NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 157

1 APRIL 2003

20 MAY 2003

RALEIGH
2004

CITE THIS VOLUME
157 N.C. APP.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRENDA H. COMPTON AND CURT OLSON, PLAINTIFFS V.
DAVID M. KIRBY, DEFENDANT

No. COA02-43

(Filed 1 April 2003)

1. Partnerships— de facto—formation of partnership—directed verdict

The trial court did not err in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by denying defendant's motion for a directed verdict and by submitting to the jury the issue of formation of a partnership, because plaintiffs presented sufficient evidence from which the jury could conclude the parties' business was a de facto partnership between plaintiffs and defendant.

2. Partnerships— breach of partnership agreement—directed verdict

The trial court did not err in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by denying defendant's motion for a directed verdict and by submitting the issue of breach of the partnership agreement, because there was sufficient evidence to show that defendant admitted he never told anyone that plaintiffs were his partners and stated that he had no intention of sharing with plaintiffs the benefits of ownership he acquired after the pertinent merger.

3. Fiduciary Relationship— breach of fiduciary duty—constructive fraud

The trial court did not err in an action regarding the dissolution of the parties' business arrangement by denying defendant's motion for a directed verdict and by submitting to the jury the issue of breach of fiduciary duty and open, fair, and honest dealings, and the issue of constructive fraud, because: (1) plaintiffs presented sufficient evidence to support their allegation that defendant engaged in self-dealing which constitutes a breach of a partner's fiduciary duties; and (2) a breach of fiduciary duty amounts to constructive fraud, and plaintiffs already established the existence of a fiduciary duty and a breach of that duty.

4. Appeal and Error— preservation of issues—failure to assert in motion for judgment notwithstanding verdict

Although defendant contends the trial court erred in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by submitting to the jury special interrogatories, this assignment of error is overruled because defendant failed to assert the special interrogatories issue in his motion for judgment notwithstanding the verdict as required by N.C. R. App. P. 10(b)(2), and therefore, he failed to preserve this issue for review.

5. Damages and Remedies— actual damages—opinion of property owner—purchase agreement

The trial court did not err in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by submitting the issue of actual damages to the jury, because: (1) the opinion of a property owner is competent evidence as to the value of such property; (2) plaintiffs presented evidence that defendant received over $250,000 in compensation for a business deal, and defendant admitted that he did not share any of the benefits with plaintiffs; and (3) plaintiffs introduced into evidence a draft purchase agreement where one company indicated it would purchase both the parties' company and another company.

6. Unfair Trade Practices— treble damages—attorney fees—constructive fraud—in or affecting commerce—proximate cause

The trial court did not err in an action regarding the dissolution of the parties' business arrangement by submitting jury

issues on unfair and deceptive trade practices (UDTP) and by awarding treble damages and attorney fees to plaintiffs, because: (1) North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim, and the Court of Appeals already concluded that the issue of constructive fraud was properly submitted to the jury; (2) the jury properly found that defendant's actions were in or affecting commerce; and (3) plaintiffs successfully demonstrated that defendant's actions proximately caused their injury.

7. Damages and Remedies— punitive damages—moot

Although defendant contends the trial court erred in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by awarding $90,000 in punitive damages under N.C.G.S. § 1D-15(a)(1), this argument is moot because: (1) the trial court determined that defendant's conduct constituted a violation of N.C.G.S. § 75-1.1 and trebled the actual damages award to $195,000; and (2) plaintiffs were required to elect between the treble damages and the $90,000 punitive damages award, and chose treble damages.

Appeal by defendant from order and judgment entered 2 February 2001 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 January 2003.

Hunton & Williams, by Christopher G. Browning, Jr., for plaintiff appellees.

Maupin Taylor & Ellis, P.A., by John I. Mabe, Jr., and Allen F. Reid, II, for defendant appellant.

McCULLOUGH, Judge.

This case arises out of a business relationship between plaintiffs Brenda Compton and Curt Olson and defendant David Kirby. The evidence at trial showed that defendant worked in Charlotte as the President of Colliers Vinson International Property Consultants of Charlotte, Inc. (Colliers-Charlotte), a real estate brokerage firm owned by his father, Albert Kirby. Colliers-Charlotte was part of a larger entity called Colliers International, a loosely structured organization of independent commercial real estate brokers who cross-refer business to one another. In March 1996, defendant created a real estate brokerage firm called Colliers Vinson International Property

Consultants of Raleigh, Inc. (Colliers Vinson of Raleigh). Defendant was the sole owner and President of Colliers Vinson of Raleigh, and plaintiffs were independent brokers who worked for him in Raleigh.

For the first nine months of its existence, Colliers Vinson of Raleigh operated without a valid real estate license due to an oversight by defendant's attorneys. On 11 December 1997, Colliers Vinson of Raleigh was administratively dissolved pursuant to N.C. Gen. Stat. § 55-14-21 for failure to file statutorily required annual reports. However, according to defendant, the business still existed and operated under the trade name of Vinson Property Consultants.

In the fall of 1996, Colliers International informed defendant that he could not use the Colliers name for his Raleigh corporation. Due to friction between Colliers International and Colliers Vinson of Raleigh and low business volume in Raleigh, defendant and his father considered closing the business and began discussing the matter with plaintiffs in September 1996. On 3 October 1996, plaintiffs met with both defendant and his father in Charlotte and the parties decided to keep the Raleigh office open. Plaintiffs and defendant agreed to change the business's name from Colliers Vinson of Raleigh to Vinson Property Consultants, and the appropriate assumed name certificate was filed in the Wake County registry.

Mr. Albert Kirby told both defendant and plaintiffs that his company would advance funds to Vinson Property Consultants to reimburse operating expenses while the office attempted to capture part of the Raleigh real estate market. According to plaintiffs, they and defendant agreed upon an arrangement whereby defendant owned 51% of Vinson Property Consultants, and each plaintiff owned 24.5%. Plaintiffs and defendant created a bank account in the name of Vinson Property Consultants, with the understanding that the money therein would be used to pay regular operating expenses. Plaintiffs deposited $24,000.00 of their personal funds into the account and told defendant that the money was a capital contribution into the partnership the three of them had just created. Each month, Vinson Property Consultants submitted a monthly tally of expenses to Colliers-Charlotte, and each month the Vinson account was reimbursed so that the bank account retained a $24,000.00 balance. Over time, Colliers-Charlotte advanced over $44,000.00 to Vinson Property Consultants.

One of the main goals of Vinson Property Consultants was to handle referrals from Colliers-Charlotte and to win approval as a

referral agency for business associated with the Colliers International network. As the business got underway, plaintiffs and defendant agreed that Vinson Property Consultants should be registered as a limited liability company. Plaintiffs prepared a draft of an operating agreement, but it was never finalized and no written agreement was ever made or signed by the parties. On 12 March 1997, plaintiff Curt Olson wrote a letter to defendant and confirmed the terms of the partnership agreement that he alleged existed between himself, defendant, and Ms. Compton. Defendant called Mr. Olson the same day and expressly recognized that the terms of the partnership set out in the letter were correct.

Plaintiffs signed contracts with third parties and became personally liable for the obligations of Vinson Property Consultants. After speaking with defendant, plaintiffs obtained approval for business cards which showed each plaintiff to be a "principal" in Vinson Property Consultants. Plaintiffs maintained that, in the real estate industry, the term "principal" is synonymous with "partner" and signifies ownership and control.

Throughout the trial, plaintiffs pointed to numerous instances in which defendant referred to and treated them as his partners. In late 1996, defendant approved an announcement in *Commercial Real Estate Today*, a regional real estate publication, which stated:

> David Kirby, President of Colliers Vinson International of Charlotte, North Carolina, announces the formation of Vinson Property Consultants, L.L.C. in Raleigh. Mr. Kirby is also very pleased to announce the addition of R. Curt Olson, CCIM and Brenda H. Compton as Principals in the firm.

Plaintiffs also presented the testimony of Mr. Ray McCrary, a prospective job applicant who spoke to defendant in early 1997. Mr. McCrary testified that defendant referred to plaintiffs as his partners and indicated that plaintiffs owned 49% of Vinson Property Consultants, while he owned the remaining 51%. Plaintiffs also introduced a number of documents approved (and, in some instances, signed) by defendant in which he recognized that plaintiffs were co-owners of Vinson Property Consultants. Additionally, plaintiffs were described as "partners" on their group health care application.

As a result of the discussions between themselves and defendant, plaintiffs worked approximately 60 to 70 hours per week to make the business successful. The primary goal was to make the business prof-

itable enough to earn the right to operate as part of the Colliers network of real estate brokerages. At trial, plaintiffs testified to both long work hours and a "very stressful" period. They also testified that their efforts took up a great deal of time and left them little opportunity to earn personal commissions.

In 1997, defendant and his father conducted negotiations for the sale of both Colliers-Charlotte and Vinson Property Consultants to Colliers Macaulay Nicolls, Inc. (CMN), a large affiliate of the Colliers network. When plaintiffs learned of the possible sale and merger, they agreed that defendant was in the best position to represent the interests of Vinson Property Consultants, due to his history of association with the Colliers network. Plaintiffs allowed the discussions to proceed with the belief that defendant was negotiating on their behalf, as well as his own. However, plaintiffs later learned that, during the discussions, defendant indicated he was the sole owner of Vinson Property Consultants. Plaintiffs eventually contacted CMN and informed its representatives of their co-ownership interest in Vinson Property Consultants and their belief that the business was a partnership consisting of themselves and defendant. CMN reviewed the business records of both Colliers-Charlotte and Vinson Property Consultants and decided not to purchase Vinson Property Consultants because of its disputed ownership and its low value.

In December 1997, defendant wrote to plaintiff Brenda Compton and asked her to execute a release of her rights of ownership in Vinson Property Consultants. She refused. In February 1998, the following sales and transfers occurred in a single large transaction: Mr. Albert Kirby sold most of the assets of Colliers-Charlotte to defendant, including the exclusive right to use the Colliers name in Charlotte. Defendant sold 85% of that acquisition to CMN, who in turn divided its purchase with Colliers Pinkard (another Colliers affiliate located in Baltimore, Maryland). Defendant, CMN, and Colliers Pinkard then merged their assets into a newly formed entity called Colliers N.C. Partners, LLC. In September 1997, the licensor and owner of the Colliers name gave CMN satellite rights to develop the Colliers name in Raleigh for one year. After its formation, Colliers N.C. Partners, LLC obtained the right to use the Colliers name in Charlotte from defendant and the satellite rights to develop the Colliers name in the Raleigh market from CMN.

On 13 February 1998, defendant was named President of Colliers N.C. Partners, LLC and owned 15% of the new business. Defendant

also received $80,000.00 in cash, a guaranteed salary of $72,000.00 per year for two years, a car allowance, and payment of his dues in a number of private clubs. Plaintiffs received no compensation or other consideration as a result of the transaction and were ordered to vacate the Raleigh office immediately. They were also informed that their $24,000.00 capital contribution to Vinson Property Consultants would not be returned.

On 20 February 1998, plaintiffs filed a complaint against defendant, Colliers Pinkard, and CMN, alleging the existence of a partnership between themselves and defendant and demanding a number of remedies based upon the dissolution of their business arrangement. The same day, plaintiffs also obtained an *ex parte* temporary restraining order which ordered defendant to refrain from "(1) ousting Plaintiffs from their business premises . . . and interfering with Plaintiffs' ongoing business; and (2) selling the partnership Vinson Property Consultants, or distributing its assets to the exclusion of Plaintiffs[.]" On 5 March 1998, the trial court entered a preliminary injunction which prevented defendant from taking action to dissolve, sell, or distribute the assets of Vinson Property Consultants without plaintiffs' participation.

On 1 October 1998, plaintiffs filed an amended complaint which included allegations of breach of a partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices against defendant. Defendant answered and asserted a number of defenses. On 27 August 1999, defendant filed a motion for summary judgment, which was subsequently denied by the trial court on 15 September 1999. The case proceeded to a trial by jury at the 21 August 2000 Civil Session of Wake County Superior Court.

During the trial, plaintiffs presented the testimony of five witnesses. Plaintiffs testified about the financial arrangement between themselves, defendant, and Mr. Albert Kirby for operating funds for Vinson Property Consultants; the correspondence between themselves, defendant, and others; and drafts of the proposed limited liability company agreement. Both plaintiffs testified that defendant acknowledged an intent to enter into a partnership with them to operate a new business in Raleigh that superceded the corporation for which plaintiffs originally worked. Plaintiffs further testified they were entitled to damages because defendant did not acknowledge them as his partners from September 1997 to January 1998, the time during which the sale transaction occurred and when Colliers N.C. Partners, LLC was formed. Plaintiffs reiterated that one of the goals

for their partnership with defendant was to perform well and earn an affiliation with the Colliers network. Plaintiffs consistently argued that defendant was supposed to obtain the Raleigh satellite rights for the use and benefit of Vinson Property Consultants, that he did in fact obtain the satellite rights after the merger, but that he misappropriated them.

When defendant moved for directed verdict at the close of plaintiffs' evidence, the trial court took the matter under advisement and instructed defendant to proceed with the presentation of his evidence. Defendant presented the testimony of several witnesses, including Mr. David Frederick, the Chief Operating Officer of Colliers Pinkard and a representative of Colliers N.C. Partners, LLC. Mr. Frederick explained the 1997 sale and transfers as follows: in 1997, the Colliers network re-evaluated Colliers-Charlotte because it had not satisfactorily kept up with managerial and technological changes necessary for it to be a profitable business. After review, the Colliers network told Colliers-Charlotte it could either combine with a large Colliers affiliate which could financially back it and boost its operations or lose its right to use the Colliers name. Colliers-Charlotte chose to combine with CMN, with the understanding that the assignment of satellite rights in North Carolina depended upon CMN's initial involvement and later involvement by Colliers Pinkard. Mr. Frederick further testified that the Colliers satellite rights were eventually controlled by Colliers N.C. Partners, LLC, an entity which was 85% owned by a sizeable Colliers affiliate. Defendant's 15% interest was comprised of Colliers-Charlotte contracts, but not Vinson Property Consultants. According to Mr. Frederick, even though defendant owned 15% of Colliers N.C. Partners, LLC, he never controlled the Colliers satellite rights and was not a decision-maker for Colliers N.C. Partners, LLC. Vinson Property Consultants was not part of the merger between Colliers-Charlotte, CMN, and Colliers Pinkard. In fact, plaintiffs continued to do business in Raleigh, but changed the name of their Raleigh office to International Property Consultants.

