to Turnamics' inventory computer system. According to her inventory records, the serial number on the pawned caliper matched the number for the missing caliper. Magdalene Black specifically stated the caliper pawned at Westside was owned by Turnamics, was never released or entrusted to defendant, and was never sold. Subsequent evidence failed to reconcile how defendant, a delivery driver without access to production equipment, would have legitimate possession of the caliper. Defendant, in a prior written statement given to Welch, stated that after he was laid off from Turnamics he "found calipers in [his] winter coat pocket" but "[d]id not return them to Turnamics." Defendant felt Turnamics owed him for holiday pay, and "he could get money out of Turnamics by pawning [the caliper] and getting the cash." Because there is substantial evidence of each essential element of the offense charged and of defendant being the perpetrator of the offense, this assignment of error is overruled.

II. Sentencing as a Habitual Felon

[2] Under North Carolina law, a person who has three previous felony convictions may be sentenced as a habitual felon. N.C. Gen. Stat. §§ 14-7.1 to -7.6 (2001). Defendant challenges the trial court on three grounds. First, defendant argues the trial court erred in relying on a conviction obtained in 1982 as part of the basis for his conviction as a habitual felon because defendant did not have counsel during the 1982 trial. Second, defendant argues using a nineteen-year-old conviction as a predicate for habitual felon status constitutes cruel and unusual punishment. Third, defendant argues the sentence imposed is so disproportionate to the charge that it results in cruel and unusual punishment. Because we find no merit to defendant's arguments, we affirm.

Defendant first argues the use of the 1982 conviction should be suppressed because defendant was not represented by counsel at that trial. The United States Supreme Court has authorized collateral

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attacks on earlier convictions during habitual felony sentencing where there was a complete denial of counsel in the trial that led to the earlier conviction. *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963). “[F]ailure to appoint counsel for an indigent defendant [is] a unique constitutional defect.” *Custis v. United States*, 511 U.S. 485, 496, 128 L. Ed. 2d 517, 528 (1994). However, claims of ineffective assistance of counsel do not amount to a failure to appoint counsel and cannot be used to collaterally attack prior convictions. *Id.* The issue, therefore, is whether this attack is proper as a claim of failure to appoint counsel or improper as a claim of ineffective assistance of counsel.

The testimony at trial establishes that defendant was appointed counsel. The appointed counsel later withdrew, and defendant signed a waiver of counsel. Defendant claims that his waiver was not knowing or voluntary because defendant subsequently hired another attorney who failed to appear on the date he was sentenced. The essence of defendant’s claim is not that the State failed to appoint counsel but, rather, that the counsel procured by defendant provided ineffective assistance by failing to appear. Because this does not equate to a failure to appoint counsel, it is ineffective as a collateral attack on the prior conviction. *Custis*, 511 U.S. at 496, 128 L. Ed. 2d. at 528.

Defendant next argues that relying on a nineteen-year-old conviction as a predicate for habitual felon status results in an unconstitutional infliction of cruel and unusual punishment. Defendant asserts that three felonies over a period of almost twenty years cannot fit under the plain meaning of the word “habitual.” We disagree. North Carolina General Statute § 14-7.4 does not contain a provision disallowing the use of past felonies due to any time limitation based on conviction date. Other statutes for habitual convictions have provisions limiting the use of older convictions. *See, e.g.*, N.C. Gen. Stat. § 20-138.5 (having a provision precluding use of convictions seven years or older for habitual DWI convictions). “[T]he expression of one thing is the exclusion of another.” *Appeal of Blue Bird Taxi Co.*, 237 N.C. 373, 376, 75 S.E.2d 156, 159 (1953). The General Assembly enacted provisions limiting the use of older convictions only in certain classes of habitual offense statutes. In the case of the Habitual Felon Act, the General Assembly did not include that provision, nor will we read one into the statute.

Finally, defendant argues that the sentence imposed is so disproportionate to the charge that it results in an unconstitutional infliction of cruel and unusual punishment. In support, defendant cites

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Solem v. Helm, 463 U.S. 277, 77 L. Ed. 2d 637 (1983). Defendant is mistaken. “Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment’s proscription of cruel and unusual punishment.” *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). Further, our Supreme Court “reject[ed] outright the suggestion that our legislature is constitutionally prohibited from enhancing punishment for habitual offenders as violations of constitutional strictures dealing with . . . cruel and unusual punishment.” *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985) (citations omitted). This Court has recently held “[h]abitual felon laws have withstood scrutiny under the Eighth Amendment to the United States Constitution in our Supreme Court and in the United States Supreme Court.” *State v. Cates*, 154 N.C. App. 737, 741, 573 S.E.2d 208, 210 (2002) (citing *Rummel v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382 (1980); *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985)). The sentence imposed in the case *sub judice* under the habitual felon laws is not so “grossly disproportionate” so as to result in constitutional infirmity.

Defendant was not sentenced for 90 to 117 months in prison because he pawned a caliper obtained by false pretenses for approximately twenty dollars. Defendant was sentenced to that term because he committed multiple felonies over a span of almost twenty years and is a habitual felon.

Affirmed.

Judges MCGEE and HUNTER concur.

IN THE MATTER OF: DEONTE S. LANEY, ACOYA LANEY

No. COA02-640

(Filed 18 March 2003)

Appeal and Error— appealability—failure to appeal from final order—adjudication and temporary disposition

Respondent mother’s appeal from the 24 October 2001 adjudication and temporary dispositional order adjudicating her children as neglected that was entered after the 4 October

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2001 hearing is dismissed because respondent failed to appeal from a final order as required by N.C.G.S. § 7B-1001.

Appeal by respondent from order entered 24 October 2001 by Judge Wayne Michael in District Court, Iredell County. Heard in the Court of Appeals 13 February 2003.

Thomas R. Young, for petitioner-appellee, Iredell County Department of Social Services; and Crosswhite, Edwards and Crosswhite, P.A., by Andrea Edwards, for Guardian ad Litem.

Winifred H. Dillon for respondent-appellant.

McGEE, Judge.

Iredell County Department of Social Services (petitioner) filed juvenile petitions on 23 July 2001 regarding six-year-old Deonte Santnez Laney (Deonte) and ten-year-old Acoya Demagia Laney (Acoya), collectively referred to as “the children.” Petitioner assumed nonsecure custody of the children on the same day, and four subsequent nonsecure custody hearings were held. Pursuant to these hearings, the children remained in the custody of petitioner and resided with their maternal grandfather, Edsel Laney.

The children were adjudicated neglected in a hearing on 4 October 2001. An adjudication and temporary dispositional order was entered by the trial court on 24 October 2001. The trial court continued the case for sixty days for final disposition. Shevalo Laney (respondent), mother of the children, gave oral notice of appeal on 4 October 2001 and filed a written notice of appeal on 18 October 2001. A dispositional hearing was held on 29 November 2001. In an order filed 11 January 2002, the trial court ordered that the children remain in the custody of petitioner with placement continuing with Edsel Laney.

The evidence at trial tended to show the following. Officers from the Iredell County Sheriff’s Department arrived at respondent’s apartment in response to a 911 call on 22 June 2001. Officer Zane Lambert testified that he found Acoya alone and scared in the apartment without supervision, and that Acoya could not provide information about the location of his parents. Officer Lambert observed that there was little to no furniture in the apartment and that he saw only a single air mattress for sleeping. Detective Cheryl Hildebrand testified she observed respondent early in the morning, clad in revealing cloth-

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ing, and with Deonte. Detective Hildebrand further testified that the only food she found in the apartment was a half bag of potato chips and a small amount of ice cream.

The trial court found that respondent and the children's father, Edward Dwight Little (Little), left Acoya alone from approximately 11:00 p.m. until 5:00 a.m., while attending a work engagement for respondent, who was an exotic dancer. Deonte accompanied respondent and Little to respondent's work engagement, and sat in a vehicle with Little while respondent danced at her work engagement. Following respondent's work engagement, respondent and Little, along with Deonte, returned to the apartment. Respondent and Little were uncooperative with the law enforcement officers waiting there for them. Respondent refused to provide information and was arrested for delaying an officer.

The trial court found that Acoya was ten years old and Deonte was six years old at the time of the incident, and that neither child was enrolled in school and that no meaningful educational alternative had been provided for them. Acoya had been enrolled in school and subsequently removed. Respondent claimed she was home schooling Acoya, but she failed to observe the required legal formalities for home school. Respondent and Little had also engaged in at least one incident of domestic violence with the children present. Respondent appeals the trial court's 24 October 2001 adjudication and temporary dispositional order.

We must first determine whether respondent's appeal is properly before this Court. The General Assembly has expressly set forth the procedure for review of a trial court's final order in a juvenile petition in N.C. Gen. Stat. § 7B-1001.

Upon motion of a proper party as defined in G.S. 7B-1002, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. Notice of appeal shall be given in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry. A final order shall include:

- (1) Any order finding absence of jurisdiction;
- (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;

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- (3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or
- (4) Any order modifying custodial rights.

N.C. Gen. Stat. § 7B-1001 (2001).

Respondent's appeal from the 24 October 2001 adjudication and temporary dispositional order that was entered after the 4 October 2001 hearing was not an appeal from a final order as required by N.C.G.S. § 7B-1001 and is therefore premature. The order filed on 24 October 2001 was a temporary order and the matter was continued by the trial court for final disposition at a later date. The final hearing had not occurred and the final order had not been filed when respondent gave notice of appeal. Accordingly, this matter is not properly before our Court.

Respondent argues in her reply brief that the 24 October 2001 order was a final order. Respondent contends the language in N.C.G.S. § 7B-1001(3) provides for any order to be immediately appealable. The broad reading advocated by respondent would open the door for multiple appeals whenever adjudication orders and temporary dispositions are entered before a final disposition. The statutory language does not show that the General Assembly intended this result. The statute states that an appeal must be from a final order. In this case, respondent's appeal is based on an adjudication and temporary disposition which was not a final order under N.C.G.S. § 7B-1001.

Respondent incorrectly argues that *In re Taylor*, 57 N.C. App. 213, 290 S.E.2d 797 (1982) and *In re J.L.W.*, 136 N.C. App. 596, 525 S.E.2d 500 (2000) support her argument that the 24 October 2001 order was a final order. In these cases, appellants appealed from orders that adjudicated the juveniles as delinquent. In holding that both appeals were premature because they arose from orders adjudicating delinquency before any disposition had occurred, our Court stated that "[a]n adjudication of delinquency is not a final order." *In re J.L.W.*, 136 N.C. App. at 602, 290 S.E.2d at 504 (quoting *In re Taylor*, 57 N.C. App. at 214, 290 S.E.2d at 797).

Respondent also argues the appeal was timely because the trial court did not file a final disposition within sixty days after the adjudication and temporary dispositional order was entered. Respondent contends she was allowed to file her appeal anytime during the seventy days following the adjudication order under N.C.G.S. § 7B-1001.

IN RE LANEY

[156 N.C. App. 639 (2003)]

Respondent cites no authority in support of this reading of the statute. This is an issue of first impression before this Court.

While N.C.G.S. § 7B-1001 provides for an appeal from an order that has not been the subject of a final disposition within sixty days, we do not believe the General Assembly intended to permit appeals to be filed during the sixty-day period. The statute gives the trial court sixty days to enter a final disposition in a case. It follows that an appeal cannot be taken from the adjudication or temporary dispositional order until the sixty-day period has run. If a final order has not been entered at the conclusion of this sixty-day period, the statute provides a ten-day period to appeal the initial order. Permitting an appeal before the sixty-day period has concluded would allow parties to appeal before the trial court entered a final disposition even though the disposition was timely. This result would produce premature and unnecessary appeals to this Court.

Respondent should have waited sixty days following the filing of the adjudication and temporary dispositional order to determine if the trial court filed a final disposition within the statutory requirement period. After expiration of the sixty-day period, respondent would have been permitted to file a written notice of appeal within ten days. This argument is overruled.

Respondent contends that the filing of the appellate entries on 11 January 2001 was treated as a notice of appeal by the trial court. The appellate entries stated that “[t]he respondent[] [has] given Notice of Appeal to the N.C. Court of Appeals.” However, the only notice of appeal given by respondent was on 18 October 2001 relating to the 24 October 2001 filing. The record does not show that respondent gave proper notice of appeal from the 11 January 2002 order, which was the appropriate order from which to appeal. Accordingly, the 11 January 2002 order is not before us for review.

Respondent recognized the premature nature of her appeal and filed a writ of certiorari with this Court on 27 January 2003 requesting review of the 24 October 2001 order. Respondent again has requested review of the adjudication and temporary disposition but has not appealed the final disposition in the case. We decline to grant certiorari because the final disposition would remain in effect because it is not before this Court on appeal. Time for appealing the 11 January 2002 order has expired and was not the subject of respondent's writ of certiorari.

IN RE PADGETT

[156 N.C. App. 644 (2003)]

Respondent argues she filed a premature appeal to protect her rights at the direction of the trial court. However, respondent failed to protect her appellate rights by never appealing the appropriate order. Respondent was not entitled to appeal the adjudication and temporary dispositional order until after sixty days had passed to allow entry of a final dispositional order. After the sixty-day period, respondent could have filed a written notice of appeal to this Court. Respondent did not file a written notice of appeal within the ten-day period following the sixty-day period. Respondent also did not file a written notice of appeal from the 11 January 2002 order. After the trial court filed the final disposition on 11 January 2002, respondent could have filed a written notice of appeal within ten days, appealing the final disposition and adjudicatory order. However, respondent continued with her appeal from the adjudication and temporary order in contravention of N.C.G.S. § 7B-1001. Accordingly, the appeal was not taken from a final order and is not properly before this Court.

Nevertheless, even if respondent had properly appealed the final dispositional order, the evidence at trial supported the trial court's findings of fact and conclusions of law in the final dispositional order and was sufficient to affirm the trial court's decision.

We hold that respondent failed to appeal from a final order as required by N.C.G.S. § 7B-1001. Accordingly, this appeal is not properly before this Court.

Appeal dismissed.

Judges HUDSON and STEELMAN concur.

IN THE MATTER OF: PAMELA PADGETT, KENNETH PADGETT

No. COA02-481

(Filed 18 March 2003)

1. Child Support, Custody, and Visitation— custody—neglect

The trial court did not err in a child custody case by adjudicating the children as neglected juveniles, because the findings of fact revealed that the children's physical, emotional, and mental

IN RE PADGETT

[156 N.C. App. 644 (2003)]

well-being were impaired or in substantial risk of being impaired based on improper care.

2. Child Support, Custody, and Visitation— custody award to grandparents—DSS reasonable efforts

The trial court did not err in a child custody case by awarding custody to the children's maternal grandparents even though respondent mother contends the order on review violated N.C.G.S. § 7B-507(a) in that it failed to make any finding of fact as to whether the Department of Social Services (DSS) should continue to make reasonable efforts to prevent or eliminate the need for placement of the juveniles, because N.C.G.S. § 7B-507(a) was inapplicable to this case when the order on review did not place or continue the placement of the children with DSS.

3. Child Support, Custody, and Visitation— custody award to grandparents in Alaska—due process

The trial court did not violate respondent mother's due process rights in a child custody case by awarding custody to the children's maternal grandparents, residents of Alaska, even though respondent mother contends the award constructively denies her visitation without notice or hearing, because respondent was given notice of the hearing and an opportunity to be heard on the visitation issue.

Appeal by respondent mother from order filed 28 September 2001 by Judge Elton G. Tucker in Pender County District Court. Heard in the Court of Appeals 11 February 2003.

Regina Floyd-Davis for petitioner-appellee Pender County Department of Social Services.

Angela H. Brown for respondent-appellant mother.

BRYANT, Judge.

Diane Padgett (respondent) appeals from an order (the Order on Review) orally rendered on 23 July 2001 and filed on 28 Sep-

IN RE PADGETT

[156 N.C. App. 644 (2003)]

tember 2001¹ granting custody of respondent's children to their maternal grandparents.²

On 15 September 2000, the Pender County Department of Social Services (DSS) filed juvenile petitions alleging respondent's children were neglected. On 16 January 2001, the trial court filed an order (the Order on Adjudication) adjudicating the children as neglected juveniles. In that order, the trial court made the following pertinent findings of fact by "clear, cogent and convincing" evidence:

2. [DSS] has provided services to [respondent] for several years in an effort to stabilize the family and assist with the needs of the family. That [respondent] has not met the needs of [respondent's daughter, Pamela Padgett] in that she has not kept medical appointments for Pamela Padgett which has resulted in uncontrollable behaviors at school. Additionally, both juveniles have been left unattended and unsupervised.

. . . .

4. . . . There have been numerous instances of the school's inability to contact [respondent] during emergencies and non-emergencies. [Pamela Padgett] often appear[ed] to be sleep-deprived and hungry. . . .

5. That the maternal grandfather indicated that the [children] were placed in their physical custody by DSS during a period when [respondent] was incarcerated [Respondent] was not appropriately caring for the [children] who were found padlocked in bedrooms without access to a bathroom and with the household refrigerator padlocked. . . .

1. Subsequent to this case, amended subsection (d) of N.C. Gen. Stat. § 7B-906 became effective and as of 1 January 2002 requires any order from a custody review hearing to "be reduced to writing, signed, and entered within 30 days of the completion of the hearing." N.C.G.S. § 7B-906(d) (2001).

2. Two orders bearing different file numbers were written and entered separately as a result of the 23 July 2001 hearing. The first order, the Order on Review, filed 28 September 2001 (00 J 98 & 00 J 99) is the subject of this appeal. Respondent's notice of appeal cites only 00 J 99; however, we treat her notice and appeal as a petition for writ of *certiorari* in 00 J 98, which we grant in order to consider these related matters together. The second order, filed 12 February 2002, arose out of a separate custody action initiated by the maternal grandparents in 01 CVD 429. Because respondent has failed to perfect any appeal in 01 CVD 429 that case is not before us. Accordingly, only the assignments of error resulting from the Order on Review (00 J 98 & 00 J 99) are addressed in this appeal. The respondent father does not appeal.

IN RE PADGETT

[156 N.C. App. 644 (2003)]

The trial court concluded the children were neglected juveniles, in that respondent “is unable to provide for the necessary care or supervision” of the children, and the children resided in “an environment injurious to [their] welfare” as respondent “failed to ensure medical necessities, appropriate supervision, consistent schooling[,] and a stable environment.” The trial court ordered legal custody of the children to remain with DSS and also ordered DSS to request an “Interstate Compact home evaluation” of the children’s maternal grandparents who resided in Alaska.

At the 23 July 2001 hearing, respondent testified as to why, in her opinion, her children should not be removed to Alaska with their maternal grandparents. There was also testimony from the children’s father, maternal aunt, and maternal grandfather; and respondent’s attorney and attorneys for other parties presented argument. In the Order on Review, the trial court found as fact that it “was not convinced [respondent] has corrected the problems which led to the children’s removal at the origination of the Juvenile Petition.” The trial court further found “the children suffered such neglect in the home of their mother, [respondent], that [the trial court] is unable to determine that sufficient improvement is likely in the near future.” The trial court concluded as a matter of law that it was in the best interests of the children “that their legal custody be granted to their maternal grandparents.”

The issues are whether: (I) the adjudication of the children as neglected juveniles was supported by adequate findings of fact; (II) there are sufficient findings of fact and conclusions of law to support the Order on Review; and (III) removal of the children to Alaska constructively denies respondent visitation in violation of her procedural due process rights.

I

[1] Respondent first contends the trial court’s findings of fact in the Order on Adjudication are insufficient to support the trial court’s conclusion the children were neglected juveniles.³ We disagree.

3. DSS urges this Court to dismiss this assignment of error as respondent failed to file notice of appeal within 30 days of the Order on Adjudication pursuant to Rule 3(c) of the Rules of Appellate Procedure. Appellate Rule 3(b), however, provides that the time to take appeals in juvenile matters is governed by N.C. Gen. Stat. § 7A-666, and appeals in termination of parental rights cases are governed by N.C. Gen. Stat. § 7A-289.34. See N.C.R. App. P. 3(b). However, both referenced sections have been repealed and replaced by other provisions. Appeals in child custody cases

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A neglected juvenile is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who lives in an environment injurious to the juvenile's welfare; or has been placed for care and adoption in violation of law. . . .

N.C.G.S. § 7B-101(15) (2001). Although the statute is silent on whether the juvenile to be adjudicated as neglected must sustain some injury as a result of neglect, "this Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.'" *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (quoting *In re Thompson*, 64 N.C. App. 95, 101, 306 S.E.2d 792, 796 (1983)). Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding. *Id.* at 753, 436 S.E.2d at 902.

In this case, respondent, in her brief to this Court, does not argue that the findings of fact are unsupported by the evidence.⁴ Accordingly, those facts are deemed supported by competent evidence. *See Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). The trial court found as fact: (1) respondent had not kept medical appointments for Pamela Padgett resulting in uncontrollable behavior at school;⁵ (2) both children had been left unattended and unsupervised; (3) the school had been

are now governed by section 7B-1001; and appeals in termination of parental rights cases are governed by section 7B-1113. *See* N.C.G.S. §§ 7B-1001, -1113 (2001). Right to appeal in this case is therefore governed by section 7B-1001 requiring notice of appeal within 10 days of any order of disposition following an order adjudicating a juvenile as neglected. *See* N.C.G.S. § 7B-1001. Here, respondent filed notice of appeal within 10 days of the Order on Review that finally disposed of this matter. Although it appears notice of appeal was properly given to the Order on Adjudication, to any extent necessary we grant *certiorari* to review the merits of this assignment of error. *See* N.C.R. App. P. 21.

4. Respondent did assign as error that there was insufficient evidence to support the findings of fact but failed to include in the record the transcript of evidence presented at the hearing and, instead, focuses her argument on whether the conclusions of law are supported by the trial court's findings.

5. The record indicates the medical treatments were for bi-polar disorder and attention deficit disorder.

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unable to contact respondent during both emergencies and non-emergencies; (4) Pamela had often appeared sleep-deprived and hungry; and (5) during a period of time when respondent was incarcerated, the children were found padlocked in bedrooms without access to a bathroom and with the refrigerator also padlocked. These findings of fact show that the children's physical, emotional, and mental well-being were impaired or in substantial risk of being impaired because of improper care. *See Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902. Thus, the trial court did not err in adjudicating the children as neglected juveniles.

II

[2] Respondent next argues the trial court's award of custody to the children's grandparents in the Order on Review was unsupported by the findings of fact and conclusions of law. We disagree. Specifically, respondent argues the Order on Review violated section 7B-507 of the North Carolina General Statutes in that it failed to make any finding of fact as to whether DSS should continue to make reasonable efforts to prevent or eliminate the need for placement of the juveniles.

The clear language of section 7B-507, however, states such a finding must be made in any order "placing or continuing the placement of a juvenile in the custody or placement responsibility of [DSS]." N.C.G.S. § 7B-507(a) (2001). In this case, the Order on Review did not place or continue the placement of the children with DSS, nor did it continue placement responsibility with DSS. To the contrary, the order granted custody to the children's grandparents and specifically released DSS "from all duties over the minor children." Thus, section 7B-507 was not applicable, and the trial court did not err in awarding custody of the children to their grandparents in the Order on Review.

III

[3] Respondent finally contends the order granting custody over her children to their maternal grandparents, residents of the State of Alaska, violates her constitutional procedural due process rights by constructively denying her visitation without notice or hearing.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998). In this case respondent clearly had notice of the neglect proceedings as well as

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the custody proceedings instituted by the maternal grandparents.⁶ The record also discloses respondent had notice of the custody review hearing and was present and testified as to why, in her opinion, the children should not be removed to Alaska, and respondent's attorney was given the opportunity to present argument on respondent's behalf. Under section 7B-906, a trial court in a custody review hearing is required, if relevant, to make findings of fact regarding a plan of visitation. *See* N.C.G.S. § 7B-906(c)(6) (2001). Thus, notice of a custody review hearing is notice the trial court will consider issues related to visitation. Indeed, in the Order on Review, the trial court did in fact preserve respondent's right to visitation with her children.⁷ Respondent was given notice of the hearing and an opportunity to be heard on the visitation issue and, therefore, her procedural due process rights were not violated. Accordingly, the trial court did not err in adjudicating the children as neglected juveniles and awarding custody of the children to their maternal grandparents.

Affirmed.

Judges HUNTER and ELMORE concur.

WILLIAM R. WHITEHURST, AND WIFE, MARY DARLENE WHITEHURST, PLAINTIFFS V.
HURST BUILT, INC.; CARL E. SMITH, D/B/A SELECT STUCCO; AND STO CORP.,
DEFENDANTS

No. COA02-352

(Filed 18 March 2003)

Statutes of Limitation and Repose— real property improvement statute of repose—installation of synthetic stucco system

The trial court did not err by granting defendant builder's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claims, arising out of the improper installation of a synthetic

6. Respondent acknowledges she was given notice of the maternal grandparents' intervention in the case and their intention to seek custody.

7. Respondent's contention she has been constructively denied visitation of her children because of the distance between North Carolina and Alaska is also undermined by her testimony that she and the children resided with her parents in Alaska between 1996 and 1997, showing she had the ability, at least at some point, to travel and stay in Alaska.

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stucco system on a house, based on expiration of the real property improvement statute of repose under N.C.G.S. § 1-50(a)(5)a, because: (1) the complaint was filed more than six years after substantial completion of the house, and the complaint stated that the only acts subsequent to completion were repairs; and (2) the complaint contained no allegation that the purchase agreement contained an explicit repair obligation apart from any duty existing under warranty.