Defendant also testified on his own behalf. He stated that he was the sole owner of Vinson Property Consultants and that plaintiffs worked for him; plaintiff Compton was the manager and plaintiff Olson was the broker-in-charge. Defendant asserted that he never agreed to form a partnership with plaintiffs and that plaintiffs mistakenly thought otherwise. Defendant testified that plaintiffs referred to Vinson Property Consultants as a corporation and signed documents which stated the business was a corporation. He also pointed

out that when they applied for renewal of their real estate licenses, they stated they were employed by the Raleigh corporation owned by him. Defendant also stated that he never had control of the Colliers satellite rights and therefore could not have misappropriated them to the detriment of Vinson Property Consultants and plaintiffs.

Defendant's renewed motion for directed verdict at the close of all the evidence was denied. The jury agreed with plaintiffs that a partnership existed between plaintiffs and defendant, and that defendant's failure to acknowledge the partnership amounted to a breach of his fiduciary duty. The jury's determination that defendant breached his fiduciary duty led to a verdict against him for constructive fraud, which itself became the basis for an award of treble damages (pursuant to N.C. Gen. Stat. §§ 75-1.1 and 75-16 (2001)) and attorney's fees for plaintiffs (pursuant to N.C. Gen. Stat. § 16.1 (2001)). Damages were originally calculated based on (1) the price for which defendant sold part of Colliers-Charlotte, and (2) defendant's continued compensation.

On 15 September 2000, the trial court entered judgment for plaintiffs in the sum of $185,000.00 with interest from 20 February 1998 at the statutory rate of 8% per year, plus costs. Prior to entry of judgment defendant was given a $10,000.00 credit due to a pretrial settlement between plaintiffs and the other original defendants in the lawsuit. Defendant made timely motions for a new trial and for judgment notwithstanding the verdict (JNOV), which were denied on 22 December 2000. An amended judgment (awarding costs and attorney fees to plaintiffs along with the previous judgment) was entered on 2 February 2001, and defendant appealed on 2 March 2001.

On appeal, defendant argues the trial court committed reversible error by submitting to the jury a number of issues regarding the alleged partnership, including (I) the formation of the partnership; (II) the breach of the partnership agreement; and (III) the breach of fiduciary duty and open, fair, and honest dealing by defendant. Defendant also assigns error to the trial court's submission of (IV) special interrogatories to the jury, as well as the trial court's submission of the issues of (V) actual damages; (VI) punitive damages; and (VII) unfair trade practices and the subsequent award of treble damages and attorney's fees to plaintiffs. Lastly, defendant argues the trial court erred by (VIII) denying his motions for summary judgment, directed verdict, and JNOV. For the reasons stated herein, we conclude defendant received a trial free from error.

Our standard of review from the denial of a motion for directed verdict or JNOV is "whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000). "If there is more than a scintilla of evidence supporting each element of the plaintiff's case, the directed verdict motion should be denied. Review by an appellate court is limited to examining the grounds asserted in the directed verdict motion." *Little v. Matthewson*, 114 N.C. App. 562, 565, 442 S.E.2d 567, 569 (1994) (citation omitted), *aff'd*, 340 N.C. 102, 455 S.E.2d 160 (1995). Thus, a motion for directed verdict should be denied "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Graham v. Gas Co.*, 231 N.C. 680, 683, 58 S.E.2d 757, 760 (1950). With these concepts in mind, we turn to the arguments presented by the parties.

Formation of the Partnership

[1] By his first assignment of error, defendant argues the trial court committed reversible error by submitting to the jury the issue of formation of a partnership because no partnership *de jure* was formed and the parties conducted business in the form of a corporation as a matter of law. Plaintiffs, on the other hand, contend the issue was properly submitted to the jury because a *de facto* partnership arose between themselves and defendant. Upon review, we agree with plaintiffs.

N.C. Gen. Stat. § 59-36 (2001) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."

> A partnership is a combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business.

Zickgraf Hardwood Co. v. Seay, 60 N.C. App. 128, 133, 298 S.E.2d 208, 211 (1982). "To prove existence of a partnership, an express agreement is not required; the intent of the parties can be inferred by their conduct and an examination of all of the circumstances." *Wike v.*

Wike, 115 N.C. App. 139, 141, 445 S.E.2d 406, 407 (1994). A partnership may be inferred from all the circumstances, so long as the circumstances demonstrate a meeting of the minds with respect to the material terms of the partnership agreement. *See Davis v. Davis*, 58 N.C. App. 25, 293 S.E.2d 268, *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982).

> "Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of 'all the circumstances attendant on its creation and operation.' "
>
> Not only may a partnership be formed orally, but "it may be created by the agreement or conduct of the parties, either express or implied[.]" . . . "A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such."

Eggleston v. Eggleston, 228 N.C. 668, 674, 47 S.E.2d 243, 247 (1948) (citations omitted).

In the present case, plaintiffs acknowledge that they originally worked as independent brokers at defendant's corporation, Colliers Vinson of Raleigh. Despite this fact, the inference of a new partnership relationship may be drawn from acts which refute the prior relationship. Thus, in order to prevail, plaintiffs had to present evidence from which the jury could conclude that plaintiffs and defendant agreed "to carry on as co-owners a business for profit" in 49% and 51% shares. *See Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 253 S.E.2d 18, *disc. review denied*, 297 N.C. 457, 256 S.E.2d 810 (1979). Defendant contends plaintiffs' evidence is insufficient as a matter of law to show the parties reached a meeting of the minds with respect to the critical terms of their alleged partnership.

When considering all the evidence in the light most favorable to plaintiffs, as we are obligated to do, we conclude that plaintiffs did present sufficient evidence of a partnership to survive defendant's motion for directed verdict, despite defendant's arguments to the contrary. Plaintiffs correctly point out that "[i]t is immaterial that the parties intended to reduce their agreement to writing at a later date. A partnership may be formed by an oral agreement." *Campbell v.*

Miller, 274 N.C. 143, 149, 161 S.E.2d 546, 550 (1968). *See also Potter v. Homestead Preservation Assn.*, 330 N.C. 569, 576, 412 S.E.2d 1, 4 (1992). Plaintiffs provided sufficient evidence from which the jury could conclude that they and defendant were partners. Specifically, plaintiffs testified they and defendant met on 3 October 1996 and agreed to become partners in Vinson Property Consultants. This intent was repeated in plaintiff Olson's 12 March 1997 letter to defendant. In pertinent part, Mr. Olson's letter stated:

> Dear David:
>
> I wanted to write this letter to you to set forth my understanding of what we are trying to accomplish here in Raleigh. Having worked long and hard for the previous seven months, I believe that it is time for my Partner Agreement to be put in writing and formalized. We have discussed the need for this many times.
>
> * * * *
>
> It is my understanding, that when the new company [the LLC] is formed, the terms of our relationship will be as follows:
>
> VPC started January 1, 1997.
>
> Commissions are split 50/50 with the firm.
>
> After $150,000 in gross commissions, a new split of 60/40 occurs.
>
> VPC provides or reimburses health insurance for Principals'. [sic] Principals' family members must reimburse VPC.
>
> Brenda and I opened the business checking account with $24,000 from our personal funds, to pay bills. Reimbursement would be made by Colliers Vinson of Charlotte twice each month to replenish the account.
>
> David Kirby owns 51 percent of VPC. Brenda and I share the remaining 49 percent.
>
> When VPC acquires satellite status or Colliers recognition, David Kirby will reduce his share of stock to 25 percent by giving shares to Curt and Brenda. VPC will have responsibility for payment of all bills after this occurs.
>
> After 18 months, Brenda and I will share 15 to 20 percent of our stock with other partners. New partners will receive three to five percent of stock which will be purchased at the going rate.

> Colliers Vinson of Charlotte has provided Errors & Omissions insurance to Principals of VPC.

Shortly after Mr. Olson faxed the letter to defendant, he and defendant spoke on the phone. Mr. Olson testified that

> [H]e was very quiet. Again I took the lead in the discussion because it was a quiet phone call, and I just said, David I've been here a very good while, I need to know what we've got here and make sure everything is correct. That's all I'm trying to do. And I said, Is it correct? And he said, Yes.

Though defendant denied this at trial, the jury heard testimony from both plaintiffs and defendant and ultimately accorded more weight to plaintiffs' testimony. Additionally, plaintiffs and defendant opened a bank account at First Union and signed an agreement stating that Vinson Property Consultants was an "unincorporated business owned entirely by the undersigned." Plaintiffs' and defendant's signatures followed. Plaintiff Brenda Compton testified she told defendant that her and Mr. Olson's $24,000.00 deposit was a capital contribution into the business.

During the trial, plaintiffs contended defendant knew of several instances in which they described themselves as and acted as his partners. Plaintiffs introduced a number of contracts in which they, as principals of Vinson Property Consultants, contracted with companies for services in furtherance of their business. Plaintiffs indicated that they notified defendant of these documents, and his signature appears next to plaintiffs' signatures on several of those contracts. Similarly, defendant knew plaintiffs were holding themselves out as "principals" of Vinson Property Consultants and approved business cards describing plaintiffs as principals. Plaintiffs presented testimony from a number of people, including defendant's father, who stated that the term "principal" is synonymous with ownership in the real estate industry. Defendant himself wrote an announcement describing plaintiffs as principals in Vinson Property Consultants and explained to others that he owned 51% of the business while plaintiffs owned the other 49%. One prospective job applicant, Mr. Ray McCrary, testified that defendant referred to plaintiffs as his "partners."

In response to defendant's assertion that Vinson Property Consultants was a corporation rather than a partnership, plaintiffs argued that, during the time in question, the corporation did not exist

because it had previously been dissolved. They therefore contend that Vinson Property Consultants, as a matter of law, was not a corporation. Plaintiffs also indicated that the North Carolina Real Estate Commission was notified of the partnership shortly after it was created; the Real Estate Commission later informed Mr. Olson that he should wait until the written partnership agreement was signed before he changed the company's business license. Plaintiffs further testified that the written partnership agreement was not finalized because defendant's attorney became sick and died.

The evidence presented at trial was replete with contested issues of fact. When faced with the conflicting factual accounts presented by the parties, the jury weighed and considered the evidence and accorded more weight to plaintiffs' rendition. We hold the trial court properly denied defendant's motion for directed verdict because plaintiffs presented sufficient evidence from which the jury could conclude that Vinson Property Consultants was a partnership between themselves and defendant. Defendant's first assignment of error is overruled.

Breach of the Partnership Agreement

[2] By his second assignment of error, defendant argues the trial court erred by submitting to the jury the issue of breach of the partnership agreement because there was insufficient evidence that he exercised control over the use of the Colliers name. Plaintiffs, on the other hand, argue that defendant's conduct throughout the negotiations with CMN and Colliers Pinkard constituted a breach of the partnership agreement.

Plaintiffs presented testimony that defendant reached a deal with CMN and Colliers Pinkard in February 1998. As a result of the deal, defendant informed plaintiffs that he was keeping all the assets of Vinson Property Consultants, including its name, and indicated that plaintiffs were not part of the deal. When questioned at trial, defendant admitted he never told anyone that plaintiffs were his partners and stated he had no intention of sharing with plaintiffs the benefits of ownership he acquired after the merger.

Based on the foregoing, we hold the trial court properly submitted the issue of breach of the partnership agreement to the jury because plaintiffs presented sufficient evidence to survive defendant's motion for directed verdict. Defendant's second assignment of error is overruled.

Breach of Fiduciary Duty; Open, Fair, and Honest Dealing; and Constructive Fraud

[3] Defendant next argues the trial court erred by submitting to the jury the issue of breach of fiduciary duty and open, fair and honest dealing by him because as a matter of law there was no partnership and no breach of a partnership agreement. He also contends the issue of constructive fraud was improperly presented to the jury. We do not agree.

A fiduciary duty "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). In *Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954), our Supreme Court stated:

> It is elementary that the relationship of partners is fiduciary and imposes on them the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs. Each is the confidential agent of the other, and each has a right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs.

This principle is codified within the North Carolina Uniform Partnership Act, N.C. Gen. Stat. §§ 59-31 to -73 (2001). N.C. Gen. Stat. § 59-50 requires partners to "render on demand true and full information of all things affecting the partnership to any partner[.]" N.C. Gen. Stat. § 59-51 states:

> (a) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

As previously discussed, plaintiffs presented evidence that defendant entered into a merger with CMN and Colliers Pinkard and did not share the benefits of the merger with plaintiffs. Plaintiffs alleged that defendant engaged in self-dealing, which constitutes a breach of a partner's fiduciary duties. *See Reddington v. Thomas*, 45 N.C. App. 236, 262 S.E.2d 841 (1980). Because plaintiffs presented evidence in support of their allegation, the trial court properly submitted this issue to the jury.

In a related assignment of error, defendant argues the trial court erred in submitting the issue of constructive fraud to the jury. However, a breach of fiduciary duty amounts to constructive fraud. "Once plaintiff established a *prima facie* case that defendant[] owed plaintiff a fiduciary duty and that duty was breached, which amounted to constructive fraud, the burden of proof shifted to defendants to prove that they acted in an open, fair and honest manner[.]" *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 12, 379 S.E.2d 868, 874 (1989), *modified in part and rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). As we have already determined that plaintiffs established the existence of a fiduciary duty and a breach of that duty, we likewise conclude the issue of constructive fraud was properly submitted to the jury.

Special Interrogatories

[4] By his next assignment of error, defendant argues the trial court erred by submitting to the jury special interrogatories on the issues of (1) whether defendant negotiated for his own benefit in regard to the potential sale of Vinson Property Consultants or the right to operate as a Colliers affiliate in the Raleigh market, and (2) whether defendant falsely represented that he was the owner of Vinson Property Consultants.

> A JNOV motion is "essentially a renewal of a motion for directed verdict," *Smith v. Price*, 74 N.C. App. 413, 418, 328 S.E.2d 810, 815 (1985), *aff'd in part, rev'd in part on other grounds*, 315 N.C. 523, 340 S.E.2d 408 (1986), and thus must be preceded by a motion for directed verdict at the close of all evidence. *See Whitaker v. Earnhardt*, 289 N.C. 260, 264, 221 S.E.2d 316, 319 (1976). On appeal, we apply the same standard of review as that for a directed verdict. *See Northern Nat'l Life Ins. Co. v. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). Notably, "[t]he movant cannot assert grounds [for the JNOV] not included in [his] motion for directed verdict." *Love v. Pressley*, 34 N.C. App. 503, 509, 239 S.E.2d 574, 580, *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

Barnard v. Rowland, 132 N.C. App. 416, 421, 512 S.E.2d 458, 463 (1999). Defendant failed to assert the special interrogatories issue in his motion for JNOV and consequently failed to preserve the issue for our review. *See* N.C.R. App. P. 10(b)(2) (2002). Accordingly, his assignment of error is overruled.

Actual Damages

[5] By his fifth assignment of error, defendant argues the trial court erred by submitting the issue of actual damages to the jury because plaintiffs did not present sufficient evidence of actual damages. We do not agree.

"The burden of proving damages is on the party seeking them. As part of its burden, the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987) (citations omitted). "Absolute certainty is not required, but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion." *Tillis v. Cotton Mills*, 251 N.C. 359, 366, 111 S.E.2d 606, 612 (1959).

In the present case, the jury awarded plaintiffs $65,000.00 in actual, compensable damages. Defendant argues the jury awarded plaintiffs damages using a "lost opportunity" theory of recovery and made its calculations based upon his salary and benefits, as well as the sale of 85% of Colliers-Charlotte's assets to CMN. He contends the sale of Colliers-Charlotte's assets cannot be the basis for the damages award because that company was a distinctly separate business in Charlotte and had no bearing upon the calculation of damages. He further points out that Vinson Property Consultants did not have a history of profits and was not succeeding financially. In short, defendant argues that plaintiffs did not provide tangible evidence of damages, but rather relied on speculation, which is an insufficient basis upon which a jury may award damages. *Olivetti*, 319 N.C. at 547-48, 356 S.E.2d at 586; *see also McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 407-08, 466 S.E.2d 324, 329, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996).

The record indicates that plaintiffs paid $24,000.00 of their personal funds into a First Union bank account in the name of Vinson Property Consultants. Plaintiff Brenda Compton told defendant this money was a capital contribution and would be used to pay bills. She also testified that she and Mr. Olson contributed the money with the belief that defendant would recognize their ownership interest in Vinson Property Consultants. When the merger was completed in February 1998, defendant informed plaintiffs that their $24,000.00 would not be returned to them.

The jury also heard testimony from plaintiffs regarding their long work hours in furtherance of the business. Ms. Compton testified she and Mr. Olson worked approximately 60-70 hours per week from 3 October 1996 to 18 February 1998. Plaintiffs estimated that they worked about 3,000 hours more than they would have if they were mere employees of Vinson Property Consultants, and testified a commercial real estate worker earned approximately $36.00 per hour. Plaintiffs argued that the jury could have awarded actual damages of $108,000.00 ($36.00 per hour x 3,000 hours), plus $24,000.00 for their capital contribution. They therefore contend an award of $65,000.00 is well within reason.

Plaintiff Curt Olson testified that he sent defendant a letter on 31 October 1997 in which he assessed the value of the partnership interest and opportunity he believed defendant took from him and Ms. Compton. Each of Mr. Olson's calculations exceeded $50,000.00. We note that the opinion of a property owner is competent evidence as to the value of such property. *See* Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 180 (5th ed. 1998).

In August 1997, defendant and his father signed a letter of intent with CMN concerning the sale of Colliers-Charlotte and Vinson Property Consultants. The letter recognized that the value of Vinson Property Consultants was equal to the value of Colliers-Charlotte. Over time, as defendant learned that plaintiffs considered themselves his partners, he restructured the deal with CMN so that he and his father would sell Colliers-Charlotte's physical assets to CMN, as well as the right to operate a Colliers office in Raleigh, while CMN would acquire the satellite rights to Raleigh from Colliers International and in turn would transfer those rights to the new company, Colliers N.C. Partners, LLC. In return, defendant received $80,000.00 in cash, a two-year guaranteed salary of $144,000.00, a $15,600.00 car allowance, payment of club dues totaling $8,560.00, $12,000.00 of guaranteed vacation pay, 15% ownership of Colliers N.C. Partners, LLC and the title of President, and a number of additional benefits. Defendant received over $250,000.00 in compensation for the deal, and admitted he did not share any of the benefits with plaintiffs.

Additionally, plaintiffs introduced into evidence a draft purchase agreement wherein CMN indicated it would purchase both Colliers-Charlotte and Vinson Property Consultants. The consideration, which would flow to defendant, was 5000 shares of CMN stock, with a par value of $8 per share. The agreement was never signed. However, defendant conceded that, had it been signed, plaintiffs would have

been entitled to 49% of the benefit flowing to Vinson Property Consultants. Later, on 10 December 1997, the terms of the deal changed; Vinson Property Consultants was no longer part of the sale, and 10,000 shares of CMN stock was designated for defendant. In lieu of the 10,000 shares, defendant received $80,000 in cash.

Based on this evidence, we conclude that plaintiffs presented sufficient evidence of actual damages for the issue to go to the jury. As the jury's award was based on the evidence and appears reasonable, this assignment of error is overruled.

Unfair and Deceptive Trade Practices and Treble Damages

[6] By his next assignment of error, defendant argues the trial court erred by submitting jury issues on unfair and deceptive trade practices (UDTP) and by awarding treble damages and attorney fees to plaintiffs because the Unfair Trade Practices Act does not apply to this situation. Upon review, we do not agree.

N.C. Gen. Stat. § 75-1.1 (2001) provides:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purpose of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.
>
> * * * *
>
> (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). We review each element in turn.

A trade practice is unfair if it is "immoral, unethical, oppressive, unscruplous, [sic] or substantially injurious[.]" *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *overruled on other*

grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989). A trade practice is deceptive if it " 'possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception.' " *Forsyth Memorial Hospital v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 170 (1992) (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)), *disc. review denied*, 333 N.C. 344, 426 S.E.2d 705 (1993) (citations omitted). A party may be guilty of unfair or deceptive acts or practices when it engages in conduct that amounts to an "inequitable assertion of its power or position." *Edwards v. West*, 128 N.C. App. 570, 575, 495 S.E.2d 920, 924 (citations omitted), *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998).

North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim. *Spence v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 665, 668, 347 S.E.2d 864, 866 (1986). *See also HAJMM Co.*, 94 N.C. App. at 14, 379 S.E.2d at 876; and *Wilson v. Wilson-Cook Medical, Inc.*, 720 F.Supp. 533, 542 (M.D.N.C. 1989). Because we have already held that the issue of constructive fraud was properly submitted to the jury, defendant's argument that the UDTP claim is improper must fail.

We also believe the jury properly found that defendant's actions were "in or affecting commerce." Defendant's actions revolved around the sale of a business; namely, the sale of Colliers-Charlotte's assets to CMN and the later formation of Colliers N.C. Partners, LLC with both CMN and Colliers Pinkard. Defendant's actions clearly affected commerce in this State, particularly the availability of a Colliers affiliate in the Raleigh real estate market and the general marketing and sale of commercial real estate in that market. *See Walker v. Sloan*, 137 N.C. App. 387, 529 S.E.2d 236 (2000) (Where an employee group unsuccessfully tried to buy out the American Express Financial Advisors office in which they worked and were later terminated, they successfully alleged a Chapter 75-1.1 claim against the defendant, who engaged in "bad faith business dealing" to defeat their buyout attempt.).

Finally, we believe plaintiffs successfully demonstrated that defendant's actions proximately caused their injury. Based on the foregoing, we believe the trial court properly submitted this issue to the jury, and defendant's assignment of error is overruled.

Punitive Damages

[7] In his next assignment of error, defendant contends his actions were justified, so that the punitive damages award of $90,000.00 was unwarranted. We disagree.

Punitive damages are justified in cases of constructive fraud, N.C. Gen. Stat. § 1D-15(a)(1) (2001), as long as "some compensatory damages have been shown with reasonable certainty." *Olivetti*, 319 N.C. at 549, 356 S.E.2d at 587. Damages assessed for UDTP violations pursuant to N.C. Gen. Stat. § 75-1.1 are trebled automatically. *See* N.C. Gen. Stat. § 75-16 (2001); and *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 61, 338 S.E.2d 918, 924, *disc. review denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). Plaintiffs can assert both UDTP violations under N.C. Gen. Stat. § 75-1.1 and fraud based on the same conduct or transaction. Successful plaintiffs may receive punitive damages or be awarded treble damages, but may not have both. *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426, 344 S.E.2d 297, 301, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 464 (1986).

As previously discussed, plaintiffs successfully alleged a UDTP claim. The trial court determined that defendant's conduct constituted a violation of § 75-1.1 and trebled the actual damages award to $195,000.00. Plaintiffs were required to elect between the treble damages and the $90,000.00 punitive damages award, and chose treble damages. Defendant's arguments regarding punitive damages are therefore moot, and this assignment of error is overruled.

Motions for Summary Judgment, Directed Verdict, and JNOV

In his final assignment of error, defendant argues the trial court erred in denying his motions for summary judgment, directed verdict, and JNOV. However, after considering the scope of our review as well as the evidence presented by plaintiffs, we believe the trial court correctly denied all of defendant's motions. Accordingly, his final assignment of error is overruled.

Upon careful review of the record, transcripts, and the arguments presented by the parties, we believe the trial court acted properly in all respects. We conclude defendant received a fair trial, free from error.

No error.

Chief Judge EAGLES and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. ELDRIDGE FRANK WOLFE

No. COA02-388

(Filed 1 April 2003)

1. **Criminal Law— competence to stand trial—hearing—notice**

Defendant received reasonable notice of a hearing on his capacity to stand trial where defense counsel raised the issue of a hearing on the first day of trial by stating that he had never received a report from defendant's competency examination, the trial court found the report in the case file and allowed both defendant and the State to review and copy the report, and the court proceeded with the competency hearing over defendant's assertion that he needed more time. N.C.G.S. § 15A-1002 (2002).

2. **Criminal Law— continuance denied—defendant's competence questioned**

There was no error in a first-degree murder prosecution where the trial court denied defendant's motion to continue after defense counsel questioned defendant's competency to proceed during jury selection. The ruling on the motion to continue was not the source of any prejudice to defendant; moreover, the court granted a week's recess for treatment of defendant after an evaluation by a doctor.

3. **Criminal Law— competence to stand trial—jurors selected before competence questioned**

There was no plain error in the trial court's failing to strike ex mero motu four jurors selected the day before defense counsel questioned defendant's competency. Defendant did not move to strike jurors at trial and it is not clear that defendant was not competent on that date.

4. **Criminal Law— competence to stand trial—supporting evidence**

A trial court finding of defendant's competence to stand trial was supported by medical testimony.

5. **Criminal Law— self-defense—instruction denied**

The trial court did not err by denying a request for a self-defense instruction in a murder prosecution where the evidence

was insufficient to raise the issue of whether defendant reasonably believed he had to shoot to protect himself from death or great bodily harm.

6. Sentencing— habitual felon—indictment—prima facie case—prior judgments—discrepancy in race of defendant

The State met the statutory prima facie requirement for submitting an habitual felon case to the jury where the State submitted certified records of judgments entered upon felony convictions of a person bearing defendant's name, but defendant is white while the convicted person's race in one of the indictments is noted as black. Discrepancies in details are for the jury to consider.

7. Sentencing— habitual felon—instructions—identity of defendant

The trial court did not err in an habitual felon prosecution by denying defendant's request for an instruction that the jury must find beyond a reasonable doubt that defendant is the person named in the prior judgments. The references to the name in the instructions given could only have been understood as referring to defendant.

8. Sentencing— habitual felon—prior offense upgraded

The trial court did not err by not dismissing an habitual felon charge where defendant contended that a 1987 voluntary manslaughter conviction was a Class F felony in 1987 rather than the Class D felony it would have been at this trial. Voluntary manslaughter is a superseded offense which the State was specifically authorized to use by N.C.G.S. § 14-7.7.

9. Constitutional Law— ex post facto—habitual felon sentence enhancement

The use of a voluntary manslaughter judgment from 1987 to support an habitual felon indictment did not violate constitutional ex post facto provisions because defendant's habitual felon status only enhances his punishment in the present case, not his punishment for the underlying voluntary manslaughter.

10. Constitutional Law— ex post facto—habitual felon statute

The violent habitual felon statute, N.C.G.S. § 14-7.7, is not an ex post facto law in that it was passed in 1994 but allows the use of felony judgments from 1967. An habitual felon statute enacted

in 1967 put perpetrators on notice that certain crimes could be used to enhance punishment for later crimes.

Appeal by defendant from judgment entered 27 October 2000 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 22 January 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

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

MARTIN, Judge.

Defendant was indicted for the first degree murder of Paul Solis and for being a violent habitual felon. He appeals from a judgment sentencing him to life imprisonment without parole entered upon jury verdicts finding him guilty of second degree murder and being a violent habitual felon.

The evidence presented at trial indicates that at about 10:30 or 11:00 p.m. on 3 August 1999 Paul Solis was shot and killed by defendant in the back parking lot of the Korner Pocket, a pool hall in Raleigh, N.C. Testimony by various witnesses indicated that defendant and Solis were friends prior to 3 August.

Defendant's wife, Patti Wolfe, testified that she and defendant and their 13-year-old son, Jacob, went to the Korner Pocket sometime before sundown on 3 August. She stated that she talked to Solis to ask if something had happened between him and defendant the night before, but Solis said everything was all right. While there, Tami Muse, whom Patti knew to be defendant's "friend," came in and sat at the bar. Because defendant had brought Muse over to their house earlier that day while Patti was at home, Patti was very upset that Muse was at the bar. Patti stated that Muse and defendant went outside separately several times, but obviously to talk together. Because Patti was angry, she talked and danced with others. Defendant, whom Patti described as "very jealous," became angry with her and said they had to leave.

Patti testified that she, defendant and Jacob left via the front door of the bar and that Jacob pulled defendant some feet away to say that he wanted them to be like a family. Patti saw defendant rest his gun on the bumper of a nearby truck and heard him say to Jacob that Patti was "going to die tonight. She's drunk and she doesn't know

what she's doing and she's going to have to die." The three then continued around the side of the building to the back lot where they had parked Patti's truck. Patti testified that defendant was calling her names and pushing and tripping her. She stated that as they came around the back corner of the building, she saw Solis in the back doorway, but they did not exchange greetings. When they got to the truck, Jacob suddenly ran away back around the building. Because she was scared, Patti followed him into the bar and hid. She stated that by the time she got to the front corner of the building, she heard a gunshot. She further testified that defendant had taken cocaine that day and had been doing drugs for a day or so, that they had been drinking since the afternoon, and she described defendant as "out of control" that night. Patti also stated that defendant always carried a gun with him.