Appeal by plaintiffs from judgment entered 18 October 2001 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 7 January 2003.

Lewis & Roberts, PLLC, by Daniel K. Bryson and Kurt F. Hausler, for plaintiffs-appellants.

Dean & Gibson, L.L.P., by Christopher J. Culp, for defendant-appellee, Hurst Built, Inc.

Dinsmore & Shohl, L.L.P., by Joseph N. Tucker, for defendant-appellee, Hurst Built, Inc.

GEER, Judge.

This appeal addresses the application of the statute of repose in N.C. Gen. Stat. § 1-50(a)(5)a to claims arising out of the installation of a synthetic stucco system on a house. We hold that the superior court properly granted defendant's motion to dismiss when the complaint was filed more than six years after substantial completion of the house and, according to the complaint, the only acts subsequent to completion were repairs.¹

In January 1992, plaintiffs Mr. and Mrs. Whitehurst entered into a contract with defendant Hurst Built, Inc. ("Hurst") for the construction and purchase of a house. Hurst served as the general contractor for the Whitehursts' house and employed Select Stucco to apply a synthetic stucco system (also known as EIFS) on the exterior. The Whitehursts moved into the house after the closing on 12 August 1992.

1. Plaintiffs originally sued three defendants, including appellee Hurst Built, Inc. (the builder), Sto Corp. (the manufacturer of the synthetic stucco system), and Select Stucco (the contractor who applied the stucco). The present appeal involves only Hurst Built, Inc. Plaintiffs dismissed their claims against Sto Corp. and the trial court granted Select Stucco's motion to dismiss, from which order plaintiffs did not appeal.

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The complaint alleges that between August 1992 and the summer of 1994, the Whitehursts experienced several moisture intrusion problems with their house. Upon discovery of each problem, they notified Hurst, which then on several occasions performed or directed repairs. In the summer of 1994, Hurst agreed to test the house for moisture intrusion by removing sections of the EIFS, but found no moisture visible on the sheathing. Select Stucco replaced the removed EIFS and Hurst assured the Whitehursts that they would experience no problems with the EIFS if they caulked and painted the house every three to five years.

In January 1996, the Whitehursts notified Hurst that there were several areas at the rear of their house where the EIFS appeared to be pulling away. After Hurst and Select Stucco made repairs to the problem areas, Select Stucco reported to the Whitehursts that they had found no moisture intrusion.

In mid-June 1996, because of reports in the media regarding problems with synthetic stucco houses and because of their own continuing problems, the Whitehursts became concerned that the EIFS on their house was either defective or defectively applied. Plaintiffs, therefore, had Prime South Homes, Inc. inspect their house. Prime South found elevated moisture readings and concluded that the EIFS had been improperly applied.

Plaintiffs filed suit three years later on 4 June 1999, alleging that they had notified defendants of the moisture-related damage as well as their concerns about defective EIFS, but that defendants had failed to perform the necessary "remedial activities" to correct the defects. Plaintiffs were required to remove the EIFS on their own, repair the damage, and install new exterior siding. With respect to Hurst, plaintiffs alleged negligence, breach of express warranty, breach of implied warranties of habitability and good workmanship, breach of contract, breach of implied warranty of merchantability, negligent misrepresentation, breach of implied warranty of fitness for particular purpose, unfair and deceptive trade practices, and negligence *per se*.

On 10 August 1999, defendant made a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground that the real property improvement statute of repose and the applicable statutes of limitation barred plaintiffs' claims. Plaintiffs filed no response to defendant's motion to dismiss. At the 4 October 1999 hearing on defendant's motion, plaintiffs and their counsel failed

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to appear. On the next scheduled hearing date, 10 December 1999, neither plaintiffs nor their counsel appeared and the court entered an order granting defendant's motion to dismiss with prejudice.

Thereafter, plaintiffs filed a motion to reconsider and a rehearing on defendant's motion to dismiss was held 3 July 2001. After rehearing the matter, the trial court declined to reverse its initial order of dismissal.

Standard of Review

"When a party files a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), '[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.'" *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670-71, 355 S.E.2d 838, 840 (1987)). The court must construe the complaint liberally and "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). The appellate court conducts a *de novo* review of the pleadings to determine their legal sufficiency and decides whether the trial court's ruling on the motion to dismiss was erroneous.

Statute of Repose

The North Carolina real property improvement statute of repose provides:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. Gen. Stat. § 1-50(a)(5)a.² "The repose period begins to run when an event occurs, regardless of whether or not there has been an injury." *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001). Plaintiffs had the burden of showing that

2. The parties have focused solely on the applicability of the statute of repose. We do not, therefore, address whether any of plaintiffs' claims would also have been barred by the applicable statutes of limitation.

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they brought this action within six years of either (1) the substantial completion of the house; or (2) the specific last act or omission of defendant giving rise to their causes of action. *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76, 518 S.E.2d 789, 791 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000).

The Whitehursts correctly concede that they filed suit more than six years after “substantial completion” of their house since they were able to move into the house in August 1992. Plaintiffs argue, however, that their complaint sufficiently alleged that the last act or omission of defendant occurred within six years of the date of the filing of their complaint. We disagree.

Since the complaint was filed on 4 June 1999, we must determine what acts or omissions the complaint alleges as occurring during the six-year period beginning 4 June 1993. In *Nolan*, 135 N.C. App. at 79, 518 S.E.2d at 793, this Court stated, “In order to constitute a last act or omission, that act or omission must give rise to the cause of action.” With respect to EIFS or moisture damage, the bases for plaintiffs’ causes of action, the complaint alleges three instances in which Hurst arguably acted after 4 June 1993. The complaint refers generally to “several moisture intrusion problems” occurring between August 1992 and summer 1994 and alleges that Hurst, when notified of the problem, “visited the house to perform or direct repairs.” In summer 1994, Hurst tested for moisture intrusion, but found none. In January 1996, the EIFS was pulling away from the house and Hurst “made repairs to the affected areas.” The viability of plaintiffs’ complaint hinges on whether the 1992-1994 and January 1996 “repairs” are sufficient to constitute a last act or omission under N.C. Gen. Stat. § 1-50(a)(5)a.

This Court has already answered that question in *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999). After considering allegations indistinguishable from those in this case, this Court held: “A duty to complete performance may occur after the date of substantial completion, however, a ‘repair’ does not qualify as a ‘last act’ under N.C. Gen. Stat. § 1-50(5)[sic] unless it is required under the improvement contract by agreement of the parties.” *Id.* at 241, 515 S.E.2d at 450. The *Monson* Court explained that “[t]o allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5) [sic].” *Id.* at 240, 515 S.E.2d at 449. We are bound by *Monson*. Since, according

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to plaintiffs' complaint, the only work performed on plaintiffs' house after 1993 was "repairs," we cannot classify those acts as a "last act or omission" under N.C. Gen. Stat. § 1-50(a)(5)a.³

While plaintiffs argue that Hurst's work on the house in January 1996 was done in order to complete the house in accordance with the terms of the initial contract, the complaint contains no allegation that the purchase agreement contained an explicit repair obligation apart from any duty existing pursuant to warranty. Without such an allegation, this case cannot be distinguished from *Monson*. See *Monson*, 133 N.C. App. at 239, 515 S.E.2d at 448 (finding statute of repose applicable even "[a]ssuming *arguendo* that a continuing duty of repair existed pursuant to a warranty"); *Nolan*, 135 N.C. App. at 77-78, 518 S.E.2d at 792 (because implied warranties related to improper construction of home, statute of repose began to run on the last day defendant performed construction). Even after liberally construing the pleadings and treating plaintiffs' allegations as true, we cannot conclude that defendant's actions subsequent to June 1993 were anything other than a repair. Thus, we find that the trial court did not err in granting defendant's motion to dismiss.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

IN THE MATTERS OF: WILLIAM RYAN HARTON, FREDONIA RUTH ADAMS,
ANNA LEE ADAMS, AND JACK CORBIN ADAMS

No. COA02-492

(Filed 18 March 2003)

1. Child Abuse and Neglect— neglect—best interest of child—sufficiency of evidence

A trial court had sufficient evidence to consider in determining the best interests of respondent's children in a neglect case where the court considered information from respondent and

3. Plaintiffs contend in their brief that no moisture intrusion occurred prior to the repairs in January 1996 and that the repairs necessarily, therefore, caused the moisture problem. This contention is inconsistent with the complaint, which describes "moisture intrusion problems" occurring as early as August 1992 and "continuing" through mid-June 1996.

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DSS reports, and heard testimony from DSS representatives, a school official, and public safety officers.

2. Child Abuse and Neglect— permanency planning review order—findings

The trial court did not make sufficient findings in a permanency planning review order which continued custody of respondent's children with the Department of Social Services where the court merely stated a single evidentiary fact and adopted reports from DSS and the guardian ad litem rather than making findings under the specific criteria set out in N.C.G.S. § 7B-907(b).

Appeal by respondent from order filed 24 October 2001 by Judge Robert M. Brady in Burke County District Court. Heard in the Court of Appeals 11 February 2003.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Mary R. McKay attorney-advocate for juveniles.

Maitri "Mike" Klinkosum for respondent-appellant mother.

BRYANT, Judge.

Holly Harton Adams (respondent) appeals from an order filed 24 October 2001 from a permanency planning review hearing (Permanency Planning Review Order) continuing custody of respondent's children with the Burke County Department of Social Services (DSS).

On 28 November 2000, DSS filed a juvenile petition alleging respondent's children were neglected in that they were not receiving "proper care, supervision or discipline" and were living "in an environment injurious to their welfare." Specifically, the petition alleged respondent's children had been exposed to numerous incidents of domestic violence between respondent and her live-in boyfriend Mitch Houser, including two separate incidents where Mr. Houser, while intoxicated, bit one of the children in the eye and had attempted to run over respondent with a car. Respondent had subsequently been voluntarily admitted to a hospital after an apparent suicide attempt. The petition also alleged Mr. Houser had threatened the children, and respondent had failed to seek as-

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sistance against domestic violence or to separate from Mr. Houser, as DSS had advised.

Following an 11 January 2001 hearing, the trial court in an order filed 22 January 2001 found as fact that the allegations in the petition were true and concluded as a matter of law that respondent's children were neglected juveniles. The trial court entered disposition based on additional findings of fact incorporating the reports of the guardian *ad litem* and DSS. Based on these reports, the trial court further concluded that DSS had made reasonable efforts to prevent the removal of the children from respondent's home, but continuation in the home "would be contrary to [the children's] best interests." As a result, DSS was granted custody over respondent's children. The trial court further ordered respondent to complete a substance abuse assessment, attend group counseling, complete parenting classes, submit to random drug testing, and obtain and maintain stable housing and employment independent of Mr. Houser.

A custody review hearing was held on 5 April 2001, and the trial court filed an order on 2 May 2001 that adopted the updated reports of the guardian *ad litem* and DSS as findings of fact and further found respondent had complied with portions of the 22 January 2001 order, including obtaining a substance abuse assessment, completing parenting classes, and submitting to a random drug test. The trial court also found as fact, however, that Mr. Houser was regularly at respondent's residence, and despite the children's desire for reunification with respondent, respondent had not obtained housing or employment independent of Mr. Houser. Moreover, respondent's problems, including criminal charges against her, continued due primarily to the influence of Mr. Houser. The trial court concluded as a matter of law that DSS had made reasonable efforts to reunite the children with respondent but reunification was not in their best interests. The trial court ordered that DSS continue custody of respondent's children and that respondent and her children have no contact with Mr. Houser.

At the permanency planning review hearing held 18 October 2001, evidence was presented by witnesses called by respondent, including representatives from DSS, a school official, two public safety officers, and Mr. Houser. In addition, respondent testified in her own behalf, was examined by the other parties, and admitted to continuing a relationship with Mr. Houser and having no intentions of separating from him. In the Permanency Planning Review Order, the trial court adopted more recent reports of DSS and the guardian *ad litem* as findings of fact and further found respondent had no intention, at the

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time of the custody review or at the permanency planning review, of ending her relationship with Mr. Houser and had lied to DSS about her relationship with him.¹ The trial court concluded as a matter of law that DSS had made reasonable efforts to reunite the juveniles with respondent, but the efforts had been unsuccessful and should cease. Further concluding it would be in the best interests of respondent's children for DSS to continue custody over the children and for all reunification efforts to cease, the trial court then proceeded to outline a permanent plan for the custody and guardianship of each child.

The dispositive issue is whether the trial court's findings of fact in the Permanency Planning Review Order were sufficient to support the trial court's order ceasing all efforts to reunify respondent with her children.

Specifically, respondent argues that the trial court failed to comply with section 7B-907(b) of the North Carolina General Statutes by not considering information from required sources and failing to make the required findings of fact upon the determination that the juveniles were not to be returned to respondent.²

Under section 7B-907, "[a] trial court is required to conduct a permanency planning hearing in every case where custody of a child has been removed from a parent" within twelve months of the date of the original custody order. *In re Dula*, 143 N.C. App. 16, 18, 544 S.E.2d 591, 593 (2001), *aff'd*, 354 N.C. 356, 554 S.E.2d 336 (2001) (per curiam); see N.C.G.S. § 7B-907(a). At a permanency planning hearing, the trial court must "consider information from the parent, the juvenile, guardian, any foster parent, relative or pre-adoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid . . . in the court's review." N.C.G.S. § 7B-907(b) (2001). If at the conclusion of the permanency planning hearing the trial court determines

1. Respondent does not assign error to the specific findings of fact but instead argues those findings are insufficient to support the trial court's order.

2. Respondent also contends the trial court failed to comply with N.C. Gen. Stat. § 7B-906. Section 7B-906, however, governs custody review hearings, see N.C.G.S. § 7B-906 (2001), and although section 7B-907 provides a custody review hearing may be combined with a permanency planning review, see N.C.G.S. § 7B-907(a) (2001), there is nothing in the record to suggest this was the case here. To the contrary, all indications from the record are that the 18 October 2001 hearing was solely a permanency planning hearing. Accordingly, we do not address respondent's arguments related to section 7B-906.

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the children are not to return home, the trial court is required to consider certain criteria and make written findings of fact on the criteria relevant to the case. *Id.* Those criteria are:

- (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
- (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
- (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
- (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
- (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
- (6) Any other criteria the court deems necessary.

Id.

[1] Respondent first contends the trial court erred by failing to require DSS as custodian of the children to present evidence instead of relying only on the written reports of DSS representatives. The record, however, reflects DSS representatives were called as witnesses by respondent and cross-examined by an attorney from DSS and counsel for other parties, including the guardian *ad litem*. The trial court considered information from respondent, DSS reports, and heard testimony from DSS representatives, a school official, and public safety officers. Further, the DSS reports themselves contain information from relevant sources under section 7B-907(b). Thus, we conclude the trial court had sufficient evidence to consider in determining the best interests of respondent's children. *See In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) (essential requirement in

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a child custody hearing is the presentation of sufficient evidence to determine what is in the best interests of the juveniles).

[2] Respondent further argues the trial court failed to make the required findings of fact under section 7B-907(b). We agree. Section 7B-907(b) requires a trial court to make written findings on all of the relevant criteria as provided in the statute. *See* N.C.G.S. § 7B-907(b). When a trial court is required to make findings of fact, it must make the findings of fact specially. *See In re Anderson*, 151 N.C. App. 94, 96, 564 S.E.2d 599, 601 (2002); *see also* N.C.G.S. § 1A-1, Rule 52 (2001) (“findings by the court”). The trial court may not simply “recite allegations,” but must through “‘processes of logical reasoning from the evidentiary facts’” find the ultimate facts essential to support the conclusions of law. *Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (quoting *Appalachian Poster Advertising Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988)).

In this case, the trial court in its findings of fact in the Permanency Planning Review Order found that respondent had no intention of separating from Mr. Houser and adopted DSS and guardian *ad litem* reports as the remaining facts. The trial court, however, made no findings of fact under the specific criteria provided in section 7B-907(b). By stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports, the trial court’s findings are not “specific ultimate facts . . . sufficient for this Court to determine that the judgment is adequately supported by competent evidence.” *Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (internal quotations omitted) (citation omitted). Accordingly, we must vacate the Permanency Planning Review Order and remand this case for the trial court to specially make the required findings of fact under N.C. Gen. Stat. § 7B-907(b).

Vacated and remanded.

Judges HUNTER and ELMORE concur.

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[156 N.C. App. 661 (2003)]

STATE OF NORTH CAROLINA v. ALFRED WILLIAMS

No. COA01-1516

(Filed 18 March 2003)

Evidence— prior drug offense—no similarity—prejudicial

Testimony about an alleged prior drug sale should not have been admitted in a prosecution for cocaine possession where there was no similarity between the two offenses and the only relevance of the testimony was to illustrate defendant's predisposition to drug violations. The testimony was prejudicial because the evidence of possession was not conclusive.

Appeal by defendant from judgment entered 10 May 2001 by Judge Loto G. Caviness in Henderson County Superior Court. Originally scheduled to be heard in the Court of Appeals on 17 September 2002. Reassigned to this panel by order dated 16 January 2003 of Chief Judge of the North Carolina Court of Appeals.

Attorney General Roy Cooper, by Assistant Attorney General Frank G. Swindell, Jr., for the State.

James L. Goldsmith, Jr., for defendant appellant.

TIMMONS-GOODSON, Judge.

Alfred Williams (“defendant”) appeals from his conviction of felony possession of cocaine. For the reasons discussed herein, we hold that defendant is entitled to a new trial.

The State’s evidence at trial tended to show the following: On 14 August 2000, Officer Joshua Howard (“Officer Howard”) was patrolling the Green Meadows area of Henderson County. While on patrol, Officer Howard observed Mr. Coleman (“Coleman”) operating a vehicle and defendant riding on the passenger side. Coleman stopped the vehicle in front of a house, defendant got out of the vehicle, entered the residence, and Coleman continued to drive. Officer Howard testified that he was familiar with the residence due to “numerous drug arrest[s]” conducted in and around the property. After defendant got out of the vehicle, Officer Howard followed Coleman as he drove “around the block,” and then returned to retrieve defendant. Officer Howard considered the actions of Coleman and defendant “extremely suspicious” and therefore

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he continued to follow Coleman. Officer Howard testified that Coleman's vehicle did not possess a license plate and he waited until he reached a "safe location" before stopping Coleman for a traffic violation. Upon making the traffic stop, Officer Howard learned that Coleman did not have a driver's license; had several vehicle registration violations; and a protective pat down of Coleman revealed that he was in possession of a hypodermic needle. Coleman was placed under arrest.

After placing Coleman under arrest, Officer Howard instructed defendant to exit the vehicle. A protective pat down of defendant yielded no contraband or weapons, but Officer Howard noticed a "blob of tissue paper that really stuck out" on the "passenger side front door," which was "real wet." According to testimony from Officer Howard, he "felt [the tissue] was something suspicious" and he confiscated "the tissue" for further analysis, but did not arrest defendant. Officer Howard described the front interior of Coleman's vehicle as "not at all clean," contained "drinks and things," and it "appeared [as if] somebody [had gone] to a fast food restaurant."

Upon returning to the police station, Officer Howard noticed that "the wet tissue" had what he "felt was saliva on" it as if "it had been in someone's mouth." Subsequently, Officer Howard sent the "tissue paper" to the State Bureau of Investigation ("SBI") for testing. The test results revealed that the "tissue" contained ".1 gram of cocaine base." As a result, an arrest warrant was issued for defendant, and he was subsequently charged with possession of cocaine.

At trial, the State offered testimony, pursuant to North Carolina General Statutes § 8C-1, Rule 404(b), from Melody Harding Lamontaine ("Lamontaine"), an inmate in the custody of the Sheriff's Department. According to Lamontaine, on 22 April 2000, approximately four months prior to defendant's arrest, she was acting as an informant for Agent John Pace ("Agent Pace"). Lamontaine testified that she was assisting Agent Pace in gathering information on individuals engaged in selling illegal narcotics. At the direction of Agent Pace, Lamontaine contacted defendant by telephone and initiated a meeting to purchase drugs from him. Lamontaine testified that she met defendant in a parking lot, where he was sitting on the passenger side of a vehicle driven by a female. During the meeting, defendant took out a "black pill container" with a "lid on it" and sold Lamontaine "five rocks of cocaine." After making the purchase, Lamontaine returned to Agent Pace and gave him the "five rocks of cocaine."

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At trial, Agent Pace testified on behalf of the State to corroborate the testimony given by Lamontaine. Agent Pace testified that on 22 April 2000 he was employed with Alcohol and Law Enforcement. He further testified that he witnessed Lamontaine enter a vehicle with defendant, exit that same vehicle, and then return to him with “five white colored rocks,” which he then gave to Officer Lyle Case of the Hendersonville Police Department. The “five white colored rocks” were sent to SBI where they were determined to be cocaine. According to Agent Pace, defendant was never charged with or indicted for a crime in connection with the 22 April 2000 incident with Lamontaine.

After the jury found defendant guilty of felony possession of cocaine, defendant admitted his status as a habitual felon. Defendant was sentenced to an active term of imprisonment for a minimum period of 107 to a maximum period of 138 months. From this conviction and resulting sentence, defendant appeals.

In his sole issue for review, defendant argues that the trial court erred in admitting testimony from Lamontaine under North Carolina General Statutes § 8C-1, Rule 404(b). Defendant contends that testimony of his alleged prior drug sale in order to show motive and intent to possess cocaine was inadmissible. We conclude that the admission of testimony from Lamontaine was prejudicial error requiring that defendant be granted a new trial.

Rule 404(b) of the North Carolina Rules of Evidence provides in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). “We have held that Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002); *see State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). In drug cases, evidence of other drug violations is often admissible to prove many of the purposes under Rule

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404(b). *State v. Montford*, 137 N.C. App. 495, 501, 529 S.E.2d 247, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000). In order to admit evidence under the exception for motive, the prior act must “ ‘pertain[] to the chain of events explaining the context, motive and set-up of the crime’ and ‘form[] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.’ ” *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (quoting *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990)), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). “In each case, ‘the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted.’ ” *State v. Willis*, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000) (quoting *State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994)).

In *Willis*, over the defendant’s objection, the trial court admitted evidence of the defendant’s previous conviction of common law robbery to show his identity, *modus operandi*, motive, and the existence of a common plan or scheme. *Id.* at 822, 526 S.E.2d at 193. This Court concluded that the similarity between the past robbery and the robbery for which defendant was charged was nearly non-existent, because there was no evidence concerning the manner in which the previous robbery was carried out. *Id.* at 823, 526 S.E.2d at 193-94. This Court further concluded that the admission of the prior common law robbery conviction was prejudicial error in that it only went to show the defendant’s character to commit common law robbery. *Id.*

In the case at bar, the testimony provided by Lamontaine detailed an alleged drug transaction which took place four months prior to defendant’s arrest for possession of cocaine. However, the similarity between the alleged drug sale to Lamontaine and the crime for which defendant is charged in this case is non-existent. The manner in which the alleged 22 April 2000 transaction was carried out was in no way similar to the matter before this Court.

Testimony from Lamontaine revealed the following: (1) on one occasion she met defendant who was the passenger in a vehicle operated by a female; (2) defendant produced a “black pill container;” and (3) gave her “five rocks of cocaine” in exchange for a sum of money. However, testimony from Officer Howard reveals that in the case before this Court (1) defendant was the passenger in a car driven by a male; (2) defendant went into a residence and then returned to the vehicle; (3) defendant possessed no drugs or weapons at the time he was stopped by Officer Howard; (4) during the traffic stop, defendant was in close proximity to a “piece of tissue,” which tested positive

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for cocaine. The only commonality between the alleged crime described by Lamontaine and the matter in this case is that both incidents involved defendant riding as a passenger in a vehicle. The testimony from Lamontaine failed to show that the alleged 22 April 2000 sale of drugs by defendant was relevant to show defendant's motive and intent to commit the crime at issue here. The only relevance of the testimony from Lamontaine was to illustrate defendant's predisposition toward drug violations, which is a purpose forbidden by Rule 404(b). Therefore, the admission of testimony from Lamontaine was erroneous.

In the present case, the evidence supporting defendant's possession of cocaine while perhaps sufficient to support a conviction on a theory of constructive possession was not conclusive. The "wet tissue" containing the small quantity of cocaine was located in the passenger side door of a vehicle owned by Coleman. The evidence at trial described the state of the vehicle's interior as "not at all clean" and cluttered with "fast food" items. Thus, there is a reasonable possibility that had Lamontaine's testimony not been allowed, a different result may have been reached in defendant's trial. We hold that the admission of Lamontaine's testimony was prejudicial to the right of defendant to a fair trial.

New trial.

Judges WYNN and ELMORE concur.

UNITED SERVICES AUTOMOBILE ASSOCIATION, PLAINTIFF V. MICHAEL A. RHODES, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF DEANNA MARIE RENALDS RHODES, DECEASED, INTEGON INSURANCE COMPANY/GMAC, B & R RENT-A-CAR, INC., NATIONWIDE MUTUAL INSURANCE COMPANY AND CLARENCE WILLIAM GOFF, JR., DEFENDANTS

No. COA02-740

(Filed 18 March 2003)

Insurance—rental car—permissive use—prohibited operation

The driver of a rented vehicle did not exceed the scope of the rental company's permission for use of the vehicle when she drove while intoxicated, even though she violated a provision of the rental agreement as to her operation of the vehicle, and her

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violation of the operation provision did not constitute a basis for the exclusion of coverage by the rental company's insurer (Nationwide). Otherwise, even the negligent operation of a rental vehicle would be excluded, a result contrary to the purpose of the motor vehicle liability insurance laws.

Appeal by defendant Nationwide Mutual Insurance Company from judgment dated 9 April 2002 by Judge William C. Griffin, Jr. in Dare County Superior Court. Heard in the Court of Appeals 18 February 2003.

Wallace, Morris & Barwick, P.A., by Thomas H. Morris, for plaintiff appellee.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker and Ernie K. Murray, for defendant-appellant Nationwide Mutual Insurance Company.

Gaylord, McNally, Strickland, Snyder & Holscher, L.L.P., by Danny D. McNally, for defendant-appellee Michael A. Rhodes, Individually and as Administrator of the Estate of Deanna Marie Renalds Rhodes, deceased.

C. Everett Thompson, II for defendant-appellee Clarence William Goff, Jr.

BRYANT, Judge.

Nationwide Mutual Insurance Company (Nationwide) appeals a declaratory judgment dated 9 April 2002 determining the applicability of an automobile liability insurance policy issued by Nationwide. The findings of fact contained in the judgment are as follows:

2. [C]ounsel for all parties . . . stated in open court that there were no factual issues in existence and that the [trial] [c]ourt need only determine the legal issue raised by the pleadings and the discovery filed therein.

3. . . . [P]laintiff, United Services Automobile Association (hereinafter "USAA"), filed this action on June 7, 2001, seeking a declaratory judgment action adjudicating the rights, duties, and obligations of USAA under a policy of automobile liability insurance providing underinsured motorist coverage (UIM) to Deanna Marie Rhodes, . . . covering a 1998 Jeep Grand Cherokee Laredo.

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4. . . . [D]efendant, B & R Rent-A-Car, Inc. (hereinafter “B & R”), rented a 1996 Ford automobile to defendant, Anne R. Hampton [(Hampton)], on or before October 15, 1999, which she was operating on that date on US Highway No. 158 in Kill Devil Hills, North Carolina, and which collided with the rear of the 1998 Jeep Grand Cherokee Laredo in which Deanna Marie Rhodes was riding as a passenger, causing injuries to her which resulted in her death.

5. [Hampton] was operating the 1996 Ford automobile owned by defendant B & R while intoxicated.

6. . . . Integon Insurance Company/GMAC provided automobile liability insurance coverage to [Hampton] on a motor vehicle owned by her, . . . in the amount of \$100,000.00 per person, and payment of the full amount of said coverage has been tendered to the estate of Deanna Marie Rhodes, on the basis that the B & R vehicle was a substitute vehicle, resulting in Integon’s liability insurance coverage for this accident being primary.

7. [Nationwide] provided automobile liability insurance coverage in the amount of \$100,000.00 per person on B & R vehicles on the date of the accident under policy number 61 FB913829-0003E, which said coverage would provide secondary liability coverage to the defendant, [Hampton], if coverage is found to exist.

8. . . . USAA[] affords UIM coverage to the decedent’s estate, the amount of which will be effected by the existence or nonexistence of coverage on the B & R vehicle insured under the defendant Nationwide’s policy.

9. [Hampton] entered into a rental agreement with the defendant B & R for the rental of the vehicle she was operating at the time of the accident, which agreement was in writing and provided, among other things, that “the vehicle shall not be used . . . while under the influence of intoxicants or drugs.”

. . . .

11. . . . Nationwide’s policy of automobile liability insurance issued to defendant B & R contains no exclusion that excludes coverage for operators of the defendant B & R vehicles who might be under the influence of intoxicants or drugs at the time of the operation of such vehicles, and its automobile liability insurance policy contains no exclusions of coverage based upon the adoption of any of the terms of the rental agreement.

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Based on these findings, the trial court reached the following conclusions:

1. [O]n October 15, 1999, [Hampton] was operating the 1996 Ford automobile which she had rented from . . . B & R[] and was in lawful possession of said vehicle at the time of the automobile accident
2. . . . [T]he automobile liability insurance policy issued by defendant Nationwide to defendant B & R provided liability insurance coverage on its rental vehicles[] and contained no provision that would exclude coverage in the event a le[s]see operated a rental vehicle while under the influence of intoxicants or drugs.
3. . . . [T]he terms of the contract set forth in the defendant B & R rental agreement executed by . . . Hampton, including the prohibited uses set forth therein, do not supercede the terms of the automobile liability insurance policy issued by defendant Nationwide to . . . B & R, do not constitute a legal basis for the exclusion of coverage afforded under the terms of the policy, and do not alter the terms of the insurance policy.

The trial court then determined that the Nationwide policy afforded secondary liability insurance coverage on the rental vehicle in the amount of \$100,000.00 per person.

The Nationwide policy issued to B & R and reviewed by the trial court for purposes of the declaratory judgment defined an insured as “[y]ou [(B & R)] for any covered ‘auto’” and “[a]nyone else while using with your permission a covered ‘auto’ you own, hire or borrow.”

The dispositive issue is whether Hampton was using the rental vehicle with B & R’s permission so as to make her an insured under the terms of the Nationwide policy. Nationwide argues because Hampton drove the rental vehicle while intoxicated, which was prohibited by the B & R rental agreement, Hampton did not qualify as a permissive user, and thus an insured, under the Nationwide policy. For the reasons stated below, we conclude that Hampton was using the vehicle with B & R’s permission and was therefore insured by Nationwide.

The Nationwide policy provides that, besides B & R, an insured is “[a]nyone else while using with [B & R’s] permission a covered ‘auto’ [B & R] own[s], hire[s] or borrow[s].” In order to ascertain who is

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insured under the Nationwide policy, it is therefore necessary to determine whether, at the time of the accident, Hampton was using the rental vehicle with B & R's permission. According to the terms of the rental agreement, Hampton was granted use of the rental vehicle for a specified time period. Although the agreement restricted the manner in which the vehicle was to be used by prohibiting its operation while intoxicated, Hampton's failure to use the vehicle *as permitted* did not negate the fact that she was in use of the vehicle "with [B & R's] permission." North Carolina has no case law that speaks directly to this distinction, but other jurisdictions have considered the issue. We find particularly instructive the holding in *Allstate Ins. Co. v. Sullivan*, 643 S.W.2d 21 (Mo. Ct. App. 1982), in which the insurer argued a driver's use of a rental vehicle had gone beyond the permission granted by the named insured in that the driver had signed a rental agreement prohibiting use of the vehicle while intoxicated and then driven it in an intoxicated state, resulting in an accident. The *Sullivan* court stated:

The question . . . becomes solely whether the *use* (as distinct from the operation) by [the driver] of the vehicle was within the scope of permission given by Budget [(the named insured)]. It clearly was. There is no claim that [the driver] was utilizing the vehicle for a purpose prohibited by the rental agreement. The only attack is upon the operation of the vehicle. [The driver's] rental of the car was for a broad, almost unfettered use. . . . [The driver] was *using* the car with the permission of Budget, whether or not he was operating within the constraints of Budget's permission.

Id. at 23; *see also New York Cas. Co. v. Lewellen*, 184 F.2d 891, 894 (8th Cir. 1950) (where the court, in applying Missouri law, held that "the violation of . . . a rule [concerning the use of firm equipment by employees while drinking] is not sufficient to terminate automatically the employer's express permission for the actual use of the vehicle at the time an accident occurs").

In *City of Norfolk v. Ingram*, the Virginia Supreme Court further noted that while Virginia case law, similar to North Carolina precedent, denies coverage "because of a bailee's violations of an owner's instructions as to the *time* of operation of the vehicle, the *purpose* of its operation, the *route* the vehicle is to be driven, and the *person* who is to operate the vehicle," the employee in *Ingram* did not act outside the scope of his employer's permission when he operated the employer's vehicle while intoxicated even though this was in express

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violation of the employer's orders. *City of Norfolk v. Ingram*, 367 S.E.2d 725, 727 (Va. 1988); compare *Fehl v. Surety Co.*, 260 N.C. 440, 441, 133 S.E.2d 68, 69 (1963) (per curiam) (where a potential buyer had permission to drive the vehicle seven miles to his home and was instructed to return it within two and a half hours but kept it for twenty hours and then became involved in an accident, the facts showed a major deviation from the permitted use and the driver's use was consequently without the permission of the owner); *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 347, 337 S.E.2d 180, 183-84 (1985) (driver's use of a leased vehicle constituted a material deviation from the permission granted in the lease and was not a permissive use within the meaning of the policy or N.C. Gen. Stat. § 20-279.21(b)(2) where his initial use of the vehicle was permitted under the terms of a written lease, but he defaulted on the lease and nevertheless continued to use the vehicle), *aff'd*, 318 N.C. 551, 350 S.E.2d 500 (1986). The *Ingram* court's ruling relied on the reasoning in *Sullivan* and noted that if coverage could be limited by forbidding users to drive while intoxicated, "the same rationale would authorize an exclusion of . . . coverage if the vehicle were operated negligently or in violation of statute." *Ingram*, 367 S.E.2d at 727. "Such a rule[, however,] would essentially undercut the legislative policies of protecting a permissive user against liability to others and creating a means of recovery to any party injured when struck by a vehicle operated by a permissive user."¹ *Id.*; see N.C.G.S. § 20-279.21(b)(2) (2001) (imposing mandatory liability coverage for persons using vehicle with insured's permission).

We find persuasive the reasoning of *Sullivan* and *Ingram* and hold that although Hampton violated a provision of the rental agreement as to her operation of the vehicle, she did not exceed the scope of B & R's permission to use the vehicle for purposes of qualifying as an insured under the Nationwide policy. Accordingly, the trial court properly concluded that "the terms of the contract set forth in the . . . B & R rental agreement executed by . . . Hampton . . . do not constitute a legal basis for the exclusion of coverage afforded under the terms of the [Nationwide] policy" and that Nationwide must provide coverage under the terms of its policy.

1. In fact, another clause of the B & R rental agreement prohibited operation of the vehicle "in violation of any federal, state or local laws." If we were to adopt Nationwide's argument, such a prohibited use, as the *Ingram* court noted, would allow for the exclusion of coverage for even negligent operation of a vehicle, a result contrary to the purpose of the motor vehicle liability insurance laws.

STATE v. BLAKNEY

[156 N.C. App. 671 (2003)]

Affirmed.

Judges HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER LEON BLAKNEY

No. COA02-592

(Filed 18 March 2003)

**1. Drugs— felonious possession of marijuana—indictment—
“felonious” not mentioned**

An indictment did not support a guilty plea to felonious possession of marijuana where it did not contain the word “felonious” and did not refer by number to N.C.G.S. § 90-95(d)(4), which provides for felonious possession. Although the wording of the indictment might lead to the statute, the words by themselves do not provide specific notice of the statute.

2. Sentencing— habitual felon indictment—prior to substantive felony indictment

The issuance of an habitual felon indictment before a substantive felony indictment does not by itself void the habitual felon indictment if the notice and procedural requirements of the Habitual Felons Act have been complied with. In this case, the substantive felony indictment was returned well in advance of the judicial proceeding, so that there was a pending felony prosecution to which the habitual felon prosecution could attach, and defendant had notice of the substantive charges and that he was being prosecuted as a recidivist. N.C.G.S. § 90-95(d)(4).

Appeal by defendant from judgment¹ dated 8 August 2001 by Judge Lindsay R. Davis in Forsyth County Superior Court. Heard in the Court of Appeals 18 February 2003.

1. We note that the judgment includes three file numbers: 01 CRS 00005, 00 CRS 59336, and 00 CRS 59338. Because neither the habitual felon indictment (01 CRS 00005) nor the substantive felony indictment (00 CRS 59336) contain any reference to the third file number, this Court is unable to discern its origin.

STATE v. BLAKNEY

[156 N.C. App. 671 (2003)]

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

Ligon and Hinton, by Lemuel W. Hinton, for defendant appellant.

BRYANT, Judge.

Christopher Leon Blakney (defendant) appeals a judgment dated 8 August 2001 (1) entered pursuant to a guilty plea to the charges of felony possession of marijuana, possession with intent to sell and deliver marijuana, second-degree trespass, and resisting a public officer and (2) sentencing defendant as a habitual felon.

On 22 January 2001, the grand jury returned an indictment against defendant for having attained the status of habitual felon. On 5 February 2001, the predicate felony indictment was issued, charging defendant with possession with intent to sell and deliver marijuana, second-degree trespass, and resisting a public officer. This indictment was superceded by an indictment dated 25 June 2001, which added possession of marijuana pursuant to N.C. Gen. Stat. § 90-95(a)(3) as a fourth charge. According to this charge, “defendant . . . unlawfully and willfully did possess more than one and one-half ounces of marijuana[,] a controlled substance which is included in Schedule VI of the North Carolina Controlled Substances Act.”

The issues raised are whether: (I) the superceding indictment charging defendant with possession of marijuana was fatally defective because it omitted the word “feloniously” and (II) the habitual felon indictment, having been returned two weeks before the substantive felony indictment, is void.

I

[1] With respect to the superceding indictment, defendant takes issue with the sufficiency of the possession of marijuana charge. Specifically, defendant contends, because the charge does not contain the word “feloniously,” it failed to provide him with notice that he was being tried for a felony as opposed to a misdemeanor. Defendant relies on our Supreme Court’s holding “that bills of indictment charging felonies, in which there has been a failure to use the word ‘feloniously,’ are fatally defective, unless the Legislature otherwise expressly provides.” *State v. Whaley*, 262 N.C. 536, 537, 138 S.E.2d 138, 139 (1964); see *State v. Fowler*, 266 N.C. 528, 530, 146 S.E.2d 418,

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420 (1966); *State v. Price*, 265 N.C. 703, 704, 144 S.E.2d 865, 867 (1965). *Whaley* and the line of cases that followed based their holding on the reasoning stated in a 1930's case, *State v. Callett*, which explained that the need to use the word "feloniously" in a felony indictment evolved "[s]ince all criminal offenses punishable with death or imprisonment in a State prison were by . . . section [14-1] declared felonies." *State v. Callett*, 211 N.C. 563, 564, 191 S.E. 27, 28 (1937). At the time this case law developed, N.C. Gen. Stat. § 14-1 simply defined a felony as punishable by either death or imprisonment, leaving felonies difficult to distinguish from misdemeanors unless denominated as such in the indictment. See N.C.G.S. § 14-1 (1953) (amended 1969). In 1969, however, the statute was changed and now defines a felony as "a crime which: (1) [w]as a felony at common law; (2) [i]s or may be punishable by death; (3) [i]s or may be punishable by imprisonment in the State's prison; or (4) [i]s denominated as a felony by statute." N.C.G.S. § 14-1 (1969) (same as current version of statute). While the felony-misdemeanor ambiguity that prompted the holdings in *Callett* and its progeny remains in effect today with respect to subsections (1) through (3), subsection (4) now expressly provides for statutory identification of felonies. See *Whaley*, 262 N.C. at 537, 138 S.E.2d at 139 (need to state "feloniously" in indictment "unless the Legislature otherwise expressly provides"). As such, subsection (4) affords any defendant notice of being charged with a felony as opposed to a misdemeanor, even without the use of the word "feloniously," provided the indictment gives notice of the statute denominating the alleged crime as a felony. Thus, while its inclusion is still the better practice, the word "feloniously" is not required for a valid felony indictment if the indictment references the specific statute making the crime a felony.

In this case, the indictment charging defendant with possession of marijuana only refers to N.C. Gen. Stat. § 90-95(a)(3), which makes it "unlawful for any person . . . [t]o possess a controlled substance" and does not state whether this crime is a felony or a misdemeanor. N.C.G.S. § 90-95(a)(3) (2001). The charge in the indictment does state "defendant . . . unlawfully and willfully did possess *more than one and one-half ounces of marijuana*[,] a controlled substance which is included in *Schedule VI* of the North Carolina Controlled Substances Act." The indictment thus contains references to N.C. Gen. Stat. § 90-95(d)(4), which provides "[i]f the quantity of the controlled substance [possessed in violation of section 90-95(a)(3)] exceeds one and one-half ounces . . . of marijuana . . . the violation shall be punishable as a Class I felony." N.C.G.S. § 90-95(d)(4) (2001).

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Although the indictment contains identifying words that would lead defendant reading section 90-95(d)(4) to conclude he had found the applicable section to the crime charged in this case, the words by themselves, without reference to the statute number, do not provide defendant with specific notice of the statute charging him with a felony. Accordingly, the indictment in this case, having failed to either use the word “feloniously” or to state the statutory section indicating the felonious nature of the charge, is invalid as it does not provide notice of the felony charge against defendant. Because this leaves the indictment fatally defective, the charge for possession of marijuana must be vacated. The State, however, may elect to re-indict defendant in accordance with this opinion. *See Whaley*, 262 N.C. at 537, 138 S.E.2d at 139.

II

[2] Defendant next challenges the validity of the habitual felon indictment. The Habitual Felons Act, N.C.G.S. §§ 14-7.1 to -7.6 (2001), allows for the indictment of a defendant as a habitual felon if he has been convicted of or pled guilty to three felony offenses. *State v. Allen*, 292 N.C. 431, 432-33, 233 S.E.2d 585, 586-87 (1977). “The effect of such a proceeding ‘is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past.’” *Id.* at 435, 233 S.E.2d at 588 (quoting *Spencer v. Texas*, 385 U.S. 554, 556, 17 L. Ed. 2d 606, 609 (1967)). The Habitual Felons Act requires two separate indictments, the substantive felony indictment and the habitual felon indictment, but does not state the order in which they must be issued. *See id.* at 434, 233 S.E.2d at 587. The Act “does not authorize an independent proceeding to determine [the] defendant’s status as a habitual felon separate from the prosecution of a predicate substantive felony.” *State v. Cheek*, 339 N.C. 725, 727, 453 S.E.2d 862, 863 (1995). The “habitual felon indictment is [necessarily] ancillary to the indictment for the substantive felony and cannot stand on its own.” *State v. Winstead*, 78 N.C. App. 180, 182, 336 S.E.2d 721, 723 (1985); *see Cheek*, 339 N.C. at 728, 453 S.E.2d at 863 (citing *Allen*, 292 N.C. at 433, 233 S.E.2d at 587). In other words, the habitual felon indictment cannot be the sole charge on which the State proceeds at trial. *See Allen*, 292 N.C. at 436, 233 S.E.2d at 589 (where prior to the return of the habitual felon indictment “all the substantive felony proceedings upon which it [was] based had been prosecuted to completion and there was no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding, the indictment . . . [failed] to charge a cognizable offense”).

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[156 N.C. App. 675 (2003)]

In this case, the substantive felony indictment was not returned by the grand jury until two weeks after the habitual felon indictment but well in advance of the judicial proceeding. There was thus a “pending felony prosecution to which the habitual felon proceeding could attach.” *Id.* Furthermore, at the time his guilty plea was entered, defendant had notice not only of the substantive charges against him but also that he was being prosecuted as a recidivist. *See Cheek*, 339 N.C. at 728, 453 S.E.2d at 863-64 (“[o]ne basic purpose behind [the] Habitual Felons Act is to provide notice to [the] defendant that he is being prosecuted for some substantive felony as a recidivist”) (quoting *Allen*, 292 N.C. at 436, 233 S.E.2d at 588). We therefore hold that the issuance of a habitual felon indictment prior to the substantive felony indictment does not by itself void the habitual felon indictment where the notice and procedural requirements of the Habitual Felons Act have been complied with.

Vacated in part and remanded for resentencing.

Judges HUNTER and ELMORE concur.

MATTHEW J. SPENCER, ADMINISTRATOR, PLAINTIFF V. ALBEMARLE HOSPITAL, ET AL.,
DEFENDANTS

No. COA02-505

(Filed 18 March 2003)

Civil Procedure— involuntary dismissal—failure to prosecute

The trial court erred in a medical malpractice, personal injury, and punitive damages case by dismissing under N.C.G.S. § 1A-1, Rule 41(b) plaintiff’s claims against defendants for failure to prosecute, because: (1) there was no indication that the trial court considered lesser sanctions before dismissing plaintiff’s case; (2) there was no evidence that plaintiff failed to pursue his case in a diligent and responsible manner when all the evidence indicated that plaintiff was unaware that the petition for approval of the confidential settlement had been calendared, and in fact the petition had already been heard and approved by the court; and (3) there was no evidence of prejudice to defendants as they were equally unaware of the hearing and also did not appear.

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[156 N.C. App. 675 (2003)]

Appeal by plaintiff from order entered 31 October 2001 by Judge W. Douglas Albright in Pasquotank County Superior Court. Heard in the Court of Appeals 31 October 2002.

Rose & Harrison, by Dennis C. Rose, for plaintiff appellant.

Harris, Creech, Ward and Blackerby, P.A., by Thomas E. Harris and W. Gregory Merritt, for defendant appellees William D. Russell, M.D. and Albemarle Radiology, Ltd.

Timothy P. Lehan for defendant appellees Albemarle Hospital, Philip D. Bagby and Ann Trainer.

TIMMONS-GOODSON, Judge.

Matthew J. Spencer (“plaintiff”), in his capacity as administrator and personal representative for the estate of Erica Shanae Young (“decedent”), appeals from an order of the trial court dismissing plaintiff’s claims against Albemarle Hospital, Philip D. Bagby, William Russell, M.D., Albemarle Radiology, Ltd., Sarah Hudson, M.D., CMG of North Carolina, Inc., and Ann Trainer (collectively, “defendants”) for failure to prosecute. For the reasons stated herein, we reverse the order of the trial court.

The relevant facts of the present appeal are as follows: On 20 March 2000, plaintiff filed a complaint in Pasquotank Superior Court alleging claims for medical malpractice, personal injury and punitive damages arising from decedent’s death. On 23 July 2001, plaintiff filed a petition requesting approval of a confidential settlement between plaintiff and two of the named defendants, Sarah Hudson, M.D., and CMG of North Carolina, Inc. The Honorable Jerry Tillet, Superior Court Judge, heard the matter on 17 September 2001 and approved the settlement agreement. The following day, counsel for plaintiff sent Judge Tillet’s order approving the confidential settlement to the clerk of the Superior Court of Pasquotank County for filing.

On 29 October 2001, despite the fact that plaintiff’s petition had already been heard and decided, the petition for approval of the settlement came for hearing before the trial court, the Honorable W. Douglas Albright presiding. Neither counsel for plaintiff nor counsel for defendants were present in the courtroom. At the hearing, the following colloquy occurred:

THE COURT: All right. We have got two (2) matters that are marked for settlement. Spencer against the hospital. Is this just for Court approval of the settlement?

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THE CLERK: It's my understanding that the settlement is sealed and he wanted the Court to open it. I was under the impression that [plaintiff's counsel] was going to be here today.

THE COURT: All right. Call out Spencer.

THE BAILIFF: Oh, yes. Oh, yes. Oh, yes. Matthew Spencer, Matthew Spencer, Matthew Spencer, come into court and prosecute your case or it may be dismissed.

THE COURT: All right. Dismiss it for failure to prosecute.

The court then entered an order dismissing all of plaintiff's claims against those defendants not included in the settlement approved by Judge Tillett for failure to prosecute.

On 30 October 2001, counsel for plaintiff sent a letter to Judge Albright, explaining that he was unaware that the petition to approve the settlement had been calendared for the previous day, particularly as the petition had already been heard and ruled upon. Plaintiff thereafter filed a motion pursuant to Rule 60 for relief from the trial court's order dismissing plaintiff's claims, which was heard by Judge Tillett on 10 December 2001. Noting that plaintiff had filed a notice of appeal from the order dismissing his claims and that the court therefore had limited jurisdiction over the matter, Judge Tillett entertained plaintiff's motion "for the limited purpose of indicating how [the trial court] would be inclined to rule on Plaintiff's motion were the appeal not pending." To that extent, Judge Tillett granted plaintiff relief from the order dismissing his claims. Judge Tillett's order granting plaintiff relief is not before us for review, however.

Plaintiff appeals from the 31 October 2001 order dismissing his claims for failure to prosecute.

Plaintiff contends that the trial court erred by (1) failing to consider lesser sanctions before dismissing plaintiff's case; and (2) abused its discretion in dismissing the case. For the reasons stated herein, we conclude that the trial court erred in dismissing plaintiff's case for failure to prosecute, and we therefore reverse the 31 October 2001 order of the trial court.

Rule 41(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part, as follows:

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For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2001). Under Rule 41(b), a claim may be dismissed for one of three reasons: failure to comply with the rules, failure to comply with a court order, or failure to prosecute. *See id.*; *Wilder v. Wilder*, 146 N.C. App. 574, 575, 553 S.E.2d 425, 426 (2001). Where failure to prosecute is alleged, a trial court may enter sanctions only where the plaintiff or his attorney “manifest[s] an intent to thwart the progress of [the] action” or “engage[s] in some delaying tactic.” *Foy v. Hunter*, 106 N.C. App. 614, 619, 418 S.E.2d 299, 303 (1992).