Judy Billings, Solis' girlfriend of a few months, testified that when she arrived at the bar, defendant and his family were there, as were Muse and Billings' brother and father. She testified that the situation was "very tense" because both Patti and Muse were in the bar. She did not think there was tension between defendant and Solis. Billings stated that at some point Solis went out back to take a call on his cell phone. She testified that she knew defendant always carried a gun, but that Solis never did. According to Billings, Solis was strongly opposed to violence against women and had indicated that he would intervene if he knew a man had abused or was abusing a woman.

Hosey Harrington, Jr., Billings' brother, testified that he noticed no tension between defendant and Solis on 3 August, but did see defendant and Patti arguing at the bar. When he went outside to use an outside staircase to meet one of the bartenders upstairs, Harrington stated that he saw defendant, Patti, and Jacob come around the side of the building and heard defendant say, "You f----- b----, I'll kill you," and saw Patti fall to the ground. Only a minute or so after he got to the upstairs room, Harrington heard mumbling and then a gunshot. He then looked out the window and saw defendant holding a gun in the air by his truck and shouting, "Woo, woo, woo." After defendant drove away, Harrington and the bartender, Barry Seville, went downstairs and found Solis lying on the ground with a gunshot wound to the head. Although Barry Seville was not available to testify at trial due to an accident, Detective Eugene Woodlief, a witness for the defense, testified at trial to the statement he took from Seville on 9 August 1999. Although Seville's statement corresponded for the most part with Harrington's, his version indicated that after he

and Harrington heard the gunshot and he looked down through a window to the back lot, he saw defendant walk to his truck and drive away quickly. Seville indicated in the statement that he did not see anything in defendant's hands.

Jennifer Spence, a part-time bartender at the Korner Pocket and girlfriend of defendant's brother, Robert Wolfe, testified that she was tending bar on 3 August when defendant, his family, Muse, and Solis were in the bar. She testified that the atmosphere was "awkward" because Patti and Muse were both at the bar, but that there was no tension between defendant and Solis. She stated that defendant, Patti, and Solis had drunk enough that she was going to quit serving them alcohol. Spence also testified that she had been with defendant when he had experienced hallucinations, and that she had heard him howl like a wolf when he was happy.

Robert Wolfe, defendant's brother, testified that he and the victim had been friends for about two or three years and that on the night in question the victim invited him to have a beer with him at the Korner Pocket. When defendant arrived, he asked his brother to step outside a few times and talked about being upset with the victim due to a wrestling incident between them the night before. Wolfe testified that defendant told him "he wanted to knock [the victim] out pretty much." He noticed that defendant had a gun on him that night and that he was in a "strange" mood and "just talking crazy stuff." Wolfe testified that soon after defendant and Patti and Jacob left the bar, Jacob came running back in and told him "to call 911 because [defendant] was going to kill everybody at the bar." After hiding Jacob, Wolfe went to look for defendant and saw the victim laying on the ground in the back lot. Wolfe stated that he saw defendant driving away in the truck as he came out the back door and first saw the victim on the ground. Wolfe also stated that he saw no weapon on or around the victim. He stated that defendant paged him the next evening and he told defendant to turn himself in. During their call, defendant said to his brother, "I had to pop him before he popped me."

Tami Muse testified that she had become defendant's girlfriend in June 1999. She stated that on the evening of 3 August, there was tension due to her presence, and Patti's, at the Korner Pocket. She eventually left the bar because she did not feel well. She next heard from defendant before midnight and he asked her to pick him up at The Doll House. When she arrived, she saw defendant get out of a

van driven by his mother, hug his brother Mike, and say, "It will be all right." The next morning they drove to Fayetteville and stayed with a friend of defendant's. In Fayetteville, Muse testified, defendant cried and told her that he had killed Solis on 3 August. Defendant told her that the gun had been pulled and they fought over it and it went off. After four or five days, they drove to Wilmington to stay with a friend. There she heard defendant say that he had "taken somebody out."

Michael Venable, who had grown up with defendant and Robert Wolfe and lives in Wilmington, testified that he received a call from defendant after 3 August asking Venable to meet him nearby. During their initial conversation, defendant told him:

> [he] and his wife were arguing in the parking lot. A guy come up and told him, "Hey, man, don't treat her that way. Don't talk to her that way." And he said, "F---- you. Mind your own business. If you don't, you know, I'll kill you." And [defendant] said that the guy went to go for his gun. And when the guy went for his gun, [defendant] got to his gun a little bit quicker. Said he—he cried on my shoulder. He said he really did not mean to kill the guy. He said that he was trying to back the guy away from him and the guy went to swat the gun like that. And when he swatted the gun, that the gun went off and caught him in the side of the head.

Defendant stayed with Venable for a few days until a U.S. Marshal came to the house, asked everyone for identification, and defendant turned himself in. During his stay, Venable heard defendant bragging about the 3 August incident. On cross-examination, defense counsel read to Venable a statement he had made to lead investigator Angelia Duckworth about what defendant had said to him. His statement did not state that defendant told Solis, "I'll kill you." It also mentioned that defendant thought someone had probably taken cocaine and a gun from Solis' possession before the police arrived at the scene. On re-cross examination, Venable clarified that defendant had only told him that Solis "went to go for his gun," but "never said he saw [a gun]."

Jeffrey Royal, who had been in jail with defendant while he awaited trial, testified that defendant told him two versions of what happened on 3 August 1999. In the first version, which corresponded generally with testimony by other witnesses, defendant stated that when Solis tried to talk to him about his wife, he told him to mind his own business and shot him, then drove away. Royal testified that defendant showed no remorse about Solis' death.

Dr. James Edwards, the pathologist who performed the autopsy on Solis testified that he died from a single gunshot wound to his head. In response to questions, he stated that he did not make a note in his report of any "stippling" effect on Solis' face or head from gunpowder. Such stippling, he stated, would have indicated to him that the shot happened at close range.

Crime scene agent Kathleen Myers testified that she took gunshot residue samples from Solis' hands at the scene on 3 August. Special Agent Tim Luper, a witness for the defense, testified that when he analyzed the gunshot residue samples taken from Solis, they revealed some residue on his hands. From the evidence gathered, Luper testified he could not make any conclusions as to whether Solis handled or shot the gun. Luper stated the results were "not consistent with [Solis] having fired a gun, but I can't eliminate that fact. I mean it's a possibility [Solis' hand was] in close proximity [to a gun]."

Other evidence or events at trial pertinent to this appeal are set out below.

In his brief, defendant has presented arguments in support of only seven of the thirty assignments of error contained in the record on appeal. Assignments of error not addressed in an appellant's brief are deemed abandoned and will not be considered by this Court. N.C.R. App. P. 28(a), (b)(6) (2002). The assignments of error brought forward in defendant's brief are presented in three main arguments. Defendant contends that the trial court erred in (1) handling procedural and substantive issues relating to defendant's capacity to stand trial that arose during jury selection, (2) denying defendant's request to instruct the jury on the doctrine of self-defense, and (3) denying defendant's motion to dismiss the violent habitual felon charge and failing to instruct the jury that the State must prove defendant's identity with respect to that charge beyond a reasonable doubt. We disagree with all three arguments and hold that defendant received a fair trial.

I.

Defendant first argues the trial court erred in (a) failing to afford him a proper competency hearing at the start of trial, (b) denying his motion to continue when counsel indicated during the second day of jury selection that defendant appeared unable to assist in his defense, (c) failing to strike the jurors that had been accepted while defendant was incompetent, and (d) finding defendant competent to proceed

with trial. The events relevant to these various arguments are summarized together. On 19 May 2000, Dr. George Corvin issued a report stating that defendant was suffering mental impairment and was not capable of making a plea at that time. On motion of the State, defendant was committed on 26 May 2000 to Dorothea Dix Hospital for examination regarding his competency to proceed with trial. On 10 August 2000, Dr. Robert Rollins of Dorothea Dix Hospital issued a report indicating that defendant was competent to proceed. On 2 October 2000, the first day scheduled for defendant's trial, the trial court reviewed Dr. Rollins' report and found defendant was competent to proceed.

Jury selection began on 3 October; four jurors were accepted by the parties. On 4 October, counsel for defendant indicated to the trial court that defendant could not concentrate, assist in his defense, or remember selection of jurors from the day before. Defendant moved for a continuance in order to have defendant evaluated. The trial court denied the motion to continue but allowed counsel for defendant to try to find a physician to examine defendant. Jury selection continued and two prospective jurors were excused. Counsel for defendant was unable to locate a physician to examine defendant and again moved for a continuance. The trial court denied the motion but permitted the State to call Dr. Rollins. While awaiting the arrival of Dr. Rollins, the State questioned and accepted juror Marcia Dibens. Counsel for defendant advised that defendant was unable to give input as to juror Dibens. When Dr. Rollins arrived, the trial court took a short recess for the evaluation. Dr. Rollins then testified that defendant was having significant problems with concentration and recommended that defendant receive a week's treatment followed by a reevaluation. Without making any express findings as to defendant's competence, the trial court recessed for a week. On 10 October 2000, Dr. Rollins testified that defendant seemed less depressed and could assist counsel, but was still having problems with concentration and mental focus. Dr. Rollins stated that defendant's medication had not had time to take full effect and that a few weeks would produce significant change. Defense counsel then indicated to the trial court that defendant did not seem rational and moved for a continuance until the medication could take full effect. The court denied the motion and found defendant competent to proceed. Jury selection continued and the first four jurors, as well as juror Dibens, who was questioned and accepted by defendant on 10 October, were seated on the jury.

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 112-13 (1975). In North Carolina, G.S. § 15A-1002 outlines the procedure used to determine whether a defendant has the capacity to stand trial:

> (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.
>
> (b) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered . . ., the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence.

N.C. Gen. Stat. § 15A-1002 (2002). The question of whether a defendant has the capacity to stand trial is one within the trial court's discretion and, if supported by the evidence, its determination is conclusive on appeal. *State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983); *State v. Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977).

[1] Defendant first contends the trial court failed to conduct a hearing as contemplated by G.S. § 15A-1002(b) before its 2 October ruling that he was competent to stand trial. He argues that he did not receive reasonable notice of the hearing, defense counsel did not receive a copy of Dr. Rollins' 10 August report until the hearing, Dr. Rollins' report did not address the bases given for Dr. Corvin's 19 May opinion, and Dr. Rollins was not available for cross-examination at the hearing. It appears from the record that defense counsel raised the issue of a competency hearing by explaining to the trial court that he had never received a report from the examination ordered on 26 May and had determined that defendant had never been taken to Dorothea Dix Hospital for examination. After determining that the State's counsel also had not received a copy of the report, the trial court located the report in the case file and allowed both counsel to review and copy it. At that point, defense counsel asserted that having just received the report, and given the reasonable notice required for a competency hearing under the statute, he needed time to review the

report and discuss it with Dr. Corvin or another mental health professional. However, the trial court proceeded with a competency hearing at that time. Defense counsel did not offer any evidence of conduct by defendant which had given counsel concern about defendant's competency, but argued that Dr. Rollins' report seemed very cursory, did not address the issues raised by Dr. Corvin's report, and that Dr. Rollins was not available for cross-examination. The trial court then stated that it had "conducted a hearing pursuant to the information that's been given concerning [defendant's] competency to stand trial," considered arguments of counsel and the two physicians' reports, and concluded "that the defendant is competent to stand trial . . . ."

The State's 26 May motion raised the question of defendant's competency to proceed; an examination having been ordered, G.S. § 15A-1002(b) required the trial court to conduct a hearing, after the examination, to determine whether defendant was competent to proceed. There is no indication in the record that such a hearing was held prior to 2 October.

Although a trial court is required to hold a hearing after reasonable notice to the parties, " 'it is a general rule that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.' " *State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580 (1977) (citation omitted). In this case, defendant asserted his right to the statutorily required hearing and reasonable notice; the trial court provided defendant notice shortly before commencing the hearing. The operative question is whether such notice was reasonable.

The statute at issue does not define "reasonable notice." However, in *State v. Burney*, 302 N.C. 529, 276 S.E.2d 693 (1981), our Supreme Court upheld the denial of the defendant's motion to continue on facts similar to those in the instant case. In *Burney*, defendant made a motion about a month prior to trial questioning his capacity to proceed and a psychiatric examination was ordered pursuant to G.S. § 15A-1002, with provision that a copy of the examination report be sent to defense counsel. *Id.* at 531, 276 S.E.2d at 694. The report stated that the defendant was competent to stand trial.

> Prior to trial [] defendant moved for a continuance on the ground that a copy of the hospital's report had not been sent to his attorney as had been ordered . . . . The trial judge informed defense

> counsel that he had received a copy of the report that day and would be glad to furnish him a copy of it. Counsel stated that he felt that he was entitled to an opportunity to study the report at length, and to have defendant's own experts examine it.
>
> Upon inquiry from the court, counsel stated that he had been informed previously that the report was in the clerk's office in a sealed envelope addressed to the presiding judge. He further stated that the clerk had suggested that he ask the presiding judge for a copy. Before ruling on the motion for a continuance, the court gave counsel time to read the report and go over it with defendant.

Id. at 531-32, 276 S.E.2d at 694-95 (footnotes omitted). In a footnote, the Court noted that the record did not indicate exactly when the defendant made the motion to continue, so the Court assumed it was the first day of trial. *Id.* at 531 n.1, 276 S.E.2d at 694 n.1. The Court also mentioned in another footnote that "[w]hile we cannot justify the . . . failure to send defendant's counsel a copy of the report as ordered . . ., we must note that with a minimum of effort counsel could have obtained a copy of the report sent to the presiding judge." *Id.* at 532 n.2, 276 S.E.2d at 695 n.2. Although there were other factors involved in the Court's holding that the trial court had not erred in denying the motion to continue, it is clear that the Court was not persuaded by the argument that defense counsel was entitled to a continuance because he had not received a copy of the report until the day of his motion to continue, presumably the first day of trial.

In the present case, the 26 May order for examination of defendant provided that copies of the examination report be sent to defendant's attorney and the clerk of court. On 2 October, the first day of trial, counsel for defendant stated to the court that he had asked defendant several times whether he had been taken to Dorothea Dix Hospital and he replied that he had not. The State indicated that it had spoken with employees at Dorothea Dix and learned that defendant had been examined, although not at the hospital, and the report sent to defendant and the clerk of court. Although there may have been miscommunication between defendant and his counsel concerning the facts of the examination, it does not appear that defense counsel made any further efforts to determine whether an examination had been conducted and a report made. As in *Burney*, minimal efforts such as a telephone call to the clerk or to Dorothea Dix Hospital would likely have turned up the report. Therefore, considering that counsel for defendant could have gotten access to Dr. Rollins' report

earlier, had a chance to look it over before the hearing, and had no evidence to present on the issue of defendant's competency other than Dr. Corvin's 19 May report, we cannot agree that the notice defendant received in this case was not reasonable.