Before a case may be dismissed under Rule 41(b) for failure to prosecute, the trial judge must address the following three factors: “(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.” *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428. In *Wilder*, this Court reversed dismissal of the plaintiff’s case for failure to prosecute because there were insufficient findings to support the trial court’s conclusion that dismissal was warranted. *See id.* Similarly, in the instant case, the trial court made no findings regarding plaintiff’s failure to prosecute, other than a recital in the order that plaintiff failed to appear for the hearing and that “such failure was completely unexcused and without leave by the court.” There is no indication in the record that the trial court considered lesser sanctions before dismissing plaintiff’s case. *See Page v. Mandel*, 154 N.C. App. 94, 571 S.E.2d 635, 640 (2002) (vacating the dismissal of the plaintiff’s case where the trial court did not indicate that it considered lesser sanctions). There is moreover no evidence in the record that plaintiff “manifested an intent to thwart the progress of the action to its conclusion” or “failed to progress the action toward its conclusion” by engaging in some delaying tactic. Rather, all of the evidence indicates that plaintiff was unaware that the petition for approval of the confidential settlement had been calendared for the 29 October hearing, and that, in

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fact, the petition had already been heard and approved by the trial court. Although we do not condone a litigant's failure to appear due to mere ignorance arising from a lack of diligence, there is no evidence here that plaintiff failed to pursue his case in a diligent and responsible manner. Nor is there any evidence of prejudice to defendants, particularly as defendants were equally unaware of the 29 October hearing and, like plaintiff, did not appear.

Courts are primarily concerned with the consideration and resolution of cases according to their merits, rather than dismissal for mere procedural violations. *See Wilder*, 146 N.C. App. at 576, 553 S.E.2d at 427; *Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15, *disc. rev. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981). An involuntary dismissal under Rule 41(b) "is the most severe sanction available to the court in a civil case." *Wilder*, 146 N.C. App. at 576, 553 S.E.2d at 427. Claims should be involuntarily dismissed only when lesser sanctions are not appropriate to remedy the procedural violation. *See Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984); *Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 604, 344 S.E.2d 847, 849 (1986).

Because there is no evidence in the present case to support the trial court's determination that sanctions against plaintiff were warranted, we hold that dismissal of plaintiff's case was improper. *See Green v. Eure, Secretary of State*, 18 N.C. App. 671, 672-73, 197 S.E.2d 599, 601 (1973) (holding that the trial court erred in dismissing plaintiff's action for failure to prosecute). The order of the trial court is hereby

Reversed.

Judges WYNN and HUDSON concur.

REGIONAL ACCEPTANCE CORP. v. OLD REPUBLIC SURETY CO.

[156 N.C. App. 680 (2003)]

REGIONAL ACCEPTANCE CORPORATION, PLAINTIFF v. OLD REPUBLIC SURETY COMPANY, INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE COMPANY AND FORSYTH AUTO BROKERS, INC., DEFENDANTS

No. COA02-555

(Filed 18 March 2003)

1. Judgments— collateral attack—subrogation order

The trial court properly granted summary judgment against a surety bond issuer (International) which attempted to set aside a subrogation order to which it was not a party, which did not affect it, and which was not on appeal.

2. Sureties— subrogation—purchaser of vehicle financing contract—entitlement to sue

Plaintiff corporation which purchased a vehicle financing contract was entitled to sue upon a dealer's surety bond under N.C.G.S. § 20-288(e) due to a direct relationship with the person who bought the vehicle where a default judgment against the purchaser equitably subrogated plaintiff to the purchaser's rights arising out of his purchase of the vehicle.

Appeal by defendant from judgment entered 25 February 2002 and order entered 7 June 2001 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 29 January 2003.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Derek J. Allen, for plaintiff.

Moore & Van Allen, PLLC, by Kevin M. Capalbo, for defendant.

TYSON, Judge.

Defendant International Business & Mercantile Reassurance Company ("International") appeals from the granting of summary judgment in favor of Regional Acceptance Corporation ("Regional") in the amount of \$19,297.00 plus interest. We affirm.

I. Background

On 16 September 1993, International issued a surety bond to Forsyth Auto Brokers, Inc. ("Forsyth") pursuant to N.C. Gen. Stat. § 20-288(e) (2001). On 2 February 1994, Regional and Forsyth entered into an agreement ("Agreement") for Regional to purchase vehicle

REGIONAL ACCEPTANCE CORP. v. OLD REPUBLIC SURETY CO.

[156 N.C. App. 680 (2003)]

financing contracts from Forsyth. The Agreement called for Forsyth to provide “a proper application for a certificate of title . . . showing a first lien in [Regional’s] favor for the full amount due under the contract.”

James and Robin Collins held a leasehold interest in a 1996 Ford Explorer (“Explorer”), owned by World Omni Financial Corporation (“World Omni”). Forsyth obtained the Explorer from the Collins but failed to satisfy the debt to World Omni to establish clear title to the vehicle. On 14 November 1997, Forsyth sold the Explorer to Roberto Gonzalez (“Gonzalez”) for \$8,500 down and a vehicle financing contract for \$19,297. Forsyth failed to inform Gonzalez of World Omni’s debt. Regional purchased the financing contract from Forsyth after Forsyth represented it held clear title to the Explorer. The North Carolina Department of Motor Vehicles showed World Omni’s interest in the Explorer upon application for title by Regional.

Due to World Omni’s interest in the Explorer, Gonzalez returned the Explorer to Collins. The Collins made the remainder of the payments required under the lease to World Omni until the lease expired in May of 1998. Neither Regional nor Gonzalez made any payments to World Omni.

Because he no longer had possession of the Explorer, Gonzalez defaulted on the payments to Regional under the financing contract. On 10 January 2000, Regional received a default judgment against Gonzalez in Forsyth County Case No. 99 CVS 4088. The default judgment included Regional’s equitable subrogation to the rights of Gonzalez arising out of his purchase of the Explorer.

On 8 December 2000, Regional filed its amended complaint against International, Old Republic Surety Company, which administers claims for International, and Forsyth. Regional moved for and was granted partial summary judgment on the issue of liability on 7 June 2001. Regional moved for and was granted summary judgment as to damages against International on 25 February 2002. Regional voluntarily dismissed all claims against Old Republic. International appeals.

II. Issues

International contends the trial court erred in granting summary judgment because (1) plaintiff is not entitled to be equitably subrogated to the rights of Gonzalez and (2) plaintiff is not a “purchaser” under N.C. Gen. Stat. § 20-288(e).

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III. Subrogation

[1] International contends that plaintiff is not entitled to be equitably subrogated to the rights of Gonzalez. We disagree.

A collateral attack on a judicial proceeding is “an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.” *Hearon v. Hearon*, 44 N.C. App. 361, 362, 261 S.E.2d 9, 10 (1979). North Carolina does not allow collateral attacks on judgments. *Id.* A person who is not a party to or in privity to a party and is not affected by a judgment has no status to seek to vacate a judgment. *Id.* (citing *Card v. Finch*, 142 N.C. 140, 148-49, 54 S.E. 1009, 1012 (1906)).

In a separate action in the Forsyth County Superior Court, Regional was subrogated to the rights of Gonzalez. International is seeking to overturn that order of subrogation and asserts that Regional may not sue on behalf of Gonzalez. International has not been adversely affected by the subrogation. “[T]he party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none.” *Liles v. Rogers*, 113 N.C. 197, 201, 18 S.E. 104, 106 (1893). Any defenses which International may have against Gonzalez could be asserted against Regional.

International cannot attempt to set aside a valid order of the trial court to which it was not a party, which did not affect it, and which is not on appeal to this Court. We hold that International may not attempt to set aside the order of subrogation.

IV. “Purchaser” under N.C. Gen. Stat. § 20-288(e)

[2] International contends that Regional is not a “purchaser” as required by N.C. Gen. Stat. § 20-288(e) (2001) and therefore not subject to the surety bond. We disagree.

International issued the surety bond required by statute for Forsyth to operate as a motor vehicle dealer. N.C. Gen. Stat. § 20-288 states in part:

Any *purchaser* of a motor vehicle, including a motor vehicle dealer, who shall have suffered any loss or damage by the failure

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of any license holder subject to this subsection to deliver free and clear title to any vehicle purchased from a license holder or any other act of a license holder subject to this subsection that constitutes a violation of this Article or Article 15 of this Chapter shall have the right to institute an action to recover against the license holder and the surety.

N.C. Gen. Stat. § 20-288(e) (emphasis supplied). This Court limited application of this statute to purchasers and those who claim directly through the actual purchaser. In *NCNB v. Western Surety Co.*, 88 N.C. App. 705, 364 S.E.2d 675 (1988), the purchaser of a vehicle assigned all of his rights to NCNB who subsequently sued the surety company under this statute. This Court held that where a bank is subrogated to the claims of the purchaser, it is entitled to sue on the motor vehicle surety bonds. *Id.* The Court expressly noted that it was the direct relationship between the bank and the purchaser that allowed the bank to step into the shoes of the purchaser and recover under the statute. *Id.*

As in *NCNB*, Regional stepped into the shoes of the purchaser, Gonzalez, through the subrogation order. We hold that Regional was entitled to sue under the surety bond, due to the direct relationship between Gonzalez and Regional.

V. Conclusion

International may not collaterally attack the prior judgment which subrogated Regional to the rights of Gonzalez. Because of its subrogation to Gonzalez's rights, Regional is entitled to sue on the surety bond under N.C. Gen. Stat. § 20-288(e). The trial court did not err in granting summary judgment in favor of Regional.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

USSERY v. TAYLOR

[156 N.C. App. 684 (2003)]

MICHAEL USSERY, PLAINTIFF V. MARK E. TAYLOR AND WIFE, WENDY W. TAYLOR, TIM HARRIS, COUNTRY HOME MORTGAGE, INC. AND MICHAEL G. KNOX, JR., DBA M.G. KNOX APPRAISALS, DEFENDANTS

No. COA02-443

(Filed 18 March 2003)

1. Appeal and Error— appealability—interlocutory order—substantial right—inconsistent verdicts

Although an appeal in a fraud, misrepresentation, and unfair and deceptive trade practices case from the grant of summary judgment in favor of two of the five defendants is an appeal from an interlocutory order, this appeal affects a substantial right based on the possibility of inconsistent verdicts because plaintiff's claims against the various defendants rest upon nearly identical factual allegations.

2. Discovery— requests pending—summary judgment improper

The trial court erred in a fraud, misrepresentation, and unfair and deceptive trade practices case by granting summary judgment in favor of defendants while plaintiff's requests for discovery were pending.

Appeal by plaintiff from order entered 25 February 2002 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2003.

Hewson Lapinel Owens, P.A., by H.L. Owens, for plaintiff appellant.

No brief filed for defendant appellees.

TIMMONS-GOODSON, Judge.

Michael Ussery ("plaintiff") appeals from an order of the trial court granting summary judgment in favor of Mark and Wendy Taylor ("defendants"). For the reasons stated herein, we reverse the order of the trial court.

The facts pertinent to the present appeal are as follows: On 13 December 2001, plaintiff filed a complaint in Mecklenburg County Superior Court alleging claims for fraud, misrepresentation, and unfair and deceptive trade practices. In his complaint, plaintiff alleged, *inter alia*, that defendants conspired with others to fraud-

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ulently induce plaintiff to purchase certain real property owned by defendants for a price substantially higher than the actual value of the property.

On 14 December 2001, plaintiff served written requests for discovery. On 17 January 2002, defendants filed a motion for summary judgment. Defendants responded to plaintiff's discovery requests on 5 February 2002. Finding the responses to be substantially incomplete, plaintiff filed a motion on 14 February 2002 to compel defendants to comply with his discovery requests. The same day, plaintiff filed and served defendants with notices of depositions scheduled to take place on 25 April 2002. On 20 February 2002, defendants' motion for summary judgment was heard by the trial court over plaintiff's objections. Concluding that no genuine issues of material fact existed, the trial court granted summary judgment in favor of defendants on 25 February 2002. Plaintiff now appeals from the order of the trial court.

Plaintiff contends that the trial court erred in granting summary judgment to defendants before plaintiff conducted reasonable discovery. We agree and therefore reverse the order of the trial court.

[1] We note initially that the order of the trial court is not a final order, in that it grants summary judgment to only two of the five defendants in this case. We do not review interlocutory orders as a matter of course. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 382 (1950). Where the appeal affects a substantial right of one of the parties, however, such appeals may be brought pursuant to sections 1-277 and 7A-27(d) of the North Carolina General Statutes. *See* N.C. Gen. Stat. §§ 1-277, 7A-27(d) (2001). Whether or not an appeal affects a substantial right must be decided on a "case by case basis." *Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992). Our Supreme Court has held that the possibility of undergoing two trials may affect a substantial right where the same issues are present in both trials, thereby creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issues. *See Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982).

In the instant case, plaintiff's claims against the various defendants rest upon nearly identical factual allegations, requiring a jury to render essentially identical factual determinations in plaintiff's favor. Because the possibility for inconsistent verdicts exists, we con-

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[156 N.C. App. 684 (2003)]

clude that the appeal affects plaintiff's substantial rights. See *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 250-51, 507 S.E.2d 56, 62-63 (1998). We therefore review the merits of plaintiff's appeal.

[2] Plaintiff argues that the trial court erred in granting summary judgment to defendants while discovery was outstanding. We agree.

“Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so.” *Conover v. Newton and Allman v. Newton and In re Annexation Ordinance*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979); *Kirkhart v. Saieed*, 107 N.C. App. 293, 297, 419 S.E.2d 580, 582 (1992); *Joyner v. Hospital*, 38 N.C. App. 720, 723, 248 S.E.2d 881, 882-83 (1978). “The general purpose of discovery is to assist in the disclosure prior to trial of any relevant unprivileged materials and information. Such exchanges help the parties narrow and sharpen the basic facts and issues prior to trial.” *Burge v. Integon General Ins. Co.*, 104 N.C. App. 628, 630, 410 S.E.2d 396, 398 (1991). Thus, motions for summary judgment generally should not be decided until all parties are prepared to present their contentions on all the issues raised. See *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 441, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

The evidence in the instant case tends to show that the trial court granted defendants' motion for summary judgment while plaintiff's requests for discovery were pending. There is no evidence to suggest that plaintiff was dilatory in his actions, or that the pending procedures could not have led to the discovery of relevant evidence. Quite simply, plaintiff did not have adequate time to develop his case before the trial court entertained defendants' motion for summary judgment. See *Burge*, 104 N.C. App. at 631, 410 S.E.2d at 398 (reversing summary judgment in favor of the defendant where discovery was outstanding at the time summary judgment was granted and where the plaintiff had not been dilatory). Therefore, at this early stage, summary judgment was improper and both parties should have the opportunity to further develop the facts surrounding plaintiff's allegations. Because the trial court erred in prematurely granting summary judgment to defendants, we reverse the order of the trial court and remand this case for further proceedings.

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[156 N.C. App. 687 (2003)]

Reversed and remanded.

Judges TYSON and LEVINSON concur.

STATE OF NORTH CAROLINA v. CARLOS DEVITO PAYNE

No. COA02-809

(Filed 18 March 2003)

1. Probation and Parole— probation conditions—conduct in jail—DOC rules—applicable to local jail

A defendant who was serving an active term in a local jail as a condition of probation was bound by Department of Correction rules and regulations even though the probation judgment which referred to DOC rules and regulations did not address conduct in a local jail.

2. Probation and Parole— probation conditions—active term in local jail—defendant not told of state rules—similar local rule

There was sufficient evidence for the trial court to conclude that a defendant who threatened jail officers violated a probation condition requiring obedience to State Department of Correction rules, even though defendant was in a local jail and had not been told of those rules, where the local jail and DOC had similar prohibitions on threatening and abusive language toward staff members.

3. Appeal and Error— preservation of issues—constitutional challenge to probation condition—not raised below—no assignment of error

A constitutional challenge to a probation condition was not considered on appeal because it was not raised at trial and was not based on an assignment of error.

Appeal by defendant from judgment dated 29 November 2001 by Judge Michael E. Helms in Buncombe County Superior Court. Heard in the Court of Appeals 4 March 2003.

STATE v. PAYNE

[156 N.C. App. 687 (2003)]

Attorney General Roy Cooper, by Assistant Attorney General J. Bruce McKinney, for the State.

Jon W. Myers for defendant appellant.

BRYANT, Judge.

Carlos Devito Payne (defendant) appeals from a judgment and commitment upon revocation of probation dated 29 November 2001.

Defendant pled guilty on 25 May 2001 to felony death by motor vehicle and felonious hit and run. The trial court consolidated the convictions and imposed a minimum prison term of sixteen months and a maximum term of twenty months. The trial court suspended the sentence and placed defendant on supervised probation for thirty-six months. As a special condition of probation, the trial court ordered defendant to serve an active term of ninety days in the Buncombe County Detention Facility. The judgment also provided as a regular condition of probation that, "[i]f the defendant is to serve an active sentence as a condition of special probation, the defendant shall also . . . [o]bey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned."

On 3 August 2001, a violation report was filed alleging defendant had violated the regular condition of his probation while serving the active 90-day term in the Buncombe County Detention Facility. Following a hearing, the trial court activated defendant's sentence after finding defendant had willfully and without lawful excuse committed the alleged violations. The evidence presented at the hearing that is pertinent to this appeal is set out below.

The issues are whether: (I) "the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned" applied to defendant; (II) defendant's conduct was willful; and (III) defendant may argue on appeal that N.C. Gen. Stat. §§ 15A-1343(b) and 15A-1351 are unconstitutional.

I

[1] Defendant argues that since he was not housed in a Department of Correction (DOC) facility, the rules and regulations of the DOC did not apply to him. Stated another way, defendant contends the trial court's judgment placing him on probation fails to address conduct in a local jail.

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[156 N.C. App. 687 (2003)]

The regular condition of probation quoted above is based upon the provisions of N.C. Gen. Stat. §§ 15A-1351(a) and 15A-1343(b)(11). Specifically, section 15A-1351(a) provides:

Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility.

N.C.G.S. § 15A-1351(a) (2001) (emphasis added). Consistent with this section, the statute listing regular conditions of probation provides, in part:

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned

N.C.G.S. § 15A-1343(b)(11) (2001) (emphasis added). These statutes clearly show that a defendant who is serving an active sentence in a local confinement facility, such as a county jail, is also subject to the rules and regulations of the DOC even if the defendant is not housed in a DOC facility. Consequently, defendant was bound by the DOC rules and regulations.

II

[2] Defendant also claims he was not informed of DOC rules and regulations while housed in the Buncombe County Detention Facility, and therefore, his DOC rule violation was not willful.

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[156 N.C. App. 687 (2003)]

To revoke probation, the evidence must only “be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended.” *State v. Robinson*, 248 N.C. 282, 285-86, 103 S.E.2d 376, 379 (1958). In this case, the State presented evidence tending to show that when defendant became an inmate of the Buncombe County Detention Facility, he was shown a videotape advising him of the facility’s rules and regulations and provided a copy of these rules and regulations in their entirety. Part of the rules and regulations is a prohibition against threatening or using abusive language toward staff members of the detention facility. The DOC rules and regulations contain a similar prohibition against the usage of threatening or abusive language.

On 26 June 2001, defendant told an officer of the Buncombe County Detention Facility who had reprimanded him about the misuse of an emergency call box that “he had killed a man and only received 90 days, and it would be easy to do it again.” Defendant also told the officer, “I’ll see you on the street and take care of your problem in a hurry.” One month later, defendant screamed at another officer at the facility, “You don’t tell me what to do If you come in here and put your f[-----] hands on me, I’ll f[-----] kill you.” We conclude this evidence is sufficient to support the trial court’s finding that defendant willfully and without lawful excuse violated the condition of probation. Accordingly, we find no abuse of discretion.

III

[3] Finally, defendant contends that sections 15A-1343(b) and 15A-1351 are unconstitutional because they violate due process and equal protection. This contention is not based on an assignment of error in the record and therefore is not properly presented. *See* N.C.R. App. P. 10(a) (“the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal”). Moreover, defendant failed to challenge the constitutionality of these statutes in the trial court. As constitutional issues not raised in the trial court will not be considered for the first time on appeal, *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), we do not address this issue.

No error.

Judges HUNTER and ELMORE concur.

FRANCK v. P'NG

[156 N.C. App. 691 (2003)]

CATHY SCHULKES FRANCK, ADMINISTRATRIX OF THE ESTATE OF JOHN E. FRANCK, JR.,
PLAINTIFF V. CHOON HEONG P'NG, M.D., HOUSE CALL PHYSICIANS, P.A., KATHY
W. COOK, RNCS, GNP, INTEGRATED HEALTH SERVICES, INC., IHS ACQUISITION NO. 119, INC., d/B/A IHS OF DURHAM, DEFENDANTS

No. COA02-405

(Filed 18 March 2003)

Appeal and Error— appealability—arbitration procedure—interlocutory

An order was interlocutory and not immediately appealable where the court set aside an arbitration consent order because plaintiff could not afford her portion of the costs for three out-of-state arbitrators, the court gave defendants the option to use one arbitrator, with plaintiff being bound by defendant's election, and the court did not certify its order for immediate review. The order did not deny defendants the right to arbitrate, and defendants did not argue or cite authority for the proposition that an order prescribing the way in which an arbitration shall be conducted affects a substantial right.

Appeal by defendants, Integrated Health Services, Inc., and Acquisition No. 119, Inc., d/b/a IHS of Durham, from order entered 7 December 2001 by Judge Anthony Brannon in Granville County Superior Court. Heard in the Court of Appeals 10 February 2003.

Smith Debnam Narron Wyche Story & Myers, L.L.P., by John W. Narron and Jeffrey R. Ellinger, for plaintiff-appellee.

Yates, McLamb & Weyher, L.L.P., by Michael C. Hurley and Monica Langdon Lee, for defendant-appellants.

MARTIN, Judge.

Plaintiff filed this action for wrongful death alleging the negligence of defendants proximately caused the death of her husband, John E. Franck, Jr. Defendants Integrated Health Services, Inc., and Acquisition No. 119, Inc., d/b/a IHS of Durham (IHS) answered and subsequently filed a Motion for Stay and Order Referring Action to Arbitration on grounds that the parties had executed a binding arbitration agreement. Plaintiff consented to arbitration of the dispute, and on 28 February 2001, the trial court entered a Consent Order severing plaintiff's claims against IHS from her claims against the

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[156 N.C. App. 691 (2003)]

remaining defendants and referring the action to binding arbitration before the American Health Lawyers Association (“AHLA”), “assuming that the rules, procedures and selection of arbitrators for arbitration by this Association are consistent with Due Process.”

As a result of the Consent Order, the parties initiated the arbitration process, which included the selection of arbitrators from a list of seven candidates provided by AHLA, none of whom resided in North Carolina. Despite plaintiff’s request for the option of selecting arbitrators from within the state, AHLA would not provide that option. The parties then selected three arbitrators from the list of seven to preside over the dispute. AHLA informed the parties they would each be required to place in escrow 50% of all expenses to cover the arbitration, including fees and expenses for the three arbitrators. The parties were subsequently informed by letter that arbitrator fees and expenses were estimated to cost approximately \$49,000, and that each party would be required to place \$24,500 in escrow. The letter also stated an additional advance could be requested “[s]hould it become apparent that this advance will not cover the full fees and expenses.”

In reaction to the letter, plaintiff filed a Motion to Set Aside Consent Order for Arbitration alleging that the amount the parties were required to pay for arbitration was so excessive as to deny her due process, that plaintiff did not have sufficient funds to place in escrow for the arbitration, and that if required to arbitrate, plaintiff would lose her “day in court.” Upon hearing the motion, the trial court entered an order finding “[p]laintiff’s financial inability to afford her portion of the costs of the out-of-state three-member arbitration panel denies her access to the arbitral forum and is not consistent with her due process rights to have her claims heard against [defendants].” Accordingly, the trial court set aside the Consent Order and ordered that defendants IHS have “the option to arbitrate with one arbitrator pursuant to the rules and procedures of the American Health Lawyers Association, or to exercise its right to a jury trial in the N.C. Superior Court.” The order further provided that plaintiff would be bound by defendants’ election. Defendants IHS appeal.

Interlocutory orders are those made while an action is pending and which do not dispose of the case but require further action in order to finally determine the entire controversy. *Boynton v. ESC Med. Sys.*, 152 N.C. App. 103, 566 S.E.2d 730 (2002). There are two exceptions to this rule where immediate review is available: (1)

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[156 N.C. App. 693 (2003)]

where “the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay;” or (2) where the order affects a substantial right which would be lost absent immediate review. *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999).

Defendants assert that the order at issue, though interlocutory, is immediately appealable because it deprives them of their right to arbitrate their dispute and thus affects a substantial right. In support thereof, defendants note the prior holdings of this Court that an order denying a demand for arbitration affects a substantial right such that it is immediately appealable. *See, e.g., Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 566 S.E.2d 130 (2002). However, the order from which defendants appeal did not deny defendants the right to arbitrate; the order specifically provides that defendants be given the right to choose arbitration, and that plaintiff be bound by defendants’ choice. Defendants have failed to cite authority for the proposition that an order prescribing the way in which the arbitration shall be conducted, as in this case, affects a substantial right, nor have they argued on appeal how this specific action affects their right to arbitration or any other substantial right. Accordingly, we decline to hold that the trial court’s order affects a substantial right. As the trial court did not certify its order for immediate review, defendants’ appeal must be dismissed as interlocutory.

Appeal dismissed.

Chief Judge EAGLES and Judge GEER concur.

STATE OF NORTH CAROLINA v. ANTHONY LEON MOORE

No. COA02-494

(Filed 18 March 2003)

Appeal and Error— appealability—no contest plea—issues unrelated to sentence disposition or duration

A defendant’s appeal from his no contest plea under N.C.G.S. § 15A-1444(a2) in a habitual driving while impaired case is dismissed, because defendant’s two assignments of error do not raise appealable issues related to sentence disposition or duration.

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[156 N.C. App. 693 (2003)]

Appeal by defendant from judgment entered 5 December 2001 by Judge Charles H. Henry in Superior Court, Carteret County. Heard in the Court of Appeals 12 February 2003.

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

McCotter, McAfee & Ashton, P.L.L.C., by Rudolph A. Ashton, III and Kirby H. Smith, III, for the defendant-appellant.

WYNN, Judge.

Anthony Leon Moore, entered a plea of “no contest” to habitual driving while impaired and habitual felon status, and was sentenced in the mitigated range to a term of not less than 90 months and not more than 117 months. He seeks to appeal from his “no contest” plea under N.C. Gen. Stat. § 15A-1444(a2) (2002) which states:

A defendant who has entered a plea of . . . no contest . . . is entitled to appeal as a matter of right the issue of whether the sentence imposed: . . . (2) Contains a type of sentence disposition that is not authorized [by law; or] (3) Contains a term of imprisonment that is for a duration not authorized [by law].

. . . .

(e) Except as provided in subsection . . . (a2) of this section . . . and except when a motion to withdraw a plea . . . of no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea . . . in superior court, but he may petition the appellate division for review by writ of certiorari.

We, however, find that Moore’s two assignments of error do not raise appealable issues related to sentence disposition or duration. *See* N.C. Gen. Stat. § 15A-1444(a2). Accordingly, we must dismiss this appeal.

By his first assignment of error, Moore contends the trial court erred in granting the State a continuance. On 30 May 2001, Moore was arrested, pursuant to a warrant, for failing to appear at trial. On that day, Moore informed the clerk that he wished to plead guilty. On 31 May 2001, the State requested a continuance to seek a habitual DWI indictment. Moore contends that if the continuance had not been

PROGRESSIVE LIGHTING, INC. v. HISTORIC DESIGNS, INC.

[156 N.C. App. 695 (2003)]

granted, he would have received a less severe sentence upon pleading guilty. However, this assignment of error relates to the trial court's decision to grant a continuance, and does not relate to the sentencing issues set forth in N.C. Gen. Stat. § 15-1444(a2). Therefore, Moore does not have an appeal by right; furthermore, we decline to grant Moore's petition for a writ of certiorari to review this assignment of error.

By his second assignment of error, Moore alleges that the trial court committed plain error in allowing the State to prosecute him for habitual DWI, where the State used the same file number as it had previously used for the underlying DWI charge that was voluntarily dismissed by the State. This assignment of error raises an unfounded issue about the clarity of the charging instrument and does not relate to the sentencing issues set forth in N.C. Gen. Stat. § 15-1444(a2). Therefore, Moore does not have an appeal by right; furthermore, we decline to grant Moore's petition for a writ of certiorari to review this assignment of error.

Dismissed.

Judges TIMMONS-GOODSON and LEVINSON concur.

PROGRESSIVE LIGHTING, INC., PLAINTIFF v. HISTORIC DESIGNS, INC., DEFENDANT

No. COA02-705

(Filed 18 March 2003)

Appeal and Error— appeal from superior court clerk—to trial court before Court of Appeals

An appeal from a default judgment by a superior court clerk directly to the Court of Appeals was dismissed; appeal from an order or judgment by the clerk of superior court in a civil action is to the appropriate division of the trial court.

Appeal by defendant from judgment entered 12 March 2002 by the Clerk of Superior Court of Cabarrus County. Heard in the Court of Appeals 17 February 2003.

PROGRESSIVE LIGHTING, INC. v. HISTORIC DESIGNS, INC.

[156 N.C. App. 695 (2003)]

Helms, Henderson & Associates, by Christian R. Troy, for plaintiff-appellee.

Ferguson and Scarbrough, P.A., by James E. Scarbrough, for defendant-appellant.

MARTIN, Judge.

Plaintiff filed a complaint seeking to recover a sum certain plus interest due on a statement of account for goods sold to defendant. Defendant, a North Carolina corporation, filed an answer, appearing *pro se* through its corporate secretary, who is not an attorney. Plaintiff moved to strike the answer as being in violation of G.S. § 84-5 and to enter a default judgment against defendant. On 23 July 2001, the district court granted the motion to strike the defendant's answer, but denied the motion for default judgment; defendant was given thirty days within which "to file an answer through an attorney." Upon defendant's failure to file an answer, default judgment in favor of plaintiff was entered by the clerk of superior court on 12 March 2002. Defendant gave notice of appeal to this Court from the default judgment entered by the clerk.

Assigning error both to the entry of the order striking its answer and to the entry of default judgment, defendant seeks to present the issue of whether, in North Carolina, a corporation may represent itself *pro se* through its corporate officers.¹ However, defendant has no right of direct appeal to this Court from the default judgment entered by the clerk of superior court. Appeal from an order or judgment of the clerk of superior court entered in a civil action is to the appropriate division of the trial court. N.C. Gen. Stat. § 1-301.1. Therefore, this Court has no jurisdiction and the appeal must be dismissed.

Appeal dismissed.

Chief Judge EAGLES and Judge GEER concur.

1. The issue has been answered adversely to defendant in *LexisNexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 MARCH 2003

ABSHER v. THOMAS BUILT BUSES, INC. No. 02-458	Ind. Comm. (I.C. 870745)	Affirmed in part, reversed and remanded in part
BENTON v. SUTHERLAND PRECISION FRAMING No. 02-548	Ind. Comm. (I.C. 025841)	Affirmed
BRIDGERS v. BRIDGERS No. 02-726	Robeson (01CVS4360)	Affirmed
BUILDER MART OF AM., INC. v. FIRST UNION CORP. No. 02-446	Stanly (99CVS913)	Affirmed
CENTURY 21 HERITAGE, INC. v. LEACH No. 02-77	Johnston (99CVS226)	Affirmed
HARRISON v. BEAR GRASS LOGGING CORP. No. 02-306	Ind. Comm. (I.C. 977819)	Affirmed
HINCHMAN v. HINCHMAN No. 02-551	Pitt (01CVD198)	Affirmed
IN RE CARTER No. 02-621	New Hanover (99J153) (99J154)	Affirmed
IN RE FITZGERALD No. 02-828	Guilford (00J902)	Affirmed
IN RE GARNER No. 02-645	Johnston (01J38) (01J39)	Affirmed
McKINNON v. L&S HOLDING CO. No. 02-681	Ind. Comm. (I.C. 901411)	Affirmed
REIMANN v. RESEARCH TRIANGLE INST. No. 02-1061	Wake (01CVS2791)	Appeal dismissed
RUFTY v. RUFTY No. 02-564	Rowan (97CVD2095)	Vacated and remanded
STATE v. BARNES No. 02-952	Harnett (99CRS15693)	Affirmed

STATE v. BATTEN No. 02-984	Guilford (99CRS111144)	No error
STATE v. BROOKS No. 02-1016	Northampton (00CRS694) (00CRS695)	No error
STATE v. COVINGTON No. 02-121	Durham (00CRS65482) (00CRS65483) (00CRS65484) (00CRS65485) (01CRS7945)	No error
STATE v. COX No. 02-565	Guilford (99CRS106802)	No error
STATE v. FORSYTHE No. 02-281	Greene (00CRS50559) (00CRS50560) (00CRS50561) (00CRS50562) (00CRS50563) (00CRS50564)	No error
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STATE v. GORDON No. 02-140	Gaston (98CRS5414) (98CRS5415) (01CRS1115)	No error
STATE v. JENKINS No. 02-1022	Mecklenburg (00CRS155086) (00CRS155088)	No error; remanded for correction of judgment
STATE v. JOHNSTON No. 02-926	Wilkes (01CRS51468) (01CRS51469) (01CRS51470) (01CRS51471)	No error
STATE v. LIPSCOMB No. 02-991	Gaston (99CRS35708) (99CRS35710)	Affirmed
STATE v. LITTLE No. 02-957	Guilford (00CRS80777)	No error
STATE v. MATTHEWS No. 02-892	Sampson (01CRS50992) (01CRS51864) (01CRS51865)	No error, remanded for correction of clerical error in the judgment

STATE v. MILLER No. 02-503	Henderson (98CRS3982) (98CRS24480) (98CRS24471) (98CRS24477) (98CRS24478) (98CRS24479) (98CRS24482) (98CRS24496)	Affirmed
STATE v. MULLEN No. 02-821	Pasquotank (00CRS1325)	No error
STATE v. NEWSOME No. 02-792	Alamance (01CRS8894) (01CRS8895)	No error
STATE v. PEAK No. 02-801	Henderson (01CRS2972) (01CRS2973) (01CRS3272) (01CRS3273)	No error
STATE v. PETERSON No. 02-1059	Wake (00CRS70934)	No error
STATE v. PYLE No. 02-495	Pitt (00CRS58227) (00CRS58228) (00CRS58229)	No error
STATE v. RUBEN No. 01-1598	Rowen (99CRS961) (99CRS962) (99CRS963)	No error
STATE v. SAMUELS No. 02-687	Forsyth (01CRS29190) (01CRS56835)	No error
STATE v. STANBACK No. 02-114	Randolph (97CRS16050) (98CRS8319)	No error
STATE v. SWEZEY No. 02-983	Clay (01CRS878) (01CRS50153)	Dismissed
STATE v. TOMLIN No. 02-864	Chowan (01CRS353)	No error
STATE v. WALKER No. 02-866	Wake (98CRS102406) (98CRS102414) (98CRS107818) (99CRS64575)	No error

STATE v. WINCHESTER
No. 02-1125

Union
(01CRS15130)
(01CRS54402)

No error

WARD v. HOWARD
No. 02-718

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Vacated and remanded

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New Hanover
(00CVD3554)

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ADMINISTRATIVE LAW

Dismissal of claim—standard of review—de novo—De novo review was the proper standard for the trial court to use when reviewing an administrative law judge's dismissal of a claim as untimely. **Woodburn v. N.C. State Univ.**, 549.

Exempt position—employment discrimination claim—no OAH jurisdiction—A university employee in an exempt position bringing a discrimination claim did not have a right to a hearing before the Office of Administrative Hearings. N.C.G.S. § 126-16 (employment discrimination) applies to all state employees without regard to position or status, but that statute neither addresses procedural avenues nor entitles a petitioner to choose a review scheme from which she is otherwise excluded by N.C.G.S. § 126-5. Exempt university employees have available review procedures which begin with university grievance committees and lead to review by a superior court judge and an appellate court. **Woodburn v. N.C. State Univ.**, 549.

ADVERSE POSSESSION

Directed verdict—continuous, actual, and open possession—hostility—privity and tacking—The trial court did not err by denying plaintiffs' motion for directed verdict under N.C.G.S. § 1A-1, Rule 50(a) on the issue of defendant's adverse possession because defendants presented sufficient evidence of continuous, actual and open possession, the requisite hostility, and privity and tacking to satisfy the statutory period of twenty years. **Lancaster v. Maple St. Homeowners Ass'n**, 429.

APPEAL AND ERROR

Appeal from superior court clerk—to trial court before Court of Appeals—An appeal from a default judgment by a superior court clerk directly to the Court of Appeals was dismissed; appeal from an order or judgment by the clerk of superior court in a civil action is to the appropriate division of the trial court. **Progressive Lighting, Inc. v. Historic Designs, Inc.**, 695.

Appealability—arbitration procedure—interlocutory—An order was interlocutory and not immediately appealable where the court set aside an arbitration consent order because plaintiff could not afford her portion of the costs for three out-of-state arbitrators, the court gave defendants the option to use one arbitrator, with plaintiff being bound by defendant's election, and the court did not certify its order for immediate review. The order did not deny defendants the right to arbitrate, and defendants did not argue or cite authority for the proposition that an order prescribing the way in which an arbitration shall be conducted affects a substantial right. **Franck v. P'ng**, 691.

Appealability—condemnation—title and area taken—An order determining that certain parcels of land do not constitute a unified tract for purposes of condemnation by the Department of Transportation was immediately appealable, even though it was not a final determination of all of the issues. **Department of Transp. v. Airlie Park, Inc.**, 63.

Appealability—denial of summary judgment—immunity—The denial of a summary judgment was interlocutory but appealable as affecting a substantial right where the grounds for the summary judgment involved immunity to a 42 U.S.C. § 1983 claim. The inclusion of an affidavit in the record on appeal and the

APPEAL AND ERROR—Continued

granting of a motion to amend an answer did not affect a substantial right. **Campbell v. Anderson, 371.**

Appealability—failure to appeal from final order—adjudication and temporary disposition—Respondent mother's appeal from an adjudication and temporary dispositional order adjudicating her children as neglected is dismissed because respondent failed to appeal from a final order as required by N.C.G.S. § 7B-1001. **In re Laney, 639.**

Appealability—failure to follow appellate rules—failure to timely enter into written contract for transcript—The trial court did not err by denying plaintiff's motion to dismiss based on defendants' failure to follow the appellate rules including the failure to enter into a written contract for the production of the transcript within fourteen days of the filing of defendant's notice of appeal because defendant substantially complied with the appellate rules when he requested the cassette tapes contemporaneously with his notice of appeal and the tapes were not made available by the clerk's office until 90 days later. **Spencer v. Spencer, 1.**

Appealability—interlocutory order—denial of motion to intervene—Appellant's appeal from the denial of his motion to intervene in a class action against major manufacturers of various vitamin products based upon alleged price fixing and market allocation conspiracy is dismissed as an appeal from an interlocutory order. **Nicholson v. F. Hoffmann-LaRoche, Ltd., 206.**

Appealability—interlocutory order—denial of summary judgment—substantial right—sovereign immunity—Although defendants' appeal from the partial denial of summary judgment is an appeal from an interlocutory order, appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review. **Tabor v. County of Orange, 88.**

Appealability—interlocutory order—substantial right—inconsistent verdicts—Although an appeal in a fraud, misrepresentation, and unfair and deceptive trade practices case from the grant of summary judgment in favor of two of the five defendants is an appeal from an interlocutory order, this appeal affects a substantial right based on the possibility of inconsistent verdicts. **Ussery v. Taylor, 684.**

Appealability—issue already decided—Although defendant contends the trial court committed plain error by instructing the jury on the offense of first-degree statutory sexual offense and defining a sexual act as either *fellatio* or anal intercourse, this assignment of error is overruled because another panel of the Court of Appeals has decided this issue against defendant. **State v. Shepherd, 69.**

Appealability—no contest plea—issues unrelated to sentence disposition or duration—A defendant's appeal from his no contest plea under N.C.G.S. § 15A-1444(a2) in a habitual driving while impaired case is dismissed because the assignments of error do not raise appealable issues related to sentence disposition or duration. **State v. Moore, 693.**

Appealability—partial summary judgment—deeds voided—substantial right—A partial summary judgment voiding deeds was immediately appealable;

APPEAL AND ERROR—Continued

denying appellate review would strip defendants of their property without any redress except another lawsuit. **Estate of Graham v. Morrison, 154.**

Briefs—motion to strike appendix—A motion to strike an appendix to a brief was granted by the Court of Appeals where the appendix contained various State Personnel Commission and administrative law judge opinions that had not been agreed upon by parties as part of the record, had not been submitted pursuant to a motion to amend the record, and were not necessary to the resolution of the issues in the case. **Woodburn v. N.C. State Univ., 549.**

Denial of motion for new trial—errors of law alleged—review of underlying judgment—The Court of Appeals reviewed de novo the trial court's denial of plaintiffs' motion for a new trial under N.C.G.S. § 1A-1, Rule 59(a)(7) where the trial had been without a jury and plaintiffs alleged errors of law. **Young v. Lica, 301.**

Denial of 12(b)(6) motion—appeal after final judgment—The denial of a motion to dismiss for failure to state a claim is not reviewable upon appeal from a final judgment on the merits. **Shadow Grp., LLC v. Heather Hills Home Owners Ass'n, 197.**

Extension of time to file record on appeal—failure to object—death of trial judge—The Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 to hear the appeal in an adverse possession case, even though the trial court did not have authority to extend the time for plaintiffs to file the record on appeal by forty-five days, because defendants did not contest the extension, plaintiff complied with the extension, and there was an intervening death of the trial judge. **Lancaster v. Maple St. Homeowners Ass'n, 429.**

Hearing after remand for new findings—new evidence not required—It is within a trial court's discretion to receive new evidence or to rely on previous evidence after a remand for additional findings, and the trial court in this case did not abuse its discretion by not requiring additional testimony after the case was remanded for a determination of whether a substantial change in circumstances affected the welfare of the child. **Hicks v. Alford, 384.**

Hearsay—no objection—appellate review waived—Respondents waived their right to assign error to the admission of hearsay at a permanency placement hearing by failing to object either to the initial question or to further questions. **In re Ivey, 398.**

Preservation of issues—constitutional challenge to probation condition—not raised below—no assignment of error—A constitutional challenge to a probation condition was not considered on appeal because it was not raised at trial and was not based on an assignment of error. **State v. Payne, 687.**

Preservation of issues—failure to argue in brief—Although petitioner assigned error to numerous findings, those assignments of error that are not set out in the brief are deemed abandoned, N.C. R. App. P. 28(b)(6). **N.C. Dep't of Health & Human Servs. v. Maxwell, 260.**

Preservation of issues—failure to assign as error—Although defendants contend the trial court erred in a personal injury case arising out of an automobile accident by permitting the jury to read the complete transcript of defendant

APPEAL AND ERROR—Continued

bus driver's deposition, this argument is dismissed because defendants failed to assign this issue as error in the record. **Floyd v. McGill, 29.**

Preservation of issues—failure to cite authority—Plaintiff did not cite legal authority and abandoned on appeal her argument that a lender's conduct amount to an unfair or deceptive practice (which allowed her granddaughter to engage in fraud) by not questioning the circumstances of a loan on plaintiff's house. **Melton v. Family First Mortgage Corp., 129.**

Preservation of issues—failure to object at trial—Defendant did not object at trial and did not preserve for appeal its contention that a ruling on plaintiff's motion for attorney's fees was an improper advisory opinion because that ruling came before a ruling on a plaintiff's prior motion for a new trial. **Phillips v. Brackett, 76.**

Preservation of issues—failure to object at trial—Although defendants contend the trial court erred in a personal injury case arising out of an automobile accident by allowing plaintiff wife's attorney to state that plaintiff incurred actual and projected medical expenses of approximately \$330,000, this issue was not preserved for appellate review because defendants failed to object to this statement at trial. **Floyd v. McGill, 29.**

Preservation of issues—issue not raised at trial—The issue of whether plaintiff was entitled to summary judgment on tort claims ex mero motu was not addressed on appeal because plaintiff had not presented the issue to the trial court. **Ellis v. White, 16.**

Preservation of issues—motion in limine—failure to object at trial—Although defendant contends the trial court erred in a kidnapping, rape, and robbery case by overruling defendant's pretrial motion in limine to exclude a witness's testimony regarding an October 1999 incident involving defendant and the witness's then-boyfriend, this assignment of error is dismissed where defendant failed to object when the testimony was offered at trial. **State v. Bethea, 167.**

Preservation of issues—motion in limine—failure to object at trial—Although defendant property owner contends the trial court erred in a condemnation proceeding by denying his motion in limine regarding his statement to a real estate appraiser concerning the value of the property, this assignment of error is overruled because defendant waived his right to appellate review by failing to object to this testimony at trial. **City of Wilson v. Hawley, 609.**

Record—duty of appellant to complete—It is the duty of the appellant to ensure that the record on appeal is complete, and this plaintiff's argument that the court's findings were not supported by the evidence was not considered where plaintiff did not include in the record a transcript of the evidence. **Hicks v. Alford, 384.**

ASSAULT

Box cutter—deadly weapon per se—The trial court's instruction that a box cutter is a deadly weapon was not plain error in an assault and robbery prosecution. The question of whether the weapon is deadly is one of law when the character of the weapon and its manner of use admit but one conclusion; here, the victim testified that defendant attempted to cut her face with the box cutter and

ASSAULT—Continued

that she covered her face with her hands, suffering cuts which required eight stitches. Moreover, the box cutter was found, admitted into evidence, and observed by the judge and jury. **State v. Adams, 318.**

Bystander wounded—intent to kill—There was no plain error in the trial court's failure to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury upon a bystander, and defendant was not deprived of the effective assistance of counsel in his attorney's failure to move for the dismissal. Intent follows the bullet. **State v. Ramirez, 249.**

Deadly weapon inflicting serious injury—broken wine bottle—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss two charges of assault with a deadly weapon inflicting serious injury because there was substantial evidence that defendant assaulted two victims with a broken wine bottle as a deadly weapon. **State v. Morgan, 693.**

Deadly weapon inflicting serious injury—jury instruction—broken wine bottle a deadly weapon as a matter of law—The trial court did not err in an assault with a deadly weapon inflicting serious injury case by instructing the jury that a broken wine bottle was a deadly weapon as a matter of law because in the circumstances of its use by defendant here, it was likely to produce death or great bodily harm. **State v. Morgan, 693.**

BAILMENT

Truck—fire loss—work completed at time of fire—In an action that arose from the destruction of vehicles in a fire at Hurley's (the third-party defendant's) residence, deposition testimony raised a genuine issue of fact as to whether a bailment existed in plaintiff's Freightliner truck at the time of the fire, and the trial court erred by granting summary judgment for Hurley on the insurance company's subrogated claim for the truck. **Barnes v. Erie Ins. Exch., 270.**

BANKRUPTCY

Collateral attack—sale of collateral—lack of notice—Plaintiff was entitled to collaterally attack a bankruptcy consent order through a state lawsuit claiming that defendant had sold collateral in which plaintiff had a superior security interest and appropriated the funds to its own use. Federal judgments must be accorded full faith and credit but may be collaterally attacked through allegations of extrinsic fraud. Depriving the unsuccessful party of an opportunity to present its case is extrinsic fraud; here, plaintiff asserted that it had no knowledge of defendant's agreement for the sale of the collateral and no opportunity to be heard prior to the entry of the bankruptcy consent order authorizing the sale. **First-Citizens Bank & Tr. Co. v. Four Oaks Bank & Tr. Co., 278.**

CHILD ABUSE AND NEGLECT

DSS and guardian ad litem reports—not admitted during hearing—considered by court—The trial court did not err when making a permanency planning determination by considering DSS and guardian ad litem reports which complied with local rules for submitting reports even though those reports were not admitted into evidence during the hearing. Respondents were given prior notice

CHILD ABUSE AND NEGLECT—Continued

of the reports and the opportunity to present evidence against them. **In re Ivey, 398.**

Felony child abuse—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of felony child abuse inflicting serious injury under N.C.G.S. § 14-318.4(a) where the child was in defendant's sole custody when her injuries were sustained. **State v. Liberato, 182.**

Homelessness and joblessness—not abuse or neglect per se—Neither homelessness nor joblessness will per se support a finding of child abuse or neglect. **In re Ivey, 398.**

Neglect—best interest of child—sufficiency of evidence—A trial court had sufficient evidence to consider in determining the best interests of respondent's children in a neglect case where the court considered information from respondent and DSS reports, and heard testimony from DSS representatives, a school official, and public safety officers. **In re Harton, 655.**

Nonsecure custody—no petition alleging neglect or abuse—The trial court erred by ordering DSS to assume nonsecure custody of an infant where three older siblings were being placed in a guardianship but DSS had not filed a petition alleging that the infant was an abused or neglected child. The narrow exception of N.C.G.S. § 7B-500(a) did not apply because there was no evidence or findings that the child would be injured or could not be taken into custody if DSS were required to first file a petition and obtain an order. **In re Ivey, 398.**

Permanency planning review order—findings—The trial court did not make sufficient findings in a permanency planning review order which continued custody of respondent's children with the Department of Social Services where the court merely stated a single evidentiary fact and adopted reports from DSS and the guardian ad litem rather than making findings under the specific criteria set out in N.C.G.S. § 7B-907(b). **In re Harton, 655.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Change of custody—findings—sufficient—The trial court's findings were sufficient to support a modification of child custody where the court made numerous findings of fact detailing plaintiff's pervasive and harmful interference with defendant's visitation rights, as well as violent actions by plaintiff and her family directed at defendant in the presence of the minor child. **Hicks v. Alford, 384.**

Child support—modification—payment of college education—equitable estoppel—Although a trial court in a child support case could not modify a prior court order pursuant to N.C.G.S. § 1A-1, Rule 60(a) and the language in finding of fact number ten is not unequivocal in that it merely suggests that the parties should equally divide their daughter's college expenses, defendant father is equitably estopped from refusing to honor the part of the agreement in which he agreed that he should divide the costs of his daughter's college education equally with plaintiff mother. **Spencer v. Spencer, 1.**

Custody—award to grandparents—DSS reasonable efforts—The trial court did not err in a child custody case by awarding custody to the children's mater-

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

nal grandparents even though respondent mother contends the order on review violated N.C.G.S. § 7B-507(a) in that it failed to make any finding of fact as to whether the Department of Social Services (DSS) should continue to make reasonable efforts to prevent or eliminate the need for placement of the juveniles, because that statute was inapplicable when the order did not place or continue the placement of the children with DSS. **In re Padgett, 644.**

Custody—award to grandparents in Alaska—due process—The trial court did not violate respondent mother's due process rights in a child custody case by awarding custody to the children's maternal grandparents, residents of Alaska, even though respondent mother contends the award constructively denies her visitation without notice or hearing, because respondent was given notice and an opportunity to be heard on the visitation issue. **In re Padgett, 644.**

Custody—neglect—The trial court did not err in a child custody case by adjudicating the children as neglected juveniles. **In re Padgett, 644.**