For similar reasons, we also consider defendant's other contentions with regard to the 2 October hearing to be without merit. Defendant had an opportunity to be heard on Dr. Rollins' report at the hearing. Although the trial court did not make specific findings in its ruling, defendant does not assign error to this aspect of the order, and it is not clear from the brief that he contends the evidence presented at the hearing, i.e., the two reports, did not support the trial court's conclusion that defendant was competent to stand trial. In any event, Dr. Rollins' report clearly supports the trial court's conclusion and thus we may not disturb it on appeal. *Heptinstall, supra*; *Willard, supra.*

[2] Next, defendant contends the trial court erred in denying his motion to continue after defense counsel questioned his competency to proceed during jury selection on 4 October 2000. However, during the period between the trial court's ruling on the motion and the evaluation by Dr. Rollins, the only proceedings that took place were the State's questioning and excusal of a prospective juror for cause, the excusal of another prospective juror by the trial court based on his work schedule, and the State's questioning and acceptance of juror Dibens. Therefore, it appears that the trial court's ruling on the motion to continue was not the source of any prejudice to defendant. N.C. Gen. Stat. § 15A-1443 (2002). Moreover, after the evaluation, the trial court granted a week's recess for treatment of defendant, with a follow-up evaluation on 10 October.

[3] Defendant also contends the trial court erred in failing to strike *ex mero motu* the four jurors selected on 3 October. First, because defendant did not move to strike the jurors at trial, this issue is not properly preserved for appellate review. N.C.R. App. P. 10(b)(1) (2002). Defendant requests plain error review of the issue, but the plain error doctrine is limited to errors in jury instructions and the admission of evidence. *State v. Greene*, 351 N.C. 562, 528 S.E.2d 575, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000); N.C.R. App. P. 10(c)(4) (2002). Second, it is not clear from the record that defendant was not competent on 3 October. To the extent the trial court reviewed any evidence other than Dr. Rollins' testimony after his evaluation of defendant on 4 October, we note that counsel for defendant, who initiated the evaluation, had clearly stated that

defendant's "mental condition this morning is fundamentally different from how it was on Monday and how it was yesterday." Counsel for defendant also made no assertions on 3 October that defendant was not communicating with them adequately. This argument is without merit.

[4] Lastly, defendant argues the trial court erred in denying his motion to continue on 10 October to allow the medication to take full effect. In the relevant assignment of error, defendant did not assign error to the denial of his motion to continue, but rather to the trial court's finding of competence as unsupported by the evidence. N.C.R. App. P. 10(a) (2002). However, Dr. Rollins stated specifically:

> Mr. Wolfe's depression is less in my view. He has more trouble focusing on things that are currently distressing than things in the past that are less distressing. But it's my view that he is able to concentrate and communicate sufficiently as to be able to proceed.

This statement is competent evidence that supports the trial court's finding of competence. In sum, we find no reversible error was committed by the trial court with respect to the competency determinations in this case and related motions and hearings.

II.

[5] Defendant next contends the trial court erred in denying his request for a jury instruction on self-defense because the evidence supported such an instruction. "[A] defendant is entitled to a self-defense instruction 'if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm.' " *State v. Nicholson*, 355 N.C. 1, 30, 558 S.E.2d 109, 130, *cert. denied*, — U.S. —, 154 L. Ed. 2d 71 (2002) (quoting *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982)).

Defendant asserts the evidence that Solis owned guns and was known by defendant to own guns and the fact that Solis had gunshot residue on his hands indicating that he may have handled or fired a gun just prior to his death supports the theory of self-defense. In addition, defendant points to the testimony by his brother Robert and Michael Venable as to statements by defendant indicating that he shot Solis before Solis could shoot him as evidence that defendant believed it was necessary to shoot Solis to defend himself. However,

the evidence showed that Solis did not carry a gun, that no gun was found on or near him on 3 August, and, amongst defendant's various versions of the incident, he never claimed that he saw Solis with a gun. The evidence is insufficient to raise the issue of whether defendant *reasonably* believed he had to shoot Solis to protect himself from death or great bodily harm; therefore, the trial court did not err in denying the request for a self-defense instruction.

III.

[6] Defendant contends, in his final argument, that the trial court erred by denying his motion to dismiss the violent habitual felon indictment at the close of the evidence and by not instructing the jury that the State must prove defendant's identity with respect to this charge beyond a reasonable doubt.

> In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence. The court must determine whether substantial evidence supports each essential element of the offense and the defendant's perpetration of that offense. If so, the motion must be denied and the case submitted to the jury. " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion."

State v. Hairston, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000) (citations omitted). G.S. § 14-7.7 defines a violent habitual felon as:

> (a) Any person who has been convicted of two violent felonies . . ., in a court of this or any other state of the United States, . . . is declared to be a violent habitual felon. . . .
>
> (b) For purposes of this Article, "violent felony" includes the following offenses:
>
> (1) All Class A through E felonies.
>
> (2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1).
>
> (3) Any offense committed in another jurisdiction substantially similar to the offenses set forth in subdivision (1) or (2).

N.C. Gen. Stat. § 14-7.7 (2002). G.S. § 14-7.10 explains how the State may prove that a defendant has prior convictions of violent felonies:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

N.C. Gen. Stat. § 14-7.10 (2002).

Defendant first argues that the State's proof was not substantial evidence that defendant had two prior felony convictions. The State submitted certified copies of two judgments entered upon felony convictions of a person named "Eldridge Frank Wolfe," thus establishing a *prima facie* case under G.S. § 14-7.10. However, defendant argues the proof is insufficient to show that he is the same person named in the judgments because, in one of the judgments the convicted person's race is noted as black, while defendant is white. "In creating this statutory *prima facie* case, the General Assembly has dictated what amount of evidence is sufficient for the judge to submit an habitual felon case to the jury." *Hairston*, 137 N.C. App. at 354-55, 528 S.E.2d at 31. Therefore, because the State has met the *prima facie* requirement, any discrepancies in other details contained in the judgments are for the jury to consider in weighing the evidence. *State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990). The trial court did not err in denying defendant's motion to dismiss on this basis.

[7] Defendant also argues, based on this discrepancy in race, the trial court erred in denying defendant's request that the jury be instructed that it must find beyond a reasonable doubt that defendant is the "Eldridge Frank Wolfe" named in both judgments. The jury was instructed as follows:

> Now, I charge that for you to find the defendant guilty of being a violent habitual felon the State must prove two things beyond a reasonable doubt. First, that on or about December 11, 1985, Eldridge Frank Wolfe did commit the violent felony of voluntary manslaughter. And that on or about March 18, 1987, Eldridge Frank Wolfe was convicted of the violent felony of voluntary manslaughter . . . . Second, the State must prove beyond a reasonable doubt that on or about August 3rd, 1995, Eldridge Frank Wolfe did commit the violent felony of assault with a deadly weapon inflicting serious injury and that on or about March 12,

> 1996, Eldridge Frank Wolfe was convicted of assault with a deadly weapon inflicting serious injury . . . .

Defendant contends that this instruction would allow the jury to find him guilty of being a violent habitual felon if someone named Eldridge Frank Wolfe, but not necessarily the same person as defendant, had been convicted of those offenses. We are not persuaded by this argument; the references to Eldridge Frank Wolfe in the jury instruction as given could only have been understood by the jurors to refer to the defendant, who was on trial.

[8] Lastly, defendant argues the trial court erred in failing to dismiss the violent habitual felon charge because one of the felonies presented by the State, a 1987 voluntary manslaughter conviction, does not qualify for use as an underlying felony under G.S. § 14-7.7. Defendant contends that although voluntary manslaughter was a Class D felony at the time the instant case went to trial, it was a Class F felony in 1987. Defendant asserts that the State is not "authorized to elevate an offense classification from its previous class for purposes of satisfying violent habitual felony status." On the contrary, the State is specifically authorized by subsection (b)(2) of G.S. § 14-7.7 to use "[a]ny repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1) [Class A through E felonies]." Voluntary manslaughter is exactly such a superseded offense, having been upgraded by the General Assembly to a Class D felony. N.C. Gen. Stat. § 14-18 (2002); *State v. Mason*, 126 N.C. App. 318, 484 S.E.2d 818 (1997), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001).

[9] Defendant also contends that the use of the 1987 voluntary manslaughter judgment also violates the *ex post facto* provisions of the state and federal constitutions. U.S. Const., Art. I, §§ 9(3) and 10(1); N.C. Const., Art. I, § 16. "[A]n impermissible *ex post facto* law is one which, among other things, aggravates a crime or makes it a greater crime than when committed, or changes the punishment of a crime to make the punishment greater than the law permitted when the crime was committed." *Mason*, 126 N.C. App. at 324, 484 S.E.2d at 821. Because defendant's violent habitual felon status will only enhance his punishment for the second degree murder conviction in the instant case, and not his punishment for the underlying voluntary manslaughter felony, there is no violation of the *ex post facto* clauses. *Id.*

[10] Defendant further argues the holding in *State v. Mason* was incorrect because the violent habitual felon statute allows the use of felony judgments for enhancing punishment "when such action occurred on or after July 6, 1967," yet the statute was enacted in 1994. N.C. Gen. Stat. § 14-7.7 (2002). 6 July 1967 is the date the habitual felon statute, now G.S. § 14-7.1 *et seq.*, was enacted and the statute uses that date as a cut-off point for the felonies that can be used under it to enhance punishment. N.C. Gen. Stat. § 14-7.1 (2002). Thus, defendant argues that the violent habitual felon statute is an *ex post facto* law to the extent that it authorizes use of felonies committed between 1967 and 1994 to enhance punishment because offenders were not on notice between 1967 and 1994 that their offenses might thus be used in the future.

We reject the argument. Although the violent habitual felon statute was not enacted until 1994, perpetrators were on notice between 1967 and 1994, pursuant to the habitual felon statute, that certain crimes could be used to enhance punishment for later crimes.

Defendant received a fair trial and was sentenced according to law.

No error.

Judges STEELMAN and GEER concur.

SUSAN F. JOHNSON, PLAINTIFF v. BOARD OF TRUSTEES OF DURHAM TECHNICAL COMMUNITY COLLEGE, DEFENDANT

No. COA02-356

(Filed 1 April 2003)

1. Disabilities— North Carolina Persons with Disabilities Protection Act—termination from employment—misconduct discovered after discharge

The trial court erred by failing to apply *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), stating that evidence of employee misconduct discovered after a discharge which would have provided a lawful basis for such discharge if discovered earlier does not bar a discrimination claim, to plaintiff teacher's employment discrimination case under the North

Carolina Persons with Disabilities Protection Act (NCPDPA) based on defendant community college's failure to rehire plaintiff or offer her another contract, because: (1) the trial court specifically found that defendant's disability was the determining factor in the 16 June 1995 decision to not offer her another contract to teach at a jail, and the decision not to renew was made solely for motives unlawful under the NCPDPA; and (2) once it was determined that discriminatory conduct took place on 16 June 1995, it was improper for the trial court to have considered the after-acquired allegations of wrongdoing by plaintiff as a basis for defendant's motive in discharging plaintiff.

2. Disabilities— North Carolina Persons with Disabilities Protection Act—termination from employment—amount of damages, costs, and attorney fees

Although plaintiff teacher contends the trial court erred by denying plaintiff relief despite having found that defendant community college terminated her employment solely based upon her disability, this issue is remanded for an evidentiary hearing to determine the amount of damages, costs, and attorney fees that should be awarded to plaintiff in accordance with N.C.G.S. § 168A-11 and *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), because: (1) although after-acquired evidence of pre-discharge employee misconduct will not bar a discrimination claim under the North Carolina Persons with Disabilities Protection Act, such evidence may be used to bar the specific remedy of reinstatement if the employer establishes that it would have made the same employment decision had it known of the misconduct at the time of the discharge; and (2) if an employer can show that its discovery of the employee's predischarge misconduct was inevitable and independent of its employment decision, back pay shall be limited to the time between the discharge and the time of discovery.

Appeal by plaintiff from judgment entered 12 September 2001 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 22 January 2003.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiff-appellant.

Haywood, Denny & Miller, L.L.P., by George W. Miller, III and George W. Miller, Jr., for defendant-appellee.

The North Carolina Academy of Trial Lawyers, by Lynn Fontana, and the American Civil Liberties Union of North Carolina, by Seth H. Jaffe, amicus curae.

STEELMAN, Judge.

This appeal arises out of a disability discrimination claim filed by Susan F. Johnson ("plaintiff" or "Johnson") against the Trustees of Durham Technical Community College ("defendant" or "Durham Tech") under the North Carolina Persons with Disabilities Protection Act ("NCPDPA"), N.C. Gen. Stat. § 168A-1, *et seq.* (2001). Plaintiff appeals the trial court's judgment dismissing her claim with prejudice and awarding her no costs, attorney's fees or other relief. For reasons stated herein, the judgment is reversed, and this case is remanded to the trial court.

Since contracting polio as a young child, plaintiff has been unable to walk without crutches, and her physical activity has been substantially limited. In 1986, after teaching full-time for several years, plaintiff's disability forced her to quit working on a full-time basis, although she remained able to teach on a part-time basis.

In 1993, plaintiff began working with Durham Tech's Adult and Basic Skills Department as a part-time instructor for the in-house education program for inmates of the Durham County Jail Annex ("the jail"). Russ Conley ("Conley"), program director for Durham Tech's Adult and Basic Skills Department, contracted with plaintiff and supervised her work.

Plaintiff taught classes which prepared inmates to take their high school equivalency exam under her first contract with Durham Tech from November 1993 to February 1994. She entered seven additional part-time teaching contracts with Durham Tech between February 1994 and June 1995. Each of these contracts was for a specific term determined by the duration of the class taught by plaintiff.

Plaintiff initially was able to drive herself to and from work and to enter the jail using only her crutches. On 8 June 1994, plaintiff fell from her crutches as she attempted to open the security door to enter the jail and broke her back. Plaintiff applied for and received workers' compensation benefits for her injuries resulting from this fall. While recovering, plaintiff did not return to work, and defendant found a replacement teacher to fulfill the remainder of plaintiff's contract ending in August 1994.