Custody—subject matter jurisdiction—A child custody order was vacated and remanded for a determination of whether the court has subject matter jurisdiction under any of the four bases of the UCCJEA in N.C.G.S. § 50A-201 where there was no direct evidence of the minor's place of birth, of how long the minor resided in North Carolina and West Virginia, or of whether the minor resided in North Carolina for the six months before this action; there were no court records from West Virginia; and the consent order and temporary custody orders relied on by plaintiff contained no home state determination. **Foley v. Foley, 409.**

Support—extraordinary expenses—ice skating—The trial court did not abuse its discretion in a child support case by classifying the ice skating expenses of the parties' minor child as extraordinary expenses under the child support guidelines. **Doan v. Doan, 570.**

Support—monthly ice skating expenses—The trial court abused its discretion in a child support case by finding that the parties' minor child had monthly ice skating expenses of \$752.00. **Doan v. Doan, 570.**

Visitation—best interests of child—safety of child—The trial court did not abuse its discretion in a child custody case by determining the best interest of the child is promoted by visitation with plaintiff father. **Pass v. Beck, 597.**

Visitation—child not a product of forcible rape—The trial court did not abuse its discretion in a child custody case by finding as fact that the minor child was not a product of forcible rape. **Pass v. Beck, 597.**

Visitation—delay determining best interests of child—The trial court did not abuse its discretion in a child custody case by delaying determination of the best interests of the child regarding visitation by plaintiff father pending a recommendation from a psychologist because there was minimal contact between the father and the minor. **Pass v. Beck, 597.**

CITIES AND TOWNS

Annexation ordinance—subdivision test—The trial court erred by concluding that the area to be annexed by respondent city's 2000 annexation ordinance

CITIES AND TOWNS—Continued

met the subdivision test of N.C.G.S. § 160A-48(c)(3). **U.S. Cold Storage, Inc. v. City of Lumberton, 327.**

CIVIL PROCEDURE

Involuntary dismissal—failure to prosecute—The trial court erred in a medical malpractice, personal injury, and punitive damages case by dismissing under N.C.G.S. § 1A-1, Rule 41(b) plaintiff's claims against defendants for failure to prosecute. **Spencer v. Albemarle Hosp., 675.**

Summary judgment—allegation as to what testimony would be—insufficient—The trial court did not err by granting summary judgment for defendant Family First (the lender) in an action arising from a loan on plaintiff's house where plaintiff contended that a retired banker would have testified that there should have been an in-person interview before execution of the mortgage. No affidavit or other form of sworn testimony was submitted to the trial court in which the witness testified that industry standards had been violated. **Melton v. Family First Mortgage Corp., 129.**

Summary judgment—supplemental discovery—letter by plaintiff's attorney—unavailable witness—residual hearsay exception—officer's affidavit—The trial court did not err in a pedestrian's negligence action arising out of a hit and run accident by granting summary judgment in favor of unnamed defendant uninsured motorist carriers based on plaintiffs' failure to show they can offer competent evidence of how the accident occurred because supplemental discovery in the form of a letter by plaintiffs' attorney containing an unsigned summary of a report by a private investigator as to what the investigator was told by an alleged eyewitness was hearsay and not the type of evidence that may be relied on by the trial court in deciding a motion for summary judgment; the private investigator's statement was not admissible under the residual exceptions to the hearsay rule; and accident reconstruction statements in an officer's affidavit could not be considered since the officer was never tendered as an expert. **Strickland v. Doe, 292.**

CIVIL RIGHTS

42 USC 1983—underlying constitutional right not clearly stated—officer within his authority—Summary judgment was correctly granted for a DMV inspector in his individual capacity on a 42 U.S.C. § 1983 claim on the ground of qualified immunity where the inspector became involved in a dispute between a salvage dealer and plaintiff over a pick-up truck and plaintiff was arrested for obstructing the inspector. **Ellis v. White, 16.**

CLASS ACTIONS

Foreign judgment—authentication—A Kentucky class action was properly authenticated through the affidavit of an attorney. **Freeman v. Pacific Life Ins. Co., 583.**

Full faith and credit—every member not listed—judgment not ambiguous—A Kentucky judgment in a class action suit against an insurance company was not inherently ambiguous, and was entitled to full faith and credit, where the

CLASS ACTIONS—Continued

order did not list every member of the class but set out the types of insurance policies affected and certified as part of the class. **Freeman v. Pacific Life Ins. Co., 583.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Custodianship of minors' trust accounts—different claims—different issues—The trial court erred in an action for fraud, conversion, unfair and deceptive trade practices, and misappropriation regarding defendant father's custodianship of plaintiff children's trust accounts created in Florida by granting summary judgment in favor of defendant father based on either res judicata or collateral estoppel. **Beall v. Beall, 542.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Possession of crack cocaine—officer's statement—interrogation—defendant's response—absence of Miranda warnings—harmless error—An officer's post-arrest statement to defendant that defendant "needed to let me know right now before we went past the jail door if he had any kind of illegal substance or weapons on him, that it was an automatic felony no matter what it was" constituted interrogation within the meaning of the Miranda decision because the officer knew or should have known that his statement was reasonably likely to evoke an incriminating response, and defendant's response that he had crack cocaine in his pocket was improperly admitted in defendant's trial because the officer failed to give defendant the Miranda warnings prior to the custodial interrogation. However, the admission of defendant's statement was harmless error because (1) the illegal substance was found in the pocket of the coat worn by defendant, and there was no evidence to suggest that defendant did not own the coat or that the coat had only recently come into his possession; and (2) there is no reasonable possibility that the exclusion of defendant's statement would have resulted in a different verdict. **State v. Phelps, 119.**

Statement not coerced—confession and cooperation distinguished—threat to girlfriend insufficient—A cocaine defendant's statement to officers was not coerced where defendant contended that the statement was made from fear that his girlfriend would be charged, but defendant was told that his girlfriend could be arrested, not that she would be, and defendant was offered the opportunity to assist police in their investigation of defendant's supplier to avoid his immediate arrest. Defendant was not induced to confess but to cooperate, and officers kept their promise and did not immediately arrest defendant even though he did not fully cooperate with them. **State v. Carmon, 235.**

Voluntariness—coercion—failure to give Miranda warnings—exclusionary rule—motion to suppress cocaine—The trial court did not err in a felony possession of cocaine case by denying defendant's motion to suppress cocaine obtained as a result of an alleged coerced statement without the benefit of a Miranda warning when an officer had a friendly conversation with defendant during the ride to jail explaining to defendant that defendant needed to let the officer know if defendant had any illegal substances or weapons on him and defendant told the officer he had crack cocaine in his coat pocket because there was no evidence of coercion by the officer, and the cocaine would have been admissible under the inevitable discovery doctrine. **State v. Phelps, 119.**

CONFLICT OF LAWS

Custodianship of trust accounts—substantive laws of Florida—procedural laws of North Carolina—Although Florida substantive law applies in an action for fraud, conversion, unfair and deceptive trade practices, and misappropriation regarding defendant father's custodianship of plaintiff children's trust accounts based on the facts that the trusts were made in Florida under the Uniform Transfer to Minors Act and the acts allegedly took place in Florida, the remedial or procedural laws of North Carolina apply because the claim was brought in this state which is defendant's current residence. **Beall v. Beall**, 542.

CONSTITUTIONAL LAW

Confrontation—letters from accomplice—no violation—Defendant's rights under the Confrontation Clause were not violated by the admission of letters from an accomplice who refused to testify; moreover, admission of the letters was not prejudicial given the substantial evidence of defendant's involvement in the crimes. **State v. Carter**, 446.

Confrontation—unavailable witness—The admission of pretrial statements to police by a witness who later married defendant and asserted marital privilege at trial did not violate defendant's constitutional rights to due process and confrontation. **State v. Carter**, 446.

Confrontation—witness pled Fifth Amendment—The trial court did not violate defendant's constitutional right to confrontation in a first-degree murder case by allowing a witness for the State to plead the Fifth Amendment during cross-examination regarding the witness's alleged murder of another victim in an unrelated matter. **State v. Hatcher**, 391.

Double jeopardy—assault and attempted murder—Double jeopardy was not violated by consecutive sentences for assault and attempted murder. Each offense requires proof of at least one element that the other does not. **State v. Ramirez**, 249.

Effective assistance of counsel—denial of discovery—A larceny by employee defendant was not denied effective assistance of counsel by the court's denial of discovery requests where defendant did not argue that time constraints impacted her defense and did not demonstrate how the denial of the records in issue would render any attorney unable to provide assistance. **State v. Morris**, 335.

Effective assistance of counsel—failure to object—evidence of guilt overwhelming—A robbery and assault defendant did not receive inadequate assistance of counsel where his attorney did not object to certain hearsay statements, but there was such overwhelming evidence of guilt that the admission of the statements did not prejudice defendant. **State v. Adams**, 318.

Effective assistance of counsel—failure to object and move for mistrial—An attempted murder and assault defendant was not denied effective assistance of counsel where his attorney did not object and move for a mistrial after the jury saw references to dismissed offenses on defendant's fingerprint card. The court gave a curative instruction and there was ample evidence to support the conviction. **State v. Ramirez**, 249.

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—jury selection—defense tactics—A robbery and assault defendant did not receive inadequate representation during jury selection where he contended that his counsel neglected to develop certain grounds to challenge jurors, but the State and defendant asked questions concerning those grounds, jurors were excused and there was no basis for challenging the remaining jurors for cause. **State v. Adams, 318.**

Effective assistance of counsel—no objection to instruction or sentencing finding—A robbery and assault defendant did not receive inadequate assistance of counsel where defense counsel did not object to the court instructing the jury that a box cutter is a deadly weapon or did not except to the court's finding during sentencing that all of the elements of the present offense were included in prior convictions. The box cutter instruction was proper and defendant had no reason to object, and defendant's prior record level would not have changed had the alleged sentencing error not occurred. **State v. Adams, 318.**

Effective assistance of counsel—not calling witness—not objecting to argument—A robbery and assault defendant did not receive inadequate representation where defense counsel did not call a particular witness and did not object to the prosecutor's argument that the evidence was controverted. "Uncontroverted" was a fair characterization of the evidence, and defendant did not show that calling the witness would have affected the verdict. **State v. Adams, 318.**

Effective assistance of counsel—prior conflicts of interest—no investigation—A robbery and assault defendant did not receive inadequate representation where he alleged that his counsel had not investigated defendant's prior convictions for conflicts of interest in her present representation, of defendant, but there was no suggestion as to what the investigation would have revealed or how this would have affected defendant's prior record level or his sentencing. **State v. Adams, 318.**

Equal protection—differential treatment among schools—The trial court did not err by dismissing plaintiff teachers' claims under the Equal Protection Clause of the United States and North Carolina Constitutions alleging that defendant school board failed to adopt a uniform policy applicable to all teachers regarding the restructuring of the school calendar to satisfy statutory requirements for the minimum hours of school instruction for the 1999-2000 school year. **Lea v. Grier, 503.**

Full faith and credit—class action—notice—A Kentucky judgment was entitled to full faith and credit where the Kentucky court found that the defendant in a class action suit had provided the required notice, even though the plaintiff in this North Carolina action allegedly did not receive actual notice. **Freeman v. Pacific Life Ins. Co., 583.**

North Carolina—law of the land clause—plaintiff not surprised—The Industrial Commission did not violate the law of the land clause of the North Carolina Constitution in reducing a Tort Claims award for a doctor who had been injured as a college wrestler where it could not be said that new or surprising evidence was sprung upon plaintiff. **Hummel v. University of N.C., 108.**

North Carolina—separation of powers—appointment of counsel for indigent criminal defendants—The Indigent Defense Services Act, which created

CONSTITUTIONAL LAW—Continued

the Office of Indigent Defense Services (IDS) and granted IDS the power to appoint and compensate attorneys who represent indigent criminal defendants, does not violate the separation of powers provision of the North Carolina Constitution, N.C. Const. art. I, § 6. **Ivarsson v. Office of Indigent Def. Servs.**, 628.

CONSTRUCTION CLAIMS

Synthetic stucco—contributory negligence—The trial court did not err by granting summary judgment in favor of defendants dismissing with prejudice plaintiffs' claims for negligence, breach of implied warranty of merchantability, negligent misrepresentation, gross negligence, unfair and deceptive practices, negligence per se, and breach of implied warranty of fitness for a particular purpose arising out of the purchase of a townhouse finished with synthetic stucco based on plaintiffs' contributory negligence. **Swain v. Preston Falls E., L.L.C.**, 357.

CONTEMPT

Appeal to superior court—dismissed with prejudice—incarceration out of state—The superior court erred by dismissing with prejudice defendant's appeal from a district court finding of contempt for violation of a domestic violence protective order where defendant was incarcerated in Tennessee and did not appear for trial. **Hodges v. Hodges**, 404.

Violation of domestic violence protective order—criminal—An action holding defendant in contempt for violating a domestic violence protective order was criminal rather than civil because defendant was being punished for a violation of a court order. **Hodges v. Hodges**, 404.

CONTRACTS

Breach—interpretation of related agreements—12(b)(6) motion—Whether to treat related agreements as one contract should not have been considered under a motion to dismiss for failure to state a claim. **IWTMM, Inc. v. Forest Hills Rest Home**, 556.

Requirements—description of purchasing terms—consideration—Both the consideration and the description of purchasing terms were sufficient in a requirements contract to supply pharmaceuticals to a rest home. **IWTMM, Inc. v. Forest Hills Rest Home**, 556.

CORPORATIONS

Foreign—failure to obtain certificate to transact business—action dismissed—The trial court acted within its discretion by dismissing rather than continuing an action for monies owed where plaintiff did not have a certificate to transact business in North Carolina. The applicable statute, N.C.G.S. § 55-15-02, simply indicates that an action cannot be maintained unless a certificate is obtained prior to trial and does not specify the procedure in the event of failure to obtain a certificate of authority. **Harold Lang Jewelers, Inc. v. Johnson**, 187.

CORPORATIONS—Continued

Foreign—transacting business in North Carolina—The trial court's conclusion that plaintiff was transacting business in North Carolina (without a certificate of authority) was supported by the findings and the evidence where plaintiff's business in North Carolina was regular, systematic, and extensive; plaintiff had been coming to North Carolina since about 1970 to sell and consign merchandise to jewelry stores; plaintiff routinely came to North Carolina as frequently as twice every four weeks during some parts of the year, each time bringing merchandise to deliver; and the sales were finalized in North Carolina. **Harold Lang Jewelers, Inc. v. Johnson, 187.**

COSTS

Attorney fees—child support case—The trial court did not err in a child support case by awarding attorney fees under N.C.G.S. § 50-13.6 to defendant wife based on its finding that defendant did not have sufficient means to defray the cost of the action and that plaintiff husband's action was frivolous. **Doan v. Doan, 570.**

Attorney fees—findings—time and labor—The trial court's findings concerning the time and labor expended by plaintiff's counsel in a personal injury action were sufficient where the findings reflected the tasks performed and the hours spent. The court was not obligated to break down the number of hours allocated to each activity. **Phillips v. Brackett, 76.**

Attorney fees—personal injury action—findings—Any error in the trial court's reliance on affidavits concerning defendant-insurer's claims practices when awarding attorney fees for plaintiff was harmless because the findings on the remaining factors from *Washington v. Horton* were satisfactory. **Phillips v. Brackett, 76.**

Attorney fees—personal injury action—judgment amount controls—The trial court did not err by awarding attorney fees in a personal injury action where the plaintiff initially demanded \$38,750 in compensation, but the judgment was for \$3,829 in damages and was thus within the range that invokes N.C.G.S. § 6-21.1. **Phillips v. Brackett, 76.**

Attorney fees—personal injury action—lack of settlement offers—The trial court did not abuse its discretion in a personal injury action by awarding plaintiff attorney's fees based in part on lack of settlement offers, even though plaintiff had not provided documentation for her lost wage claim, because there were no offers for the claims for which defendant received timely support. **Phillips v. Brackett, 76.**

Attorney fees—will caveat—The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by denying propounder's motion for attorney fees and costs. **In re Will of McDonald, 220.**

CRIMINAL LAW

Arraignment—dismissal with leave—procedural calendaring device—The trial court did not commit plain error in a possession of drug paraphernalia, possession with intent to sell and deliver cocaine, trafficking cocaine by possession,

CRIMINAL LAW—Continued

and trafficking of cocaine by transport case by permitting defendant to be tried on charges that had been dismissed with leave at the time of defendant's arraignment. **State v. Bell, 350.**

Entrapment—delaying stop—Officers did not entrap defendant into trafficking in cocaine by transportation by delaying the stop until defendant's girlfriend began to drive him away from the scene. Defendant carried the cocaine around a parking lot, entered his girlfriend's car, and began to leave; there is no evidence that officers induced defendant to commit an offense he was in the process of committing. **State v. Carmon, 235.**

Guilty pleas—failure to timely notify DMV of change of address—court's failure to comply with statutory requirements—A defendant's plea of guilty of failure to timely notify the Department of Motor Vehicles (DMV) of a change of address must be vacated based on the trial court's failure to comply with N.C.G.S. §§ 15A-1022 and 15A-1026. **State v. Glover, 139.**

Habitual felon indictment—trial on underlying offense—less than 20 days later—The trial court did not err in a robbery and assault prosecution by denying defendant's pre-trial motion to continue his trial to a date more than twenty days after his habitual felon indictment where the State dismissed that indictment. There is no statutory language barring trial on the underlying felony charges within twenty days of an habitual felon indictment; moreover, in this case there was no prejudice because defendant was sentenced solely on the substantive charges. **State v. Adams, 318.**

Jury poll—request required—It is a defendant's responsibility to request a jury poll, even if at an inopportune time, and there was no plain error in the trial court dismissing the jury without asking defendant if he wished to poll the jury. **State v. Carmon, 235.**

Mistrial—other offenses on fingerprint card—curative instruction—The trial court did not err in an assault and attempted murder prosecution by not declaring a mistrial ex mero motu after the jury noticed that defendant's fingerprint card listed other charges which had been dismissed. The court cured any possibility of prejudice by instructing the jury not to consider the evidence. **State v. Ramirez, 249.**

DAMAGES AND REMEDIES

Automobile accident—medical expenses—The trial court did not err in a personal injury case arising out of an automobile accident by submitting to the jury the issue of damages regarding medical expenses because the evidence was sufficient to allow the jury to find that the expenses were necessary. **Floyd v. McGill, 29.**

Award of one dollar—contrary to evidence—The trial court did not abuse its discretion by granting a new trial on the issue of damages in an automobile negligence case where the court found that the jury's award of one dollar was contrary to the evidence and inadequate and the court's finding was supported by the evidence. Moreover, the trial court specifically stated that the issues of damages and negligence were not so intertwined that the entire verdict was tainted, and there was no evidence of a compromise verdict. **Loy v. Martin, 622.**

DAMAGES AND REMEDIES—Continued

Reduction—lost income and additional costs—The Industrial Commission erred in an action brought under the Tort Claims Act arising out of an accident between a train and a tractor-trailer at a railroad crossing by reducing the damages awarded for plaintiff's lost income and additional costs. **Smith v. N.C. Dep't of Transp., 92.**

Reduction—trailer loss, wrecker costs, site cleanup and storage fees—The Industrial Commission erred in an action brought under the Tort Claims Act arising out of an accident between a train and a tractor-trailer at a railroad crossing by reducing the damages awarded for plaintiff's trailer loss, wrecker costs, site cleanup and storage fees. **Smith v. N.C. Dep't of Transp., 92.**

Sale of real estate—evidence sufficient—The evidence of damages in the sale of lake front real estate was sufficient to survive a motion for a directed verdict for defendants on an unfair and deceptive trade practices claim. **Brotherton v. Point on Norman, LLC, 577.**

Sanction—willful destruction of evidence—The trial court did not err in a personal injury case arising out of an automobile accident by failing to set aside the verdict and judgment and by failing to order a new trial as a sanction for plaintiff wife's alleged willful destruction of evidence. **Floyd v. McGill, 29.**

DEEDS

Language not patently ambiguous—extrinsic evidence—The trial court erred in an adverse possession case by granting defendants' motion in limine and ruling that a portion of the pertinent 1931 deed referring to three vacant lots of a subdivision was patently ambiguous. **Lancaster v. Maple St. Homeowners Ass'n, 429.**

Transfer under power of attorney—consideration—issue of material fact—The trial court erred by granting partial summary judgment for plaintiff and voiding deeds transferred under a power of attorney where the power of attorney did not expressly grant the right to make gifts of real property and the court apparently presumed the deeds to be gifts because no excise tax appeared where there was a genuine issue of material fact as to whether the services performed by defendants for the grantor and his wife before their deaths constituted valuable consideration bargained for by the grantor. **Estate of Graham v. Morrison, 154.**

DISCOVERY

Admissions—extension of time after 30 days—The trial court did not abuse its discretion by granting a motion for the extension of time to answer a request for admissions five months after the request was served (which, in effect, allowed the withdrawal of admissions that had been deemed admitted after thirty days). **In re Estate of Lowe, 616.**

Exculpatory evidence—handwritten notes—The trial court in a first-degree murder case did not allow the State to improperly withhold exculpatory evidence including certain handwritten notes in the record that a detective allegedly made following an interview with the girlfriend of the victim indicating the victim had been threatened by two other individuals shortly before his death. **State v. Hatcher, 391.**

DISCOVERY—Continued

Records not in State's possession—A defendant in a prosecution for larceny by employee was not entitled to discovery of financial records which the State did not possess. The State provided defendant with copies of the accounting and banking records it intended to offer at trial. **State v. Morris, 335.**

Requests pending—summary judgment improper—The trial court erred in a fraud, misrepresentation, and unfair and deceptive trade practices case by granting summary judgment in favor of defendants while plaintiff's requests for discovery were pending. **Ussery v. Taylor, 684.**

DRUGS

Felonious possession of marijuana—indictment—"felonious" not mentioned—An indictment did not support a guilty plea to felonious possession of marijuana where it did not contain the word "felonious" and did not refer by number to N.C.G.S. § 90-95(d)(4), which provides for felonious possession. Although the wording of the indictment might lead to the statute, the words by themselves do not provide specific notice of the statute. **State v. Blakney, 671.**

Trafficking in cocaine—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of trafficking in cocaine where there was testimony that more than the requisite amount was seized from defendant and that he carried the drugs around a parking lot, entered his girlfriend's car with the drugs, and drove away with her before being stopped. **State v. Carmon, 235.**

EASEMENTS

Expansion—improvement of road and bridge—The trial court erred by denying plaintiffs' motion for a new trial where plaintiffs had contended that defendants' improvement of a road and bridge had enlarged an easement across plaintiffs' property, but the trial court failed to determine the location and boundaries of the easement and whether the improvements were constructed outside those boundaries. **Young v. Lica, 301.**

EMINENT DOMAIN

Comparative sales and listings—The trial court did not abuse its discretion in a condemnation proceeding by allowing plaintiff city to offer evidence of comparative sales and listings of other properties in order to show the basis of a real estate appraiser's determination of value of the condemned property where the sales the appraiser considered all occurred within four years of the taking in this case; the listings were dated within one year of the taking; and the sales comparables were in close proximity to the condemned property. **City of Wilson v. Hawley, 609.**

DOT condemnation—unity of ownership—Unity of ownership for a Department of Transportation condemnation did not exist in three parcels of land owned by two separate corporations, even though the same individual had been the sole shareholder and director of both corporations before his death, and had intended to turn the tracts into a single industrial park. Defendant presented no

EMINENT DOMAIN—Continued

persuasive grounds for reverse piercing of the corporate veil. **Department of Transp. v. Airlie Park, Inc.**, 63.

Valuation—motion to set aside verdict—credibility of witnesses—weight of evidence—The trial court did not abuse its discretion in a condemnation proceeding by denying defendant property owner's motion to set aside the verdict even though the jury verdict was vastly lower than the values given by three of the four valuation witnesses, because the credibility of witnesses and the weight of the evidence are solely for the jury to determine. **City of Wilson v. Hawley**, 609.

Value and potential use of property—The trial court did not err in a condemnation proceeding by refusing to allow defendant property owners' testimony concerning the value and potential uses of his property. **City of Wilson v. Hawley**, 609.

EVIDENCE

Affidavit—weak method of proof—need for expeditious procedure—An affidavit from a mortgage company official was properly admitted in a superior court foreclosure hearing because the necessity for expeditious procedure outweighs the weakness of the method of proof. Requiring the lender and mortgage servicer to present live testimony as to the existence of the statutory foreclosure elements would frustrate the ability of the deed of trust's sale provision to function as an expeditious and less expensive alternative to a foreclosure by action; moreover, requiring an out-of-state lender or servicer (in this case from California) to be present at a foreclosure hearing would be a burden which would be passed on in the form of increased lending costs. **In re Foreclosure of Brown**, 477.

Defendant's false answers to military regarding past drug use—impermissible character evidence—no prejudicial error—Although the trial court erred in a statutory sexual offense, sexual offense by a person in a parental role in the home of the minor victim, and taking indecent liberties with a minor case by allowing into evidence testimony about defendant's false answers to the military regarding his past drug use since the evidence was impermissible character evidence as this testimony came out in the State's case-in-chief before defendant had put his character in issue, this error alone does not entitle defendant to a new trial. **State v. Tucker**, 53.

Duplicative—harmless error—Testimony about the amount of crack cocaine that could be produced from powder seized from defendant was duplicative but harmless because the State had already proven the amount needed to constitute cocaine trafficking through the testimony of an arresting officer. **State v. Carmon**, 235.