When plaintiff returned to work for defendant under a new contract in January 1995, she was confined to a wheelchair at all times. She used wheelchair-accessible public transportation to travel to and from work at the jail and taught classes from her wheelchair. Although jail guards occasionally escorted plaintiff and helped her open doors, she generally was able to enter the jail and her classroom without assistance.

On 11 February 1995, plaintiff fell in the bathtub at her home and broke her leg. She returned to work at the jail approximately two weeks later and resumed her teaching duties from her wheelchair.

In the spring of 1995, Art Clark ("Clark"), Dean of Adult and Continuing Education at Durham Tech, and Ruth Lewis ("Lewis"), Conley's direct supervisor, discussed with Conley their concerns about plaintiff's safety and Durham Tech's liability if she were to suffer another accident at the jail. Conley also had some concerns at this time about plaintiff's prior absenteeism due to her injuries. Clark encouraged Conley to speak with plaintiff and to consider whether it would be appropriate for her to continue working at the jail in light of her previous fall.

On 16 June 1995, Conley met with plaintiff and discussed with her other teaching opportunities with Durham Tech that were not at the jail. Plaintiff was "not receptive" to these other teaching positions. Conley then informed plaintiff that "the situation had proved to be a liability for Durham Tech" and that she would not be returning to work for defendant at the jail. Conley testified that Clark had made the decision not to re-hire plaintiff and that Lewis had concurred with this decision.

Between 21 June and 24 June 1995, Clark received anonymous phone calls alleging that plaintiff was a frequent drug user, had engaged in sexual relationships with prisoners, had provided prisoners with drugs and bullets and frequently carried a loaded weapon. On 26 June 1995, Conley spoke to plaintiff at the jail and informed her that her teaching position with Durham Tech would end when her contract expired on 28 June 1995. Defendant did not offer her another teaching position.

Plaintiff filed discrimination charges against defendant with the North Carolina Department of Labor under the North Carolina Retaliatory Employment Discrimination Act ("REDA"), N.C. Gen. Stat. § 95-240, *et seq.* (2001), and with the Equal Employment

Opportunity Commission under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (2002). After exhausting her administrative remedies, plaintiff filed a complaint alleging defendant refused to re-hire her in violation of REDA and the ADA.

On 23 December 1997, Durham County Superior Court Judge Henry V. Barnette partially granted defendant's motion for summary judgment and dismissed plaintiff's REDA claim. On 18 December 1998, Durham County Superior Court Judge Narley L. Cashwell granted defendant's motion for directed verdict as to plaintiff's ADA claim.

Plaintiff appealed both the summary judgment and directed verdict rulings. A unanimous panel of this Court affirmed Judge Barnette's order granting defendant's summary judgment motion based on plaintiff's retaliatory discharge claim under REDA, reversed Judge Cashwell's decision directing a verdict based on plaintiff's ADA claim and remanded the case for further proceedings consistent with its opinion. *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 535 S.E.2d 357 ("*Johnson I*"), *disc. review denied and appeal dismissed*, 353 N.C. 265, 546 S.E.2d 102 (2000).

Plaintiff amended her complaint to add a claim under the NCPDPA alleging defendant failed to re-hire her on the basis of her disability in violation of N.C. Gen. Stat. § 168A-5(a)(1). On 29 May 2001, plaintiff and defendant filed a stipulation in which plaintiff voluntarily dismissed her claims under the ADA and defendant waived the statute of limitations defense to plaintiff's claim under the NCPDPA. This matter was tried without a jury in accordance with N.C. Gen. Stat. § 168A-11(a).

On 12 September 2001, Durham County Superior Court Judge Howard E. Manning, Jr., filed a judgment dismissing plaintiff's action with prejudice. The judgment contained lengthy findings of fact and conclusions of law, including the following:

> During the [s]pring of 1995, Conley became concerned about Johnson's safety in the jail, and also became concerned about whether he was putting Ms. Johnson in a situation which might prove to be a liability for [Durham Tech]. Conley's concern was "prompted" as a result of discussions with either Ruth Lewis or Dean Art Clark during the spring of 1995. Neither Lewis nor Clark went to the jail or conducted an investigation first hand with

respect to Johnson's ability to function safely in a wheelchair while carrying out her teaching responsibilities.

In the spring[] [of] 1995[,] Conley, after talking with Dean Clark and/or Lewis, broached the subject with Johnson about teaching elsewhere than at the jail. Johnson did not want to teach elsewhere[,] and Conley did not push the issue. Dean Clark and Lewis wanted Johnson out of the jail environment and wanted her to teach elsewhere for Durham Tech. Their view was "paternalistic" and not based on an investigation into the conditions at the jail or Johnson's ability to teach there despite her disability. While Dean Clark did not order Conley to move Johnson from the jail and put her somewhere else, he strongly "suggested" it to Conley. They [Dean Clark and Lewis] left the unpleasant task of carrying out the "suggestion" . . . and the placement of Johnson in a teaching position outside of jail to Conley. *The decision of Clark to be carried out by Conley was made solely on the basis of Johnson's disability* and was not based on poor job performance or absences occasioned by her disability or health.

. . .

On June 16, 1995, Conley met with Johnson at his office to discuss Johnson's teaching at the jail. . . .

. . .

Conley was not going to offer Johnson a contract that would permit her to remain and teach at the jail. The basis for Conley's decision was that his superiors at Durham Tech were concerned about "liability" should Johnson continue to teach there. *This concern was based solely upon her disability and was without basis in fact.* The jail was no more "unsafe" for Johnson than any other place because she was able to function at the facility safely and to do her job there as she had done since January 1995, without incident. *The decision to not offer Johnson another contract to teach a[t] the jail had been made as of June 16, 1995*, but not implemented or carried out, as the contract period had not expired and there was still time for Johnson to attempt to get Durham Tech to reverse its decision. Conley, her immediate supervisor and department head, was not going to offer her a contract to teach at the jail after the present contract expired.

(emphasis added).

I.

[1] In her first assignment of error, plaintiff contends that the trial court erred in failing to apply the United States Supreme Court decision in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 130 L. Ed. 2d 852 (1995), to her employment discrimination claim under the NCPDPA.

In *McKennon*, the employee claimed she was discharged by her employer in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621, *et seq.* (1988 and Supp. V). *McKennon*, 513 U.S. at 354-55, 130 L. Ed. 2d at 859. During the course of discovery in the discriminatory discharge action, McKennon's employer learned that she had copied confidential company documents prior to her discharge. *Id.* at 355, 130 L. Ed. 2d at 859. McKennon's employer stated that if it had known of her misconduct, it would have discharged her for that reason. *Id.* The Sixth Circuit Court of Appeals held that McKennon's prior misconduct was a lawful basis for her termination and affirmed the trial court's granting of summary judgment in favor of the employer. *Id.*

A unanimous United States Supreme Court reversed, deciding McKennon's ADEA claim in the context of its prior discrimination decision in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471 (1977). The *Mt. Healthy* Court found that the employer had two motives for firing the employee, one lawful and the other unlawful. *Id.* at 285, 50 L. Ed. 2d at 482. The Court held that if the lawful reason alone would have sufficed to justify the firing, then the employee could not prevail on a claim against the employer based upon the unlawful motive. *Id.* at 285-86, 50 L. Ed. 2d at 482-83.

The *McKennon* Court held that unlike *Mt. Healthy*, there was no "mixed motive" on the part of McKennon's employer at the time she was discharged. *McKennon*, 513 U.S. at 359, 130 L. Ed. 2d at 862.

> McKennon's misconduct was not discovered until after she had been fired. *The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason.* Mixed-motive cases are inapposite here, except to the important extent they underscore the necessity of determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal anti-discrimination law.

Id. at 359-60, 130 L. Ed. 2d at 862 (emphasis added). Thus, evidence of McKennon's misconduct discovered after her discharge, which would have provided a lawful basis for such discharge if discovered earlier, did not bar her discrimination claim under the ADEA.

The *McKennon* Court noted that the ADEA was part of a "wider statutory scheme to protect employees" which included Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (2002), and the ADA. *Id.* at 357, 130 L. Ed. 2d at 860. Since the decision, the *McKennon* rule has been widely adopted in the context of employment discrimination cases under various statutes. *See, e.g., O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002) (finding that employer's belated discovery that applicant exceeded the position's statutory age maximum would not bar an ADA claim); *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001) (applying *McKennon*'s after-acquired evidence rule to unapproved absences in a Family and Medical Leave Act case); *Crapp v. City of Miami Beach Police Dept.*, 242 F.3d 1017 (11th Cir. 2001) (applying *McKennon* to employee's Title VII race discrimination claim); *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995) (applying *McKennon* to Title VII gender discrimination claim); *Ricky v. Mapco, Inc.*, 50 F.3d 874 (10th Cir. 1995) (holding after-acquired evidence of sexual misconduct no bar to age discrimination claim); *Garrett v. Langley Federal Credit Union*, 121 F. Supp. 2d 887 (E.D. Va. 2000) (applying *McKennon* to federal whistleblowers' statute).

Several states also have adopted the *McKennon* rule, applying it to their own discrimination statutes. *See, e.g., Toyota Motor Mfg., U.S.A., Inc. v. Epperson*, 945 S.W.2d 413 (Ky. 1997) (disability discrimination under the Kentucky Civil Rights Act); *Wright v. Restaurant Concept Management*, 532 N.W.2d 889 (Mich. Ct. App. 1995) (discrimination under Michigan civil rights statute); *Baber v. Greenville County*, 488 S.E.2d 314 (S.C. 1997) (discrimination under state whistleblower's statute); *Norwood v. Litwin Eng'rs & Constructors*, 962 S.W.2d 220 (Tex. App. 1998) (disability discrimination under Texas Commission on Human Rights Act); *Barlow v. Hester Industries, Inc.*, 479 S.E.2d 628 (W. Va. 1996) (retaliatory discharge under West Virginia Human Rights Act).

In *Johnson I*, this court expressly adopted the *McKennon* rule in the context of plaintiff's original claim under the ADA. *Johnson I*, 139 N.C. App. at 685, 535 S.E.2d at 364 ("[a]n employer may not rely on evidence of employee misconduct which is acquired after the employ-

ment decision in question to defend the employment decision.") To determine whether the *McKennon* rationale should apply to the NCPDPA, we look to the provisions of the statute to ensure that *McKennon* is consistent with its purpose and content.

The NCPDPA is the North Carolina equivalent of the ADA, sharing the common purpose of providing protection against disability discrimination. 42 U.S.C. § 12101(b); N.C. Gen. Stat. § 168A-2. Both statutes contain rules regarding discriminatory employment practices against disabled persons. The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). Similarly, the NCPDPA states that "[i]t is a discriminatory practice for: (1) An employer to fail to hire or consider for employment or promotion, to discharge, or otherwise to discriminate against a qualified person with a disability on the basis of a disabling condition with respect to compensation or the terms, conditions, or privileges of employment." N.C. Gen. Stat. § 168A-5(a)(1). The ADA and the NCPDPA also contain similar remedial provisions, including those for injunctive relief and back pay awards. 42 U.S.C. § 2000e-5(g) (2002) (providing the remedial guidelines for ADA claims); N.C. Gen. Stat. § 168A-11.

N.C. Gen. Stat. § 168A-12 provides that "[a] civil action regarding employment discrimination brought pursuant to [Chapter 168A] shall be commenced within 180 days after the date on which the aggrieved person became aware of or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct." Thus, a cause of action under the NCPDPA accrues when the employee becomes aware of or should have become aware of the employer's wrongful conduct. This is consistent with *McKennon*, which focuses on the intent of the employer at the time of the alleged discriminatory act. *McKennon*, 513 U.S. at 360, 130 L. Ed. 2d at 862.

We find nothing in the purpose or content of the NCPDPA that is inconsistent with or contrary to the *McKennon* rule. Therefore, as this Court in *Johnson I* adopted *McKennon* under the analogous ADA provisions, we also find that the *McKennon* rule should be adopted in the context of claims under the NCPDPA.

In applying *McKennon* to plaintiff's appeal in the instant case, this Court is bound by the trial court's findings which are supported

by competent evidence, even if evidence exists to sustain contrary findings. *Fulcher v. Golden*, 147 N.C. App. 161, 554 S.E.2d 410 (2001). Our review of the trial court's conclusions of law is *de novo*. *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000).

As noted above, N.C. Gen. Stat. § 168A-5(a)(1) makes unlawful an employer's decision not to hire or consider for employment or "otherwise to discriminate against a qualified person with a disability on the basis of a disabling condition." Our courts have not addressed the question of whether an employer's failure to re-hire an employee or to renew an employee's contract is conduct covered by this language of the NCPDPA. However, this Court determined in *Johnson I* that a failure to renew a contract constitutes actionable conduct under REDA, which broadly defines retaliatory actions to include "*other adverse employment action*." *Johnson I*, 139 N.C. App. at 682, 535 S.E.2d at 362 (*citing* N.C. Gen. Stat. § 95-240(2) (1999)) (emphasis in original). We find plaintiff has an actionable claim under the similarly broad language of the NCPDPA for employment discrimination based on defendant's failure to re-hire plaintiff or offer her another contract.

Here, the trial court specifically found that plaintiff's "disability was the determining factor in the June 16, 1995[,] decision announced by Conley to not offer her another contract to teach at the jail" and that defendant's decision was "made solely on the basis of [plaintiff's] disability and was not based on poor job performance or absences occasioned by her disability or health." Defendant's decision not to renew plaintiff's contract was made solely for motives unlawful under the NCPDPA.

The plaintiff first became aware that she would not be offered another contract to teach for defendant on 16 June 1995. Under N.C. Gen. Stat. § 168A-12, plaintiff's cause of action accrued on 16 June 1995. The trial court's conclusion that the decision not to re-hire plaintiff was not implemented until 26 June 1995 was error. Once it was determined that discriminatory conduct took place on 16 June 1995, it was improper for the trial court to have considered the "after-acquired" allegations of wrongdoing by plaintiff as a basis for defendant's motive in discharging plaintiff. Based on the trial court's findings, judgment should have been entered for plaintiff, finding that her discharge violated the provisions of NCPDPA.

II.

[2] In her second assignment of error, plaintiff contends that the trial court erred in denying her relief despite having found that defendant

terminated her employment solely based upon her disability. She specifically argues that this Court should apply the *McKennon* rule to determine the appropriate remedy in light of after-acquired evidence of alleged employee misconduct.