Exhibit—deposition—separate counsel not provided at deposition—The trial court did not err in a personal injury case arising out of an automobile accident by admitting under N.C.G.S. § 1A-1, Rule 32(a)(3) defendant bus driver's deposition as an exhibit during her testimony even though defendant was not represented by separate counsel at the time of her deposition. **Floyd v. McGill**, 29.

EVIDENCE—Continued

Expert opinion testimony—knowledge—The trial court in a personal injury case arising out of an automobile accident did not improperly allow expert witnesses to testify to evidence of which they lacked knowledge or that was outside their area of expertise. **Floyd v. McGill, 29.**

Expert opinion testimony—no expression of defendant's guilt—A doctor did not express an opinion as to defendant's guilt so as to invade the province of the jury in a prosecution for first-degree sexual offense and taking indecent liberties with a child when she testified that she had recommended that the minor child "have no further contact with the alleged perpetrator" and that "the legal system would not try someone if the medical opinion were not supportive of that." **State v. Shepherd, 69.**

Expert opinion testimony—reliance on tests performed by another—There was no error in a cocaine trafficking prosecution in the allowance of testimony from an SBI agent concerning tests performed by another agent. The first agent (Wagoner) was accepted as an expert, and experts may base their opinions on tests performed by others if those tests are the type reasonably relied upon by experts in the field. **State v. Carmon, 235.**

Expert opinion testimony—sexual abuse—The trial court did not err in a first-degree sexual offense and taking indecent liberties with a child case by allowing an expert to testify as to her opinion that the minor child had been sexually abused. **State v. Shepherd, 69.**

Expert opinion testimony—speed of vehicles—An accident reconstruction expert's opinion about the speed of the vehicles in an accident was correctly excluded where the expert did not see the accident. **Loy v. Martin, 622.**

Foreclosure—trustee's testimony—beyond personal knowledge—other sufficient evidence—There was no prejudice in a foreclosure hearing before a superior court judge from the trustee's testimony about elements of foreclosure beyond his personal knowledge because the promissory note, deed of trust, and affidavit from the mortgage service company constituted sufficient evidence of the debt and default. **In re Foreclosure of Brown, 477.**

Hearsay—medical history—not offered for truth of matter asserted—The trial court did not err in a first-degree sexual offense and taking indecent liberties with a child case by allowing a doctor's testimony as to what the minor child had told her during the medical examination, even though defendant contends it was inadmissible hearsay, because the statements were not offered for the truth of the matter asserted but to illustrate the type of information the doctor collected in order to diagnose the minor child. **State v. Shepherd, 69.**

Hearsay—recorded recollection—The trial court did not abuse its discretion in a communicating threats case under N.C.G.S. § 14-277.1, involving a domestic disturbance between defendant and his wife, by permitting an officer to read the statement of defendant's wife into evidence even though defendant contends the State failed to lay a proper foundation under N.C.G.S. § 8C-1, Rule 803(5) for a recorded recollection based on the fact that defendant's wife did not sign the statement. **State v. Love, 309.**

Hearsay—residual exception—letters from accomplice—Letters from an accomplice who refused to testify were admissible under the residual exception of the hearsay rule. **State v. Carter, 446.**

EVIDENCE—Continued

Hearsay—residual exception—unavailable witness—An out-of-court statement to officers by a witness who later married defendant and asserted marital privilege was properly admitted under the N.C.G.S. § 8C-1, Rule 804(b)(5) hearsay exception. The court conducted a two-day voir dire, determined that the witness was unavailable, found that the statement had been made voluntarily after the witness was told about the marital privilege and that she wasn't going to be arrested, and each of the six factors for determining whether hearsay should be admitted under the residual hearsay exception was systematically analyzed. **State v. Carter, 446.**

Hearsay—residual exception—unavailable witness—statement by attorney—A summary of a report by a private investigator as to what the investigator was told by an alleged eyewitness to a hit and run accident was hearsay and not admissible under the residual exceptions to the hearsay rule set forth in N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(5) because plaintiffs failed to show that the eye-witness was unavailable other than by a conclusory statement by their attorney and failed to offer evidence that the statement possessed circumstantial guarantees of trustworthiness. **Strickland v. Doe, 292.**

Hearsay—statement against penal interest—The trial court did not err by finding that letters from an accomplice were an attempt to persuade a witness to lie and that the two-prong test for admissibility under N.C.G.S. § 8C-1, Rule 804(b)(3) for admission against penal interest was satisfied. **State v. Carter, 446.**

Lay reference to paranoia—witness's meaning explained—not prejudicial—There was no prejudice in a cocaine trafficking prosecution in the admission of an officer's characterization of defendant's behavior as paranoia. The officer was not qualified as an expert in psychology, but upon further questioning explained his meaning. **State v. Carmon, 235.**

Medical testimony—reasonable medical probability not required—The trial court did not err in a negligence action by admitting medical testimony that it was "possible" that plaintiff's shingles were caused by an incident in defendant's store where the testimony was not baseless speculation. Testimony is admissible as long as it is helpful to the jury and is based on information reasonably relied upon under Rule 703; medical testimony is no longer inadmissible for failure to state that it is based on "reasonable medical probability." **Johnson v. Piggly Wiggly of Pinetops, Inc., 42.**

Opinion—will caveat—susceptibility to influence—The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by permitting decedent's financial advisor to testify as to his opinion that he could have swayed decedent in making decisions had he so desired. **In re Will of McDonald, 220.**

Prior crimes or bad acts—domestic violence protective orders—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting evidence of prior and expired 50-B domestic violence protective orders and prior acts by defendant which led to issuance of the restraining orders, because: (1) it is proper to admit other crimes, wrongs, or acts under N.C.G.S. § 8C-1, Rule 404(b) to show intent; and (2) the evidence was competent to prove that defendant had the intent to kill, and the trial court properly

EVIDENCE—Continued

limited the purposes in its instruction by requiring the jury to consider the evidence only to show intent and only as against defendant's estranged wife. **State v. Morgan, 693.**

Prior drug offense—no similarity—prejudicial—Testimony about an alleged prior drug sale should not have been admitted in a prosecution for cocaine possession where there was no similarity between the two offenses and the only relevance of the testimony was to illustrate defendant's predisposition to drug violations. The testimony was prejudicial because the evidence of possession was not conclusive. **State v. Williams, 661.**

Prior drug offenses—no underlying facts—There was prejudicial error in a cocaine possession and habitual felon prosecution where the court admitted testimony about defendant's prior cocaine convictions without underlying facts showing similarities between those convictions and the present offense and instructed the jury that it could consider the convictions under N.C.G.S. § 8C-1, Rule 404(b). The evidence was conflicting and not so overwhelming as to make the error nonprejudicial. **State v. Hairston, 202.**

Similar subsequent offenses—chain of circumstances—The trial court did not abuse its discretion in a prosecution for murder, burglary, robbery, and kidnapping by admitting evidence of defendant's commission of four similar crimes within weeks of the charged offenses. Defendant asserted that the probative value was outweighed by the prejudice, but the court conducted a voir dire and entered an order which detailed the evidence and concluded that the evidence established a chain of circumstances or context and served to enhance the natural development of the facts. **State v. Carter, 446.**

Summary judgment—supplemental discovery—letter by plaintiff's attorney—unavailable witness—residual hearsay exception—officer's affidavit—The trial court did not err in a pedestrian's negligence action arising out of a hit and run accident by granting summary judgment in favor of unnamed defendant uninsured motorist carriers based on plaintiffs' failure to show they can offer competent evidence of how the accident occurred because supplemental discovery in the form of a letter by plaintiffs' attorney containing an unsigned summary of a report by a private investigator as to what the investigator was told by an alleged eyewitness was hearsay and not the type of evidence that may be relied on by the trial court in deciding a motion for summary judgment; the private investigator's statement was not admissible under the residual exceptions to the hearsay rule; and accident reconstruction statements in an officer's affidavit could not be considered since the officer was never tendered as an expert. **Strickland v. Doe, 292.**

Unavailable witness—testimony from bond hearing—The trial court did not err in an assault prosecution by admitting the testimony of defendant's girlfriend from a bond hearing when the girlfriend was not available at trial. Defendant did not dispute her unavailability, but contended that the bond hearing raised different issues. Defendant had the same motive at the hearing as at trial to expand upon and possibly discredit her testimony, but chose to ask no questions. **State v. Ramirez, 249.**

Unserved affidavits—no objection to earlier, identical affidavits—no prejudice—The superior court did not abuse its discretion in a foreclosure hearing by admitting unserved affidavits which related the trustee's efforts to serve

EVIDENCE—Continued

notice of the hearing and the existence of the statutory elements for foreclosure. Earlier, identical affidavits from the same witnesses had been admitted without objection, respondents were clearly familiar with the assertions contained therein, and the new affidavits contained no new assertions which respondents could contradict through further investigation or additional time. **In re Foreclosure of Brown, 477.**

Will caveat—sale of trucking business—motive—untruthfulness—The trial court did not abuse its discretion in a will caveat action alleging the will was obtained through duress and undue influence by denying propounder's motion in limine and by admitting evidence regarding propounder's sale of her trucking business even though propounder contends the evidence was impermissibly admitted to show her character for untruthfulness. **In re Will of McDonald, 220.**

FALSE PRETENSE

Obtaining property—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses involving a caliper that was pawned by defendant and that belonged to the company where defendant previously worked. **State v. Hensley, 634.**

HOMICIDE

Attempted murder—not abrogated by assault statute—Defendant was not afforded ineffective assistance of counsel in his attorney's failure to move to dismiss the common law charge of attempted murder on the theory that attempted murder was abrogated by N.C.G.S. § 14-32(a), assault with a deadly weapon with intent to kill inflicting serious injury. Attempted murder may occur through a multitude of circumstances. **State v. Ramirez, 249.**

HUSBAND AND WIFE

Loss of consortium—husband's claim—prior settlement of claim for husband's personal injuries—The trial court did not err in submitting plaintiff husband's claim for loss of consortium to the jury in plaintiff wife's personal injury case arising out of an automobile accident, even though plaintiffs had settled a separate lawsuit against defendants seeking damages for the husband's personal injuries, where the husband's claim for loss of consortium was joined with the wife's negligence claim, because: (1) each party who suffers a loss of consortium is entitled to institute a suit to recover for his or her individual loss; and (2) recovery for loss of consortium is not limited to one claim per marital unit. **Floyd v. McGill, 29.**

IMMUNITY

Public official—claims for false arrest, trespass, malicious prosecution—no maliciousness or corruption—The trial court erred by denying summary judgment for a police officer on state claims for trespass, malicious prosecution, and false arrest where there was no evidence of maliciousness or corruption and the officer was thus entitled to public official immunity. **Campbell v. Anderson, 371.**

IMMUNITY—Continued

Qualified—42 U.S.C. § 1983 claim—officer's conduct—factual dispute— Qualified immunity did not bar an action for damages under 42 U.S.C. § 1983 where allegations involving the officer's conduct were factually disputed and there were genuine issues of material fact as to whether a reasonable person in the officer's position would have known that his actions violated plaintiff's rights. **Campbell v. Anderson, 371.**

Sovereign—approval or denial of septic tank permits—governmental function— The trial court erred in a negligent misrepresentation case concerning whether certain property was suitable for supporting a septic tank for a mobile home by denying defendants' motion for summary judgment on the basis of sovereign immunity. **Tabor v. County of Orange, 88.**

Sovereign—arresting officer—acting within authority— A DMV inspector did not act outside the scope of his authority and summary judgment was granted for him correctly on the ground of sovereign immunity on claims of false arrest, malicious prosecution, and abuse of process where the inspector, defendant Mayberry, became involved in a dispute between plaintiff and the salvage dealer from whom plaintiff bought a truck and plaintiff was arrested for obstructing the inspector. **Ellis v. White, 16.**

Sovereign—negligent building inspection—waiver—building code—liability insurance— The trial court did not err in a negligence action resulting from defendant county's alleged negligent building inspection of plaintiffs' residence by granting summary judgment as a matter of law in favor of defendant county based on sovereign immunity because an exclusion in the county's liability insurance encompasses the construction defects plaintiffs allege resulted from the county's negligent building inspection. **Norton v. SMC Bldg., Inc., 564.**

INSURANCE

Fire loss of car—exclusion for racing preparation— The trial court did not err by granting summary judgment for an insurance company on a claim for a fire loss of a car body and unassembled parts where the policy excluded autos being prepared for organized racing and plaintiff testified that he planned to race the car if he could. The contention that the loss was covered because the car was not being worked on in preparation for a race at the time of the fire is not a reasonable interpretation of the policy. **Barnes v. Erie Ins. Exch., 270.**

Motor vehicles—uninsured motorist coverage—anti-stacking provision— The provision of N.C.G.S. § 20-279.21(b)(3) that prohibits an "owner" from stacking uninsured motorist (UM) coverages prohibits an insured who was a joint owner of an automobile covered by each owner's UM policy from stacking UM coverage with that of his co-owner. **Hoover v. State Farm Mut. Ins. Co., 418.**

Rental car—permissive use—prohibited operation— The driver of a rented vehicle did not exceed the scope of the rental company's permission for use of the vehicle when she drove while intoxicated, even though she violated a provision of the rental agreement as to her operation of the vehicle, and her violation of the operation provision did not constitute a basis for the exclusion of coverage by the rental company's insurer (Nationwide). Otherwise, even the negligent operation of a rental vehicle would be excluded, a result contrary to the purpose

INSURANCE—Continued

of the motor vehicle liability insurance laws. **United Servs. Auto. Ass'n v. Rhodes**, 665.

JUDGMENTS

Collateral attack—subrogation order—The trial court properly granted summary judgment against a surety bond issuer (International) which attempted to set aside a subrogation order to which it was not a party, which did not affect it, and which was not on appeal. **Regional Acceptance Corp. v. Old Republic Surety Co.**, 680.

JURISDICTION

Long arm—consent—It was not necessary to determine whether a long-arm statute comported with due process where defendant consented to jurisdiction through a letter confirming plaintiff's terms of service. **MRI/Sales Consultants of Asheville, Inc. v. Edwards Publ'ns, Inc.**, 590.

Long arm—employee search—Jurisdiction was authorized under North Carolina's long-arm statute where defendant hired plaintiff to find candidates for jobs, plaintiff's only office is in North Carolina, plaintiff's employees used equipment in that office to search for and locate candidates to be a web pressman at defendant's Michigan plant, and a letter memorializing the terms of service said that plaintiff would be performing its services in North Carolina. **MRI/Sales Consultants of Asheville, Inc. v. Edwards Publ'ns, Inc.**, 590.

Subject matter—consent, waiver, estoppel—not sufficient—The signing of a child custody consent order did not waive any challenge to subject matter jurisdiction; the UCCJEA is a jurisdictional statute and its requirements must be met for a court to have power to adjudicate child custody disputes. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. **Foley v. Foley**, 409.

JURY

Voir dire—past dealings with district attorney—criminal record—The trial court did not abuse its discretion in a first-degree murder case by failing to make further inquiry into a juror's past dealings with the district attorney and to find out whether that juror failed to honestly answer a material question on voir dire regarding whether she had come to court about anything else. **State v. Hatcher**, 391.

JUVENILES

Disorderly conduct—interference with operation of school—sufficiency of evidence—The trial court did not err by denying respondent juvenile's motion to dismiss the charge of disorderly conduct under N.C.G.S. § 14-288.4(a)(6) where the evidence showed that respondent yelled an expletive to a group of students in the hallway approximately thirty yards away at school and a teacher left his cafeteria duties to escort respondent to the detention center. **In re M.G.**, 414.

LARCENY

By employee—identity of employer—evidence sufficient—The evidence in a prosecution for larceny by employee sufficiently identified the employer where the indictments named the employer as “AAA Gas and Appliance Company, Inc,” and witnesses referred to the company as “AAA” and “AAA Gas.” **State v. Morris, 335.**

By employee—identity of person giving money to employee—not required—Indictments charging larceny by an employee were sufficient where they alleged that money was delivered to defendant for the use of her employer without alleging who delivered the money. **State v. Morris, 335.**

By employee—sufficiency of evidence—fraudulent intent—The evidence in a prosecution for larceny by employee was sufficient to establish fraudulent intent where there were discrepancies in the records for monies received and deposited on fourteen separate days when defendant was working and managing the accounts. **State v. Morris, 335.**

By employee-sufficiency of evidence—relationship of trust—The evidence in a prosecution for larceny by employee was sufficient to prove a trust relationship between defendant and her employer where defendant was solely responsible for depositing money received on the days she worked. The fact that her position was not managerial did not prohibit a trust relationship. **State v. Morris, 335.**

LIENS

Materialman’s—discharge—failure to timely file action—The trial court did not err by concluding that petitioner’s materialman’s lien was discharged because he did not timely file an action to enforce the lien where there was no prohibition against an enforcement action and several other lien holders began actions within the requisite period. Petitioner was therefore not entitled to any of the surplus funds remaining from foreclosure of the property. **Lynch v. Price Homes, Inc., 83.**

MORTGAGES AND DEEDS OF TRUST

Burden of proof—judge’s remark—A superior court judge’s remark that the debtors had failed to show valid reason for a foreclosure not to proceed did not improperly shift the burden of proof but indicated the judge’s legal conclusion. The mortgage company offered sufficient competent evidence of each of the required elements and respondents only offered evidence tending to disprove notice. **In re Foreclosure of Brown, 477.**

Foreclosure—notice—posting on rental property—A motion to dismiss a foreclosure proceeding was properly denied where respondents contended that service of process by certified mailings to the property and posting on the property were insufficient because they rented out the property, but respondents were represented by counsel at hearings before the clerk and the superior court and requested multiple continuances. Although the tax records listed an address different from the subject property, the trustee had no way of knowing that the names on the tax records, one of which was a corporation, represented the same individuals who signed the deed of trust. **In re Foreclosure of Brown, 477.**

MORTGAGES AND DEEDS OF TRUST—Continued

Foreclosure hearing—testimony of substitute trustee—There was no error in a superior court foreclosure hearing where a substitute trustee testified on direct examination about his efforts to serve the debtors (respondents) with notice of the hearing, his testimony expanded under questioning by the judge to include the existence of a valid debt, default, and power of sale, and he answered still more questions under cross-examination from respondents. It was proper for the mortgage company to inquire into the trustee's efforts to serve the debtors and, after the judge broadened the scope of the testimony, respondents further expanded the testimony on cross-examination. Parties may not complain of actions they induced. **In re Foreclosure of Brown, 477.**

Lending fees—disclosed—A lender did not fail to act in good faith by not disclosing the percentage of the loan proceeds that would be paid to the broker and mortgage company where plaintiff testified that she was provided with a list of all fees at the closing, and the closing attorney testified that he reviewed the fees and loan documents with plaintiff. **Melton v. Family First Mortgage Corp., 129.**

Rescission—no return of proceeds—fraud in treaty—The trial court correctly determined that a mortgage was not void and subject to rescission where plaintiff was not prepared to return the loan proceeds. The mortgage would be binding in any case because plaintiff knew she was mortgaging her house and did not take issue with the loan documents; fraud in the treaty (arising from representations by plaintiff's granddaughter) renders the loan voidable between the parties but binding in the hands of an innocent purchaser of the mortgage. **Melton v. Family First Mortgage Corp., 129.**

Use of regular closing attorney—not an unfair practice—There was no merit to plaintiff's claim that a lender committed an unfair or deceptive practice by sending plaintiff to an attorney who regularly closed loans for defendant and who had no incentive to disclose alleged irregularities to plaintiff. **Melton v. Family First Mortgage Corp., 129.**

MOTOR VEHICLES

Automobile accident—inadequate brakes—failure to maintain brakes—The trial court did not err in a personal injury case arising out of an automobile accident by submitting to the jury the issues of inadequate brakes and failure to maintain the brakes. **Floyd v. McGill, 29.**

Automobile accident—inoperable horn and speedometer—proximate cause—The trial court did not err in a personal injury case arising out of an automobile accident by instructing the jury that plaintiffs could recover damages based on defendant bus driver's operation of a bus with an inoperable horn and speedometer. **Floyd v. McGill, 29.**

Automobile accident—negligent training of bus driver—The trial court did not err in a personal injury case arising out of an automobile accident by submitting the issue of negligent training of defendant bus driver to the jury. **Floyd v. McGill, 29.**

Family purpose doctrine—evidence sufficient—The family purpose doctrine was established in an automobile accident case where defendants admitted in

MOTOR VEHICLES—Continued

their answer that they lived as father and son at the same residence, that the father owned the vehicle driven by the minor son at the time of the accident, and that the son was driving the vehicle with father's permission. **Loy v. Martin, 622.**

Misdemeanor death by motor vehicle—jury instruction—sudden emergency doctrine—A defendant in a misdemeanor death by motor vehicle case is not entitled to a new trial even though the trial court failed to instruct the jury on the sudden emergency doctrine because that doctrine is inapplicable to the statute which makes it illegal to drive to the left of the center of a highway. **State v. Glover, 139.**

Misdemeanor death by motor vehicle—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of misdemeanor death by motor vehicle where the evidence was sufficient for the jury to find that defendant's action in crossing the center line created a series of collisions which ultimately caused decedent's death. **State v. Glover, 139.**

Stop sign—defendant's failure to stop—plaintiff's contributory negligence—insufficient evidence—Plaintiff's motion for a judgment notwithstanding the verdict should have been granted in an automobile accident case in which defendant ran a stop sign and the jury found plaintiff contributorily negligent. Plaintiff was not required to anticipate that defendant would be negligent. **Ellis v. Whitaker, 192.**

NEGLIGENCE

Causation—shingles outbreak—There was sufficient evidence of causation in a negligence action in the admission of a doctor's testimony that an incident in defendant's store was "possibly" the cause of plaintiff's shingles outbreak, in the doctor's explanation of why the medical community believes shingles occur, and in other evidence. **Johnson v. Piggly Wiggly of Pinetops, Inc., 42.**

NUISANCE

Water flow—from common areas to townhouse—The trial court did not err in a trespass and nuisance action by finding that defendant substantially interfered with plaintiff's use and enjoyment of its property by failing to stop the flow of water from common areas into plaintiff's townhouse. The parties stipulated that defendant owned and was responsible for the common areas within the subdivision, that water flowed from those areas onto plaintiff's property, that defendant exacerbated the water flow through attempted repairs, and that this flow damaged plaintiff's property. **Shadow Grp., LLC v. Heather Hills Home Owners Ass'n, 197.**

PARTIES

Dismissal—lack of standing—The trial court did not err by dismissing the North Carolina Association of Educators as a party-plaintiff based on lack of standing. **Lea v. Grier, 503.**

PLEADINGS

Improper third-party complaint—outside the statute of limitations—struck—The trial court properly struck a third-party complaint pursuant to N.C.G.S. § 1A-1, Rule 12(f) where the complaint was improper and outside the statute of limitations. **Barnes v. Erie Ins. Exch., 270.**

Motion to amend—untimely—The court did not abuse its discretion in denying an oral motion to amend pleadings at a summary judgment hearing because the matter did not concern the correction of a misnomer and plaintiff had been put on notice that the pleading was improper in time to make a written motion to amend the complaint before the statute of limitations ran. **Barnes v. Erie Ins. Exch., 270.**

Third-party complaint—after original answer—amendment of original complaint required—The trial court did not err by granting summary judgment for a third-party defendant (Hurley) in an action arising from the destruction of plaintiff's property at Hurley's house where Hurley was not named as the defendant in the original complaint, the named defendant filed an answer and a third-party complaint against Hurley, and plaintiff filed a third-party complaint against Hurley without prior consent of the parties or leave of the court. A plaintiff filing a complaint against a third-party defendant arising from the same subject matter must follow N.C.G.S. § 1A-1, Rule 15(a) and, when the original complaint has been answered, must amend that complaint by leave of the court or consent of the adverse party. **Barnes v. Erie Ins. Exch., 270.**

POLICE OFFICERS

Claims for false arrest, trespass, malicious prosecution—no maliciousness or corruption—public official immunity—The trial court erred by denying summary judgment for a police officer on state claims for trespass, malicious prosecution, and false arrest where there was no evidence of maliciousness or corruption and the officer was thus entitled to public official immunity. **Campbell v. Anderson, 371.**

PRISONS AND PRISONERS

Injury to prisoner by jailer—jury instruction—keeper of the jail—The trial court did not abuse its discretion in an injury to prisoner by jailer case by instructing the jury concerning the definition of the keeper of a jail, and the court properly refused to give defendant's requested instruction that a keeper of the jail must be either the sheriff or a person appointed by the sheriff. **State v. Shepherd, 603.**

Injury to prisoner by jailer—sufficiency of evidence—keeper of the jail—bailiff—The trial court did not err by denying defendant's motion to dismiss the charge of injury to prisoner by jailer where defendant was a courtroom bailiff. **State v. Shepherd, 603.**

PROBATION AND PAROLE

Longer period of probation—specific findings of fact required—The trial court erred in a communicating threats case by extending defendant's probationary period to twenty-four months without making the required specific findings

PROBATION AND PAROLE—Continued

of fact that a longer period of probation was necessary as required by N.C.G.S. § 15A-1343.2(d). **State v. Love, 309.**

Probation conditions—active term in local jail—defendant not told of state rules—similar local rule—There was sufficient evidence for the trial court to conclude that a defendant who threatened jail officers violated a probation condition requiring obedience to State Department of Correction rules, even though defendant was in a local jail and had not been told of those rules, where the local jail and DOC had similar prohibitions on threatening and abusive language toward staff members. **State v. Payne, 687.**