In *McKennon*, the United States Supreme Court held that while "after-acquired" evidence of employee misconduct could not bar an employer's liability for discriminatory discharge, such evidence may be relevant to determining the relief available to the employee. *McKennon*, 513 U.S. at 360, 130 L. Ed. 2d at 862. If the employer establishes that the "wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge," then the employee's relief may be limited by the trial court. *Id.* at 362-63, 130 L. Ed. 2d at 864. Where such a showing is made by the employer, "neither reinstatement nor front pay is an appropriate remedy." *Id.* at 362, 130 L. Ed. 2d at 863.

Under N.C. Gen. Stat. § 168A-11(b), the trial court is allowed to order declaratory and injunctive relief. In a civil action, the trial court also may award back pay, which is expressly limited to a period of two years prior to the filing of this action. N.C. Gen. Stat. § 168A-11(b). Any interim earnings of the plaintiff or amounts earnable with reasonable diligence by the plaintiff shall operate to reduce any back pay award. *Id.* N.C. Gen. Stat. § 168A-11(d) provides that the trial court, in its discretion, may award reasonable attorney's fees to the substantially prevailing party as part of the costs.

As discussed above in Section I, *supra*, the remedial provisions of the NCPDPA are similar to those in the ADA. Based on this similarity, we find the structure and content of the NCPDPA is consistent with the application of the *McKennon* rule for determining remedies in cases under Chapter 168A and should be applied to determine the appropriate remedy in this case.

Although after-acquired evidence of pre-discharge employee misconduct will not bar a discrimination claim under NCPDPA, such evidence may be used to bar the specific remedy of reinstatement if the employer establishes that it would have made the same employment decision had it known of the misconduct at the time of the discharge. If an employer can show that its discovery of the employee's pre-discharge misconduct was inevitable and independent of its employment decision, back pay shall be limited to the time between

the discharge and the time of discovery. *See Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993).

Upon remand, the trial court shall enter judgment for plaintiff against defendant. The trial court shall then conduct an evidentiary hearing to determine the amount of damages, costs and attorney's fees that should be awarded to plaintiff in accordance with N.C. Gen. Stat. § 168A-11 and *McKennon*.

REVERSED AND REMANDED.

Judges MARTIN and GEER concur.

LOUIS DALENKO, AN INCOMPETENT BY INTERIM GENERAL GUARDIAN, CAROL BENNETT AND CAROL BENNETT, INDIVIDUALLY, PLAINTIFFS v. WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, THOMAS W. HOGAN, DIRECTOR, AND SUSAN HARMON, SOCIAL WORKER AND INDIVIDUAL, LOU A. NEWMAN, A PROFESSIONAL, DEFENDANTS

No. COA02-377

(Filed 1 April 2003)

1. Appeal and Error— preservation of issues—failure to comply with appellate rules—improper brief—extension of time to file brief

Defendants' motion to dismiss plaintiff's individual appeal from an order awarding sanctions and attorney fees is allowed in an action arising out of defendants' initiation of incompetency and guardianship proceedings and their subsequent intervention in plaintiff personal representative's care of her father, because: (1) plaintiff failed to timely file her appellant's brief despite obtaining four extensions of time in which to do so; and (2) after the four extensions of time, plaintiff improperly filed an 88-page brief which was stricken by the Court of Appeals, plaintiff failed to comply with an order requiring her to file a brief in compliance with the appellate rules, plaintiff received another extension of time to file her brief and did not meet that deadline, and plaintiff filed a late brief without seeking an additional extension of time.

2. Appeal and Error— preservation of issues—failure to comply with appellate rules—discretionary power to review case

Although plaintiff's appeal in her representative capacity from an order awarding sanctions and attorney fees has violated the Rules of Appellate Procedure regarding the filing of the appeal and brief, the Court of Appeals elected to exercise its discretion under N.C. R. App. P. 2 to review the matter on its merits, because: (1) plaintiff obtained only one extension of time in which to file that brief, the brief was filed within four days of the deadline, and plaintiff asserted and documented the reason for the delay; and (2) the appeal on this issue was not rendered moot based on the Court of Appeals' prior decision when that holding addressed only the issue of sanctions and the amended complaint in this case was significantly more detailed than that in the prior action.

3. Immunity— sovereign immunity—public official immunity—quasi-judicial immunity

The trial court did not err by dismissing plaintiff's amended complaint based on failure to state a claim upon which relief could be granted in an action arising out of defendants' initiation of incompetency and guardianship proceedings and their subsequent intervention in plaintiff personal representative's care of her father, because: (1) dismissal was appropriate as to defendants Department of Human Services and a social worker in her official capacity under the doctrine of sovereign immunity; (2) dismissal as to defendant social worker in her individual capacity was proper under the doctrine of public official immunity; and (3) dismissal was proper as to defendant court-appointed guardian ad litem under the doctrine of quasi-judicial immunity.

4. Judgments— subject matter jurisdiction—prosecution bonds—out of session order

The trial court did not lack subject matter jurisdiction to enter an order out of session requiring that plaintiff personal representative post $20,000 in prosecution bonds under N.C.G.S. § 1-109, because the record fails to reflect that plaintiff objected when the trial court informed the parties that it would render a decision in the matter at a later date and out of session. N.C.G.S. § 1A-1, Rule 58.

5. Costs— prosecution bonds—abuse of discretion standard

The trial court did not abuse its discretion by ordering that plaintiff personal representative was required to post prosecution bonds in the amount of $20,000 in an action arising out of defendants' initiation of incompetency and guardianship proceedings and their subsequent intervention in plaintiff personal representative's care of her father, because: (1) the trial court has discretion to award prosecution bonds under N.C.G.S. § 1-109 which are in excess of the statutory $200 amount; and (2) the trial court entered extensive findings of fact including the costs facing defendants for their defense of plaintiff's action as well as plaintiff's history of filing frivolous lawsuits.

6. Appeal and Error— preservation of issues—assignments of error

Although plaintiff personal representative contends that the trial court denied plaintiff incompetent due process and protection of the courts including the failure to appoint a guardian ad litem, this issue is overruled because none of the assignments of error that plaintiff has listed as corresponding to her argument specifically address this issue, nor does any assignment of error of record pertaining to plaintiff's appeal.

Appeal by plaintiffs from orders entered 27 June 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 10 February 2003.

Carol Bennett, pro se, for plaintiff-appellants.

Lou Newman, pro se, for defendant-appellee; and Deputy Wake County Attorney Corinne G. Russell for defendant-appellees Department of Human Services and Susan Harmon.

MARTIN, Judge.

Plaintiff Carol Bennett, in her capacity as personal representative for the estate of her father, Louis Dalenko ("Dalenko"), appeals the dismissal of her amended complaint for its failure to state a claim for relief against Wake County Department of Human Services ("DHS"), Susan Harmon ("Harmon") in her official and individual capacities, and Lou Newman ("Newman") as Dalenko's court-appointed guardian ad litem. In her capacity as personal representative, plaintiff also appeals the entry of an order requiring that she post prosecution

bonds as security for costs. Plaintiff individually appeals the entry of an order awarding sanctions and attorney's fees against her upon a finding that her individual action is wholly frivolous.

The instant action, which plaintiff initiated by the filing of a complaint on 26 May 2000, is a re-filing of an action against defendants which plaintiff filed on behalf of Dalenko as an incompetent on 7 December 1998. Both actions arose out of defendants' initiation of incompetency and guardianship proceedings as to Dalenko and their subsequent intervention in plaintiff's care of Dalenko. Plaintiff took a voluntary dismissal without prejudice of her 7 December 1998 action on 26 May 1999. Subsequently, upon motion of defendant Newman, the trial court ordered plaintiff to pay attorney's fees as a sanction upon its finding that plaintiff's 7 December 1998 complaint lacked any justiciable issue of law or fact and that plaintiff had failed to make a reasonable inquiry into the allegations of the complaint. Plaintiff appealed that order, and on 2 October 2001, this Court affirmed the lower court's award of sanctions and upheld its determination that the complaint was legally implausible on its face. *See Bennett v. Harmon*, 146 N.C. App. 447, 554 S.E.2d 420 (unpublished, No. COA00-1055, 2 October 2001).

While that appeal was pending, plaintiff initiated this action with the filing of a more detailed complaint in May 2000, followed by an amended complaint on 5 February 2001. By order entered 21 February 2001, following Dalenko's death in January 2001, plaintiff was substituted as plaintiff as the personal representative of his estate. The amended complaint alleged the same claims of negligence against defendants as the December 1998 complaint, although through more detailed allegations. In essence, the amended complaint alleged, *inter alia*, that plaintiff was providing appropriate care for Dalenko, who was elderly, in poor health, and lived with plaintiff; that defendants unjustifiably initiated incompetency and guardianship proceedings and conspired to separate plaintiff from Dalenko; that throughout the proceedings, defendants misrepresented the facts to the court and used coercive tactics on Dalenko's health care providers in an effort to separate plaintiff and Dalenko; that due to these misrepresentations, plaintiff was ordered to allow defendants unlimited access to Dalenko without interference, and DHS was appointed interim guardian of Dalenko in charge of his health care; that defendants' presence, as well as the presence of other health care workers in plaintiff's home invaded plaintiff's and Dalenko's privacy; that defendants attempted to remove Dalenko from plaintiff's

home against his will with the assistance of local authorities resulting in great emotional distress to plaintiff and Dalenko; and that defendant Newman negligently failed to fulfill her duty to Dalenko as guardian ad litem by failing to advocate for his best interests.

On 21 February 2001, the trial court entered an order dismissing the amended complaint insofar as it contained plaintiff's individual claims due to her failure to post prosecution bonds in accordance with a previous order. Plaintiff has not appealed that dismissal. On 27 June 2001, upon motion of defendants, the trial court entered an order dismissing the amended complaint, insofar as it attempted to assert claims on behalf of Dalenko pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for the failure of the complaint to state a claim for relief. The trial court also entered orders on that date awarding prosecution bonds and awarding judgment in favor of defendants for sanctions and attorney's fees against plaintiff individually for the failure of the amended complaint to state any issue of justiciable law or fact, and because plaintiff's multiple filings in the matter were frivolous and "interposed for the improper purposes of harassment and to cause unnecessary delay and increased costs of litigation."

Plaintiff appeals from the 27 June 2001 orders dismissing the complaint, awarding prosecution bonds, and awarding sanctions and attorney's fees. Plaintiff has filed two briefs on appeal: a brief in her capacity as personal representative of Dalenko's estate in which she assigns error to the dismissal of the amended complaint and the order awarding prosecution bonds, and a brief on her own behalf, appealing from the order awarding sanctions and attorney's fees to defendants.

As an initial matter, defendants have filed several motions to dismiss plaintiff's appeal, individually and as personal representative for Dalenko, for numerous violations of the Rules of Appellate Procedure and because the issues presented by her appeal are moot in the face of our prior decision affirming the trial court's determination that plaintiff's claims were legally implausible.

[1] As to plaintiff's individual appeal from the order awarding sanctions and attorney's fees, the record confirms the presence of several flagrant rules violations, including plaintiff's failure to timely file her appellant's brief despite obtaining several extensions of time in which to do so. Plaintiff sought and received four extensions

of time before filing an 88-page brief, which was stricken by the Court on 4 September 2002. She was ordered to file a brief in compliance with the appellate rules no later than 9 September 2002. Plaintiff failed to comply with this order, but obtained another extension of time to file her brief no later than 4 October 2002. She did not file her brief until 7 October 2002, and did not seek an additional extension of time within which to file it. In light of the numerous opportunities to timely file a brief in compliance with the appellate rules, and plaintiff's repeated failure to do so, her appeal is subject to dismissal. Defendants' motion to dismiss plaintiff's individual appeal is allowed. *See* N.C.R. App. P. 25.

[2] Although plaintiff, in her representative capacity, has also violated the Rules of Appellate Procedure in the filing of the appeal and brief as to the claims asserted on behalf of Dalenko, plaintiff obtained only one extension of time in which to file that brief, the brief was filed within 4 days of the deadline, and plaintiff asserted and documented the reason for the delay. Therefore, although the Dalenko appeal is also subject to dismissal for rules violations, we elect to exercise our discretion and review the matter on its merits. *See* N.C.R. App. P. 2. We also disagree that the appeal has been rendered moot in light of our prior decision, as that holding addressed only the issue of sanctions, and although plaintiff's claims are essentially the same in both cases, the amended complaint at issue here is significantly more detailed than that in the prior action.

I.

[3] Plaintiff first argues the trial court erred in dismissing the amended complaint for its failure to state a claim on behalf of Dalenko upon which relief may be granted. Defendants counter that dismissal was appropriate as to DHS and Harmon in her official capacity under the doctrine of sovereign immunity; that dismissal as to Harmon individually was proper under the doctrine of public official immunity; and that dismissal was proper as to Newman under the doctrine of quasi-judicial immunity. We agree with defendants.

"In reviewing a Rule 12(b)(6) motion, a court must determine '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.' " *Cline v. McCullen*, 148 N.C. App. 147, 149, 557 S.E.2d 588, 590 (2001) (citation omitted). "The trial court may grant this motion if 'there is a want of law to support a claim of the sort made, an absence of facts

sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.' " *Id.* (citation omitted).

"Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002). "The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function." *Id.* That entity may waive its sovereign immunity through actions such as the purchase of liability insurance. *Id.* "Unless waived, 'the immunity provided by the doctrine [of sovereign immunity] is absolute and unqualified.' " *Midgett v. N.C. DOT*, 152 N.C. App. 666, 668, 568 S.E.2d 643, 645 (citation omitted), *cert. denied*, 356 N.C. 438, 572 S.E.2d 786 (2002). "In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Paquette*, 155 N.C. App. at 418, 573 S.E.2d at 717 (holding trial court did not err in dismissing complaint where it failed to specifically allege county waived its sovereign immunity); *see also, e.g.*, *Vest v. Easley*, 145 N.C. App. 70, 74, 549 S.E.2d 568, 573 (2001) ("It is well-established law that with no allegation of waiver in a plaintiff's complaint, the plaintiff is absolutely barred from suing the state and its public officials in their official capacities in an action for negligence.").

The amended complaint in the present case does not allege a waiver of defendants' sovereign immunity. Therefore, the complaint fails to state a claim for relief against DHS and Harmon in her official capacity. *See Harwood v. Johnson*, 326 N.C. 231, 237, 388 S.E.2d 439, 443 (where suit cannot be maintained against governmental entity, suit may not be maintained against employee of that entity for actions taken in employee's official capacity), *reh'g denied*, 326 N.C. 488, 392 S.E.2d 90 (1990). Although plaintiff maintains the allegations of the amended complaint establish a "special relationship" between defendants and Dalenko which pierces their immunity, such an exception applies to the public duty doctrine, not sovereign immunity.

We further agree with defendants that Harmon as an individual is protected by public official immunity. A public official is one who "exercises some portion of sovereign power and discretion, whereas public employees perform ministerial duties." *Mabrey v. Smith*, 144 N.C. App. 119, 122, 548 S.E.2d 183, 186, *disc. review denied*, 354 N.C.

219, 554 S.E.2d 340 (2001). The complaint alleges Harmon is a social worker for DHS. Pursuant to G.S. § 108A-14, Harmon has the statutory authority to exercise discretion in that capacity. *See* N.C. Gen. Stat. § 108A-14(b) (2002); *Hobbs v. North Carolina Dep't of Human Resources*, 135 N.C. App. 412, 520 S.E.2d 595 (1999) (holding social workers for county social services are public officials). Moreover, the complaint alleges Harmon took various actions in her capacity as social worker for DHS that clearly required the exercise of discretion and were not simply ministerial. Therefore, Harmon is considered a public official for purposes of immunity.

A public official may not be held individually liable for mere negligence, but may only be liable where her conduct is malicious, corrupt, or outside the scope of her authority. *Mabrey*, 144 N.C. App. at 122, 548 S.E.2d at 186. A review of the amended complaint in this case shows plaintiff's claims are based on pure negligence. The complaint does not allege Harmon acted maliciously or corruptly as to Dalenko. The complaint also does not allege facts which would support a legal conclusion that any of Harmon's actions as to Dalenko, even if negligent, were outside the scope of her duties as an employee of DHS.

Although well-pleaded factual allegations of the complaint are treated as true for purposes of a 12(b)(6) motion, " ' "conclusions of law or unwarranted deductions of facts are not admitted." ' " *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (citations omitted). "Thus, while we are to treat as true plaintiffs' factual allegations, it is our task to determine whether these allegations as a matter of law demonstrate the adequacy, or lack thereof, of legal administrative remedies." *Id.*; *see also Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997) (conclusory allegation that public official acted willfully and wantonly insufficient to overcome motion to dismiss). Although the complaint includes an allegation that Harmon's negligence as to Dalenko was "outside the scope of [her] authority," we are not required to treat this allegation of a legal conclusion as true. We conclude the allegations of the complaint are legally insufficient to overcome Harmon's public official immunity for her allegedly negligent actions as to Dalenko done in the performance of her duties as a social worker for DHS. Accordingly, the trial court did not err in dismissing plaintiff's complaint as against Harmon individually.

The trial court also properly dismissed the complaint against defendant Newman. The complaint alleges that at all times relevant, Newman was a guardian ad litem for Dalenko, and that she was so

appointed by the court upon the filing of a petition for adjudication of incompetence as to Dalenko. As such, Newman is entitled to quasi-judicial immunity.

"Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function. . . . 'Quasi-judicial "decisions involve the application of . . . policies to individual situations rather than the adoption of new policies." ' " *Vest*, 145 N.C. App. at 73-74, 549 S.E.2d at 572 (citations omitted). Although the courts of this State have not yet specifically addressed whether guardians ad litem perform judicial functions such that they are entitled to quasi-judicial immunity, several other courts, including the United States Court of Appeals for the Fourth Circuit, have held that guardians ad litem are entitled to the absolute bar of quasi-judicial immunity.

In *Fleming v. Asbill*, 42 F.3d 886 (4th Cir. 1994), the Fourth Circuit upheld the district court's determination that a guardian ad litem, as an actor in the judicial process, was entitled to quasi-judicial immunity. The Court noted the policy reasons behind its holding, stating " '[a] guardian ad litem must . . . be able to function without the worry of possible later harassment and intimidation from dissatisfied [parties]. Consequently, a grant of absolute immunity would be appropriate. A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate . . . in judicial proceedings.' " *Id.* at 889 (citation omitted). Several other federal courts and state supreme courts have also held guardians ad litem, as well as social caseworkers, to be entitled to immunity in their various capacities. *See, e.g.*, *Miller v. Gammie*, 292 F.3d 982 (9th Cir. 2002); *Lambert v. McGinnis*, 2000 U.S. Dist. LEXIS 11848 (E.D.N.C. 2000), *affirmed*, 225 F.3d 654 (4th Cir. 2000); *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997); *Richards v. Bruce*, 1997 ME 61, 691 A.2d 1223 (1997); *Lythgoe v. Guinn*, 884 P.2d 1085 (Alaska 1994); *Barr v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994).

The allegations of the amended complaint at issue here establish that at all relevant times, Newman was engaged in her quasi-judicial duties as a court-appointed guardian ad litem, and all claims against Newman arise out of the performance of her duties in that capacity. We hold, agreeing with the policy reasons set forth by the Fourth Circuit in *Fleming*, that Newman is entitled to quasi-judicial immunity to the extent she was an actor in the judicial process vested with the ability to make decisions and apply policies to Dalenko's individual circumstance. This immunity is absolute, and accord-

ingly, plaintiff cannot state a claim for relief against Newman as guardian ad litem.

II.

[4] Plaintiff next argues the trial court lacked subject matter jurisdiction to enter an order requiring that, as Dalenko's personal representative, she post $20,000 in prosecution bonds pursuant to G.S. § 1-109. After hearing arguments, the trial court informed the parties that it would render decisions at a later date. Its orders, including the order awarding prosecution bonds, were entered out of session approximately two months later.

In our prior opinion in this matter, we rejected an identical argument by plaintiff that the trial court lacked subject matter jurisdiction to enter its order awarding sanctions because the trial court took the issue under advisement and later rendered a decision out of session. *See Bennett v. Harmon, supra.* We noted that under G.S. § 1A-1, Rule 58, which applies to both judgments and orders in civil cases, *see In re Estate of Trull*, 86 N.C. App. 361, 357 S.E.2d 437 (1987), a party will be deemed to have consented to the entry of an order out of session where that party does not expressly object. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2002). Here, the record fails to reflect that plaintiff objected when the trial court informed the parties that it would render a decision in the matter at a later date and out of session. In accordance with our prior opinion, this assignment of error is therefore overruled.

III.

[5] Plaintiff also contends the trial court abused its discretion in ordering that she post prosecution bonds in the amount of $20,000 because the evidence failed to support a conclusion that bonds in that amount were warranted. The trial court ordered that plaintiff post $10,000 to secure defendant Newman for recovery of costs in defense of the action, and $10,000 for security as to DHS and defendant Harmon.

We have previously recognized that the trial court has discretion to award prosecution bonds under G.S. § 1-109 which are in excess of the statutory $200 amount. *See Narron v. Union Camp Corp.*, 81 N.C. App. 263, 344 S.E.2d 64 (1986). The purpose of ordering such a bond is "to secure the defendant in the recovery of costs wrongfully paid out by him." *Waldo v. Wilson*, 177 N.C. 461, 463, 100 S.E. 182, 184 (1919).

The trial court in this case entered extensive findings of fact in support of its order awarding prosecution bonds, including that the action was a re-filing of plaintiff's claims from a prior action for which she took a voluntary dismissal; that the prior action was found to be completely lacking in any justiciable issue of law or fact and that plaintiff was sanctioned for filing such a baseless complaint; that plaintiff was considering dismissing the present action because she had received advice that it would take a long time to litigate, would not be profitable, and could result in further sanctions; that plaintiff has a history of filing baseless complaints resulting in sanctions, including one action which was dismissed for her failure to pay sanctions; that the trial court considered attorney time sheets submitted by defendants; that substantial deposition and other costs were foreseeable given the lengthy pleadings filed by plaintiff; and that there existed good cause to require a bond higher than the statutory amount.

We have reviewed the relevant evidence and conclude the trial court did not abuse its discretion in awarding prosecution bonds totaling $20,000, given the costs facing defendants for their defense of plaintiff's action, as well as plaintiff's history of filing frivolous lawsuits, both in general and specifically as to the claims at issue in this action.

IV.

[6] In her reply brief to this Court, plaintiff presents an additional argument, that Dalenko was denied due process and protection of the courts because of the trial court's "constant intervention and redirecting [plaintiff's] attention away from her prepared, persuasive presentation," because the trial court challenged her allegations without reading the pleadings, and because the assistant clerk of court did not appoint a guardian ad litem for the prosecution of Dalenko's case. We have reviewed plaintiff's arguments as to the trial court's actions and conclude they are without merit. As to the appointment of a guardian ad litem, none of the assignments of error that plaintiff has listed as corresponding to her argument specifically addresses this issue, nor does any assignment of error of record pertaining to the Dalenko appeal. That issue is not properly before us, and these arguments are therefore overruled. *See, e.g., Mark IV Bev., Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 500 S.E.2d 439 (where assignment of error fails to correspond to issue presented, issue not properly presented for appellate consideration), *disc. review denied*, 349 N.C. 231, 515 S.E.2d 705 (1998).

Plaintiff's individual appeal is dismissed; the orders dismissing the amended complaint as to Dalenko and requiring plaintiff to post prosecution bonds is affirmed.

Dismissed in part; affirmed in part.

Chief Judge EAGLES and Judge GEER concur.

DAVID NORMAN HUMMER, AND CYNTHIA WAX HUMMER, PLAINTIFFS v. PULLEY, WATSON, KING & LISCHER, P.A., AND TRACY K. LISCHER, INDIVIDUALLY AND AS AGENT OF PULLEY, WATSON, KING & LISCHER, P.A., DEFENDANTS

No. COA02-477

(Filed 1 April 2003)

1. Attorneys— malpractice—case within a case

A legal malpractice plaintiff is required to prove the validity and likelihood of success of the underlying case. Here, there was sufficient evidence that the attorney's failure to file a request for a hearing for a teacher in a dismissal proceeding was the proximate cause of the teacher's dismissal where the allegations against the teacher were questionable on the facts and the failure to request a hearing foreclosed judicial review.

2. Evidence— expert testimony—legal conclusion for jury

Expert testimony was properly excluded from a legal malpractice claim involving the failure to request a hearing for a teacher in a dismissal proceeding where the expert testimony was offered to tell the jury the result the school board would have reached even if a hearing had been requested and thus the result the jury should reach as a legal conclusion.

3. Evidence— emotional distress action—plaintiff's spouse's feelings—not an improper opinion

Testimony by a dismissed teacher's wife in a legal malpractice action against the teacher's attorneys, in response to a question as to how circumstances surrounding her husband's dismissal made her feel, that "all [plaintiff] wanted was his hearing to be heard and I know 'til the day I die he wouldn't have lost his job" was admissible in support of plaintiff's claim for negligent inflic-

tion of emotional distress allegedly resulting from the failure of defendant attorneys to request a hearing for plaintiff.

4. Evidence— legal malpractice claim—earlier proceedings—relevant

The trial court did not abuse its discretion in a legal malpractice case by admitting evidence of earlier proceedings. The evidence was relevant to plaintiff's claim that defendants had failed to properly research the legal issues involved in the underlying case, relevant to emotional distress claims as showing the continuation of actions by defendants, and relevant to impeach defendant-attorney's assertion that plaintiff-teacher could have sought judicial review of his dismissal even thought the attorney had not filed a request for a hearing.

5. Pleadings— amendment—new defense—no bad faith

The trial court did not abuse its discretion in a legal malpractice case by allowing defendants to amend their answer to include the defense of failure to mitigate damages where there was no evidence of bad faith and plaintiff had been made aware that damages would be at issue.

6. Damages and Remedies— failure to mitigate—evidence sufficient

There was sufficient evidence to submit the issue of plaintiff's failure to mitigate damages to the jury in a legal malpractice action.

Appeal by defendants from judgment filed 7 May 2001 and order dated 31 May 2001, and cross appeal by plaintiff David Norman Hummer from judgment filed 7 May 2001 by Judge Wade Barber in Durham County Superior Court. Heard in the Court of Appeals 11 February 2003.

Law Offices of Willie D. Gilbert, II, P.A., by Willie D. Gilbert, II for plaintiff appellant.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Warren T. Savage, for defendant appellants.

BRYANT, Judge.

Pulley, Watson, King & Lischer, P.A. (the firm) and Tracy K. Lischer (Lischer), individually and as agent of the firm, (collectively,

defendants) appeal from (1) a judgment filed 7 May 2001 entered consistent with a jury verdict finding David Norman Hummer (plaintiff) was damaged by defendants' negligence and awarding damages, and (2) an order dated 31 May 2001 denying defendants' motions for new trial and judgment notwithstanding the verdict. Plaintiff cross-appeals from the judgment filed 7 May 2001.[1]

On 13 February 1998, plaintiff and Cynthia Wax Hummer filed a complaint alleging various causes of action, including breach of contract, legal negligence (specifically including failure to request a hearing, failure to fully research the issues involved, and failure to properly investigate and prepare), negligent misrepresentation, and negligent infliction of emotional distress, all of which related to a claim of legal malpractice against defendants. On 17 March 1998, defendants filed an answer and third-party complaint against Willie D. Gilbert, II, plaintiff's current lawyer, and his law firm. In their answer, defendants asserted affirmative defenses of insulating negligence of plaintiff's current lawyer and plaintiff's contributory negligence. In the third-party complaint, defendants sought indemnification and/or contribution from Mr. Gilbert and his law firm. The trial court ultimately granted plaintiff partial summary judgment on both of defendants' affirmative defenses, granted Mr. Gilbert summary judgment on the third-party complaint, and imposed Rule 11 sanctions on defendants. These rulings of the trial court, except for the imposition of one $2,500.00 sanction, were subsequently upheld by this Court in *Hummer v. Pulley, Watson, King, & Lischer P.A.*, 140 N.C. App. 270, 536 S.E.2d 349 (2000) (*Hummer I*).[2] On 11 April 2001, defendants filed a motion to amend their answer to allege the defense of failure to mitigate damages. The trial court granted this motion on 13 April 2001, the first day scheduled for trial of this case.

At trial, plaintiff introduced evidence tending to show he was a "career status" teacher at Northern Durham High School (the school) on 12 June 1997. While helping to set up for the graduation ceremony, plaintiff was approached by Tommy Parker (Mr. Parker), the school's athletic director. Although plaintiff had formerly coached the women's basketball team, he had resigned that position under pressure from Mr. Parker, and thus Mr. Parker was no longer plaintiff's supervisor. For a prior period of approximately two years, plaintiff

1. Cynthia Wax Hummer does not appeal.

2. Consequently, in the Order on Final Pre-Trial Conference, the parties stipulated that the caption