Probation conditions—conduct in jail—DOC rules—applicable to local jail—A defendant who was serving an active term in a local jail as a condition of probation was bound by Department of Correction rules and regulations even though the probation judgment which referred to DOC rules and regulations did not address conduct in a local jail. **State v. Payne, 687.**

PUBLIC OFFICERS AND EMPLOYEES

Employment dismissal—discrimination based on handicap—conclusions of law—A de novo review reveals that the trial court did not err in an employment dismissal case by upholding the State Personnel Commission's conclusions of law that respondent employee who suffers from diabetes mellitus, peripheral neuropathy, and hypothyroidism is a qualified handicapped person under N.C.G.S. § 168A-3 and that respondent's dismissal was directly related to the discrimination against respondent based on his disability. **N.C. Dep't of Health & Human Servs. v. Maxwell, 260.**

Employment dismissal—handicapped—findings of fact—The whole record test in an employment dismissal case reveals that substantial evidence exists to support the trial court's upholding of the Administrative Law Judge's findings of fact that respondent employee who suffers from diabetes mellitus, peripheral neuropathy, and hypothyroidism is handicapped. **N.C. Dep't of Health & Human Servs. v. Maxwell, 260.**

ROBBERY

Dangerous weapon—challenge to sufficiency of evidence—failure to move for motion to dismiss—The trial court did not err by failing to dismiss the charge of felonious robbery with a dangerous weapon even though defendant contends he never made a statement that he had a gun or that he would shoot the victim. **State v. Bartley, 490.**

Dangerous weapon—failure to instruct on lesser-included offense of common law robbery—The trial court did not commit plain error in a robbery with a dangerous weapon case by failing to instruct the jury on the lesser-included offense of common law robbery where the only evidence of violence or fear was through defendant's brandishing of a firearm. **State v. Bartley, 490.**

Dangerous weapon—indictment—ownership of stolen property—An indictment which alleged that defendant took and carried away "personal property of Crown Fast Fare #729, U.S. Currency, from the person and presence of James Burke" by threatening use of a dangerous weapon sufficiently identified

ROBBERY—Continued

the owner of the property allegedly stolen by defendant because: (1) the key is whether the indictment is sufficient to negate the idea that defendant was taking his own property; and (2) the language in the indictment sufficiently does so. **State v. Bartley, 490.**

Dangerous weapon—jury instruction—mandatory presumption victim's life endangered and threatened by firearm—The trial court did not err in a robbery with a dangerous weapon case by instructing the jury that a mandatory presumption existed that the victim's life was endangered and threatened by a firearm. **State v. Bartley, 490.**

Dangerous weapon—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon even though defendant joined with others in the commission of the crime and the theory of acting in concert was not submitted to the jury where the evidence showed that defendant personally committed each element of the offense. **State v. Bethea, 167.**

SCHOOLS AND EDUCATION

Breach of contract—restructuring school calendar—The trial court erred by dismissing plaintiff teachers' breach of contract claim regarding defendant school board's restructuring of the school calendar to satisfy statutory requirements for the minimum hours of school instruction for the 1999-2000 school year which caused the teachers to work six more days than required by law. **Lea v. Grier, 503.**

Disorderly conduct—interference with operation of school—sufficiency of evidence—The trial court did not err by denying respondent juvenile's motion to dismiss the charge of disorderly conduct under N.C.G.S. § 14-288.4(a)(6) where the evidence showed that respondent yelled an expletive to a group of students in the hallway approximately thirty yards away at school and a teacher left his cafeteria duties to escort respondent to the detention center. **In re M.G., 414.**

Restructuring school calendar—minimum hours of school instruction—A de novo review revealed that the trial court did not err by granting the school board's motion to dismiss claims by teachers for declaratory, injunctive, and monetary relief for alleged violations of N.C.G.S. §§ 115C-84.2 and 115C-301.1 regarding defendant school board's restructuring of the school calendar to satisfy statutory requirements for the minimum hours of school instruction for the 1999-2000 school year. **Lea v. Grier, 503.**

SEARCH AND SEIZURE

Articulable suspicion for stop—classic drug transaction—Officers' observations were sufficient for an articulable suspicion that defendant was engaged in criminal activity, and defendant's motion to suppress cocaine seized during the subsequent stop was properly denied, where an officer saw defendant receive a softball-size package from a man in a conspicuous car at night, defendant then appeared to be nervous, and an officer with extensive narcotics training and experience in observing drug transactions testified that the incident looked like a classic drug transaction. **State v. Carmon, 235.**

SEARCH AND SEIZURE—Continued

Traffic stop—motion to suppress—motion to dismiss—reasonable articulable suspicion—The trial court did not err in a possession of drug paraphernalia, possession with intent to sell and deliver cocaine, trafficking cocaine by possession, and trafficking of cocaine by transport case by denying defendant's motions to dismiss and to suppress evidence seized by officers in a rental vehicle registered in the name of defendant after the vehicle in which defendant was a passenger was stopped for speeding in a work zone because defendant consented to a search of the vehicle, and officers had a reasonable and articulable suspicion of possible criminal activity. **State v. Bell, 350.**

SENTENCING

Aggravating factor—sufficiency of evidence—more than assertion required—A defendant was entitled to a new sentencing hearing for sexual activity by a substitute parent and indecent liberties where the court found the nonstatutory aggravating factor that the victim's psychological injuries were debilitating to an extent that she required counseling based on the prosecutor informing the court, after conferring with the victim's mother, that the victim was currently receiving counseling. The courts cannot find an aggravating factor based only upon an assertion by the prosecutor. **State v. Radford, 161.**

Aggravating factor—took advantage of position of trust or confidence—The trial court erred by using the aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of position of trust or confidence to commit the offenses to aggravate his sentences for convictions of sexual offense by a person in a parental role in the home of the minor victim. **State v. Tucker, 53.**

Attempted second-degree murder convictions vacated—motion to pray judgment on assault convictions—The trial court did not err by allowing the State's motion to pray judgment on multiple assault convictions five years after defendant's convictions for multiple attempted second-degree murders were vacated based on the fact that the crime of attempted second-degree murder was no longer recognized in North Carolina. **State v. Lea, 178.**

Habitual felon—indictment—prior to substantive felony indictment—The issuance of an habitual felon indictment before a substantive felony indictment does not by itself void the habitual felon indictment if the notice and procedural requirements of the Habitual Felons Act have been complied with. In this case, the substantive felony indictment was returned well in advance of the judicial proceeding, so that there was a pending felony prosecution to which the habitual felon prosecution could attach, and defendant had notice of the substantive charges and that he was being prosecuted as a recidivist. N.C.G.S. § 90-95(d)(4). **State v. Blakney, 671.**

Habitual felon—ineffective assistance of counsel—cruel and unusual punishment—The trial court did not err in an obtaining property by false pretenses case by sentencing defendant as an habitual felon because defendant's collateral attack on his 1982 conviction based on ineffective assistance of counsel was of no avail, and reliance on a nineteen-year-old conviction for habitual felon status was not cruel and unusual punishment. **State v. Hensley, 634.**

SENTENCING—Continued

Habitual felon—judgment on status alone—not clerical error—The entry of judgments for being an habitual felon could not be construed as clerical error where the error appeared on the judgment and the court's statements explicitly indicate the intent to enter judgments and sentences on the status of being an habitual felon. **State v. Taylor, 172.**

Habitual felon—multiple instances—only one indictment required—The State may choose to use multiple habitual felon indictments, but only a single indictment is required and presenting multiple indictments (twenty in this case) may lead to handling those indictments as though they represent a separate crime. **State v. Taylor, 172.**

Habitual felon—separate sentencing on status—error—Sentences based only on attaining habitual felon status were vacated; one who acquires habitual felon status subjects himself only to having the sentences of his current convictions enhanced. The court has subject matter jurisdiction to sentence a defendant only upon his convictions and not upon his acquired status. **State v. Taylor, 172.**

Incorrect verdict sheet—inadvertent mislabeling—arrest of judgment—Although the State has conceded error as to 00 CRS 54820 and agrees that defendant's conviction for sexual activity with a person in a parental role in the home of the minor victim under this case number should be arrested based on an incorrect verdict sheet where a count of indecent liberties should have been listed, the inadvertent mislabeling of the fourteen counts against defendant for statutory sexual offense of a thirteen, fourteen, or fifteen-year-old was not a fatal defect requiring arrest of judgment. **State v. Tucker, 53.**

Jury address by defendant—request required—There was no error, plain or otherwise, in a cocaine trafficking prosecution where defendant did not individually address the jury prior to sentencing, but his attorney spoke on his behalf and defendant did not ask to speak himself and did not object after his attorney spoke. The court is not required to specifically address defendant nor to ask whether defendant wishes to make a statement after his attorney addresses the court. **State v. Carmon, 235.**

Nonstatutory aggravating factors—assault in presence of child—course of conduct—The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury case by finding two nonstatutory aggravating factors including that defendant beat his wife and the other victim in the presence of a six-year-old child which caused her serious trauma stress, and defendant's course of conduct. **State v. Morgan, 693.**

Overlapping presumptive and aggravated range—no findings—The trial court did not err when sentencing defendant for assault and attempted murder by imposing a sentence which fell into an overlapping presumptive and aggravating range without making findings required for the aggravating range. **State v. Ramirez, 249.**

Presumptive—mitigating factor—no findings—The trial court did not err when sentencing defendant for assault and attempted murder by sentencing defendant within the presumptive range without making findings as to the mitigating factor of accepting responsibility. The court may in its discretion sentence

SENTENCING—Continued

defendant within the presumptive range without making findings regarding proposed mitigating factors. **State v. Ramirez, 249.**

Prior record level—clerical errors—The trial court did not err in an assault with a deadly weapon inflicting serious injury case by finding that defendant was a prior record level IV felon, because: (1) the misspelling of defendant's middle name as well as the incorrect birth date were clerical errors; and (2) the State presented a preponderance of evidence to show that defendant was the same person convicted in the disputed convictions. **State v. Morgan, 693.**

Prior record level—robbery with a dangerous weapon—The trial court erred in a robbery with a dangerous weapon case by sentencing defendant as a prior record level IV based on the State's uncontested and unsupported statement that defendant had eleven points placing him in that record level. **State v. Bartley, 490.**

Prior record points—no prejudicial error—There was no prejudicial error in an assault and robbery sentencing where the court concluded that defendant's prior record level was VI based on 21 prior record points; defendant took issue with one of those points on appeal; and level VI requires only 19 points. **State v. Adams, 318.**

SEXUAL OFFENSES

First-degree statutory sexual offense—sufficiency of short-form indictment—The short-form indictment used to charge defendant with first-degree statutory sexual offense was constitutional even though it did not allege all of the elements of the crime. **State v. Shepherd, 69.**

Statutory—person in a parental role—indecent liberties with a minor—sufficiency of evidence—The trial court did not err by failing to dismiss the charges of statutory sexual offense, sexual offense by a person in a parental role in the home of the minor victim, and taking indecent liberties with a minor case. **State v. Tucker, 53.**

STATUTES OF LIMITATION AND REPOSE

Appointment of administrator delayed—statute suspended—An order dismissing plaintiff's complaint for violation of the statute of limitations was reversed where the claim was made about four years after the accident that gave rise to the claim and the alleged tortfeasor's death, but less than a month after the appointment of the administrator of the estate. The statute of limitations is extended indefinitely if no administrator of the estate has been appointed within the time frame of the statute of limitations and there exists insurance coverage that would extend to the plaintiff's claim. **Simpson v. McConnell, 424.**

Claims against third party—motion to amend—untimely—denied—no abuse of discretion—The trial court properly determined that plaintiff's claims against a third-party defendant were barred by the statute of limitations where plaintiff made an oral motion to amend the complaint at a summary judgment hearing after the statute had run. **Barnes v. Erie Ins. Exch., 270.**

STATUTES OF LIMITATION AND REPOSE—Continued

Disability of minority—custodianship of trust account—Plaintiff son's claims for fraud, conversion, unfair and deceptive trade practices, and misappropriation arising out of defendant father's custodianship of plaintiff children's trust accounts created in Florida is barred by the statute of limitations even though plaintiff was under the disability of minority when this action accrued. **Beall v. Beall, 542.**

Real property improvement statute of repose—installation of synthetic stucco system—The trial court did not err by granting defendant builder's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claims, arising out of the improper installation of a synthetic stucco system on a house, based on expiration of the real property improvement statute of repose under N.C.G.S. § 1-50(a)(5)a. **Whitehurst v. Hurst Built, Inc., 650.**

SURETIES

Subrogation—purchaser of vehicle financing contract—entitlement to sue—Plaintiff corporation which purchased a vehicle financing contract was entitled to sue upon a dealer's surety bond under N.C.G.S. § 20-288(e) due to a direct relationship with the person who bought the vehicle where a default judgment against the purchaser equitably subrogated plaintiff to the purchaser's rights arising out of his purchase of the vehicle. **Regional Acceptance Corp. v. Old Republic Surety Co., 680.**

TAXES

Estate—QTIP trust distribution—directive in will—The trial court correctly directed defendants to pay the N.C. estate taxes on the remaining assets in a QTIP trust established in testator's will for the benefit of his wife where the testator, had directed that all of his estate taxes be paid entirely from his residuary estate and defendants were the co-executors and sole remaining beneficiaries of his estate. **Jones v. German, 421.**

TERMINATION OF PARENTAL RIGHTS

Clear, cogent, and convincing evidence standard—neglect—willfully left in foster care—willfull abandonment—The trial court abused its discretion by terminating respondent father's parental rights regarding his younger son under N.C.G.S. § 7B-1111 where the father was incarcerated and findings of neglect, willfully leaving the child in foster care and willful abandonment were not supported by clear, cogent and convincing evidence. **In re Shermer, 281.**

Jurisdiction—neglect—proceedings in another county—A New Hanover County district court had subject matter jurisdiction to consider a petition to terminate parental rights even though custody issues had been heard in a Wake County district court where petitioner and the child resided in New Hanover County and the New Hanover court determined that the child had been neglected by respondent. **In re Humphrey, 533.**

Neglect—abandonment—best interests of child—The trial court did not abuse its discretion by terminating respondent father's parental rights under

TERMINATION OF PARENTAL RIGHTS—Continued

N.C.G.S. § 7B-1111 on the ground that the incarcerated father neglected and abandoned the child. **Whittington v. Hendren (In re Hendren)**, 364.

Neglect—evidence sufficient—The trial court did not err by finding and concluding that respondent had neglected her child where the evidence was that respondent had limited contact with the child after 1992 and last visited him in 1995, her only contact after 1995 was a birthday card in 2001, and she did not contribute to the child's financial support after 1992. Although she was seeking visitation rights in a custody action at the time of the termination proceeding, that alone does not demonstrate that she was attempting to perform her obligations as a parent. **In re Humphrey**, 533.

Neglect—no specific allegation—factual allegations sufficient for notice—The trial court did not err by considering neglect in a termination of parental rights case where there was not a specific allegation of neglect in the petition but the factual allegations were sufficient to put respondent on notice. **In re Humphrey**, 533.

Petition—required statement omitted—not prejudicial—The omission of the statutorily required statement that a petition for termination of parental rights was not filed to circumvent provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act was not prejudicial to respondent. Additionally, there is no authority compelling dismissal solely for omission of this statement. **In re Humphrey**, 533.

THREATS

Communicating threats—subjective belief—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of communicating threats under N.C.G.S. § 14-277.1, because there was sufficient evidence that defendant's wife subjectively believed that defendant intended to carry out his threats. **State v. Love**, 309.

TORT CLAIMS ACT

Award reduced by full Commission—credibility of evidence—The Industrial Commission in a Tort Claims case may choose to find facts in contradiction to the evidence presented by plaintiff even when the opposing party offers no contradictory evidence. Here, the Commission did not err by reducing a deputy commissioner's award of \$500,000 for a doctor injured as a college wrestler to \$50,000 where the Commission specifically found that plaintiff's evidence of future lost earnings was not credible but that his testimony about his physical impairment was credible. **Hummel v. University of N.C.**, 108.

Discretion of Commission—findings—stipulation—It was within the Industrial Commission's discretion in a Tort Claims case to find that a doctor injured as a college wrestler had failed to prove loss of future income despite a stipulation that the accident had proximately caused plaintiff severe and permanent injuries. The Commission specifically found unconvincing plaintiff's evidence of reduced future earning capacity. **Hummel v. University of N.C.**, 108.

Findings by Commission—deputy commissioner's findings—disregarded—In a Tort Claims case, the Industrial Commission may disregard the

TORT CLAIMS ACT—Continued

findings of the deputy commissioner and substitute its own findings on appeal. Here, the Commission did not err by reducing a Tort Claims award of \$500,000 for future loss of earning capacity for a doctor who had been injured as a college wrestler where the Commission found that the testimony did not support the award. **Hummel v. University of N.C., 108.**

Pain and suffering award—evidence credible—The Industrial Commission did not err in a Tort Claims case by awarding plaintiff \$50,000 in damages where the evidence supporting the award for pain and suffering, mental anguish, and physical impairment is credible and supports the finding. **Hummel v. University of N.C., 108.**

Requirements—specific negligent act by a specific state employee—name of negligent employee of State agency—The Industrial Commission did not err in an action arising out of an accident between a train and a tractor-trailer at a railroad crossing by allegedly failing to follow the requirements of the Tort Claims Act under N.C.G.S. §§ 143-291 and 143-297 to find a specific negligent act by a specific state employee and to name in the claimant's affidavit the negligent employee of the State agency. **Smith v. N.C. Dep't of Transp., 92.**

Train and tractor-trailer accident—contributory negligence—The Industrial Commission did not err by finding that plaintiff was not contributorily negligent in an action brought under the Tort Claims Act for an accident between a train and plaintiff's tractor-trailer where plaintiff's truck was struck while it was stuck on railroad tracks even though defendant contends plaintiff violated N.C.G.S. § 20-116(h) by taking the wrong truck route and generally did not exercise due care in crossing the railroad tracks. **Smith v. N.C. Dep't of Transp., 92.**

Train and tractor-trailer accident—negligent maintenance of railroad crossing—The Industrial Commission did not err in an action brought under the Tort Claims Act arising out of an accident between a train and a tractor-trailer at a railroad crossing by finding that defendant Department of Transportation was negligent in its maintenance of the pertinent railroad crossing even though defendant asserts it took all reasonable and prudent steps to protect the public by creating a truck route. **Smith v. N.C. Dep't of Transp., 92.**

TRESPASS

Water flow—findings—sufficient—The trial court's conclusion that there was a trespass in defendant homeowners association's causing water to flow from common areas into plaintiff's townhouse was supported by sufficient findings where the court found that defendant's attempted remedy exacerbated the flow, that this continued after plaintiff's purchase of the property, that defendant did not stop the flow, that plaintiff did not authorize the flow, and that plaintiff spent \$2,480 to remedy the problem. Moreover, every subsequent incidence of water flowing onto the property after plaintiff's possession could constitute a trespass in and of itself. **Shadow Grp., LLC v. Heather Hills Home Owners Ass'n, 197.**

Water flow—repairs—problem exacerbated—The trial court's conclusions that defendant homeowners association caused the entry of water from common areas onto plaintiff's townhouse property were supported by the court's findings

TRESPASS—Continued

that defendant undertook to repair the water flow problem and that those repairs exacerbated the problem. **Shadow Grp., LLC v. Heather Hills Home Owners Ass'n, 197.**

TRIALS

Continuance denied—burden of demonstrating grounds not met—The denial of a motion to continue a termination of parental rights hearing was not an abuse of discretion where respondent failed to meet her burden of demonstrating sufficient grounds for a continuance. **In re Humphrey, 533.**

Continuance denied—incarcerated in Tennessee—The trial court erred by dismissing a motion to continue an appeal to superior court from a district court contempt finding under a domestic violence protective order where defendant was incarcerated in Tennessee and did not appear. While some willful act may have been committed which resulted in defendant's incarceration, it is unlikely that he was abusing the system, and there were no findings that defense counsel had advance notice. The error was prejudicial because the appeal was dismissed with prejudice. **Hodges v. Hodges, 404.**

Pretrial order—erroneous statement of no pending issues—The trial court acted within its discretion when it addressed the issue of plaintiff's failure to obtain a North Carolina certificate of authority to transact business even though a pretrial order had indicated that there were no pending motions needing resolution prior to trial. The record indicates that the issue of whether plaintiff could avail itself of the courts of the state was pending despite the erroneous statement in the pretrial order. Moreover, the issue was first presented in defendant's answer and plaintiff can hardly claim surprise. **Harold Lang Jewelers, Inc. v. Johnson, 187.**

TRUSTS

Discretionary—reasonable needs—use of trust assets to make gifts—The trial court did not err in a declaratory judgment action by concluding that defendant bank abused its discretion as trustee by asserting that it had no authority to invade the principal of plaintiff lifetime beneficiary's trust to distribute amounts to plaintiff to enable her to make substantial gifts, but the trial court erred by ordering defendant bank to exercise its discretion as trustee to determine a reasonable annual amount to distribute to plaintiff for gifting purposes. **Finch v. Wachovia Bank & Tr. Co., 343.**

UNFAIR TRADE PRACTICES

Lakefront real estate sales—size of lot changed—Evidence that plaintiffs were misled into thinking that they were buying a lot with more lakefront footage than they ultimately received was sufficient for an unfair and deceptive trade practices claim to survive a motion for a directed verdict. **Brotherton v. Point on Norman, LLC, 577.**

Mortgage—forged signature—allegation insufficient—The trial court did not err by granting summary judgment on an unfair and deceptive practices claim for defendant Family First where plaintiff contended that defendant either forged

UNFAIR TRADE PRACTICES—Continued

plaintiff's name or accepted a forged signature, but provided no substantial evidence of the forgery. **Melton v. Family First Mortgage Corp.**, 129.

Mortgage—no contact between mortgage purchaser and borrower—The trial court correctly granted summary judgment for defendant Flagstar Bank on an unfair and deceptive practices claim arising from plaintiff's allegation that her granddaughter moved in with her and acted to defraud her of assets, including inducing her to borrow money on her home. Flagstar, which purchased the mortgage soon after its execution, had no contact with plaintiff and there is no evidence that the lender was acting as an agent for Flagstar. **Melton v. Family First Mortgage Corp.**, 129.

Summary judgment—kickback—The trial court did not err by granting summary judgment on an unfair and deceptive practices claim for defendant Family First, which loaned plaintiff money on her house at her granddaughter's inducement, where plaintiff argued that Family First had failed to disclose that it would receive a kickback from the bank to whom it sold the mortgage. **Melton v. Family First Mortgage Corp.**, 129.

Summary judgment—no evidence of harm—The trial court did not err by granting summary judgment on an unfair and deceptive practices claim for defendant Family First where plaintiff argued that Family First improperly backdated loan application documents, but plaintiff failed to present any evidence of harm. **Melton v. Family First Mortgage Corp.**, 129.

UNIFORM COMMERCIAL CODE

Secured property—priorities—The trial court erred by granting summary judgment for defendant in an action to recover the outstanding debt secured by a drill rig engine which plaintiff contended had been sold in bankruptcy without plaintiff's knowledge. Defendant made no arguments regarding the priority of plaintiff's interest and there was no genuine issue of material fact as to plaintiff's interest in the engine. **First-Citizens Bank & Tr. Co. v. Four Oaks Bank & Tr. Co.**, 378.

WILLS

Caveat—duress and undue influence—directed verdict—judgment notwithstanding the verdict—motion for new trial—The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by denying propounder's motions for directed verdict, judgment notwithstanding the verdict, and for a new trial even though propounder was not present during the negotiation and execution of the will. **In re Will of McDonald**, 220.

Caveat—undue influence—jury instructions—The trial court did not err in a will caveat action alleging the will was obtained through duress and undue influence by instructing the jury that it could consider on the issue of undue influence whether decedent was subjected to misrepresentations regarding the wishes of her natural children, whether propounder obtained other transfers of property from decedent, and whether propounder was disposed to exert undue influence. **In re Will of McDonald**, 220.

WILLS—Continued

Revocation—implied—subsequent letter—insufficient—The trial court did not err by not giving a jury instruction on revocation of a will where the purported revocation was a formally executed letter which stated that the testator had not written a will and would do so only with certain family members present. The writing cannot be considered a will because it made no attempt to devise the testator's property, it is not a codicil because it does not attempt to explain, modify, or revoke a will, and the letter is not sufficient evidence of an implied revocation because it was not expressly inconsistent with any provision expressed in the will. **In re Estate of Lowe, 616.**

WITNESSES

Absence not improperly procured—plea bargain—no prohibition on testimony—The State did not improperly procure the absence of a witness within the meaning of N.C.G.S. § 8C-1, Rule 804(a) where there was nothing in the witness's actual plea agreement which prohibited him from testifying, although an initial plea offer contained a provision that the witness would not be required to testify. **State v. Carter, 446.**

Marital privilege—limits—Statements relating conversations with defendant which occurred before his marriage to the witness or in the presence of a third party did not violate statutory prohibitions on compelling a spouse to testify. **State v. Carter, 446.**

Unavailable—refusal to testify—A witness was not available to testify, and thus his letter was admissible as against his penal interest under N.C.G.S. § 8C-1, Rule 804(b)(3), where he was not ordered to testify but refused to answer questions, was openly hostile to the court, and made clear that the threat of additional prison time made no difference to him since he was serving a term of 106 to 130 years. **State v. Carter, 446.**

WORKERS' COMPENSATION

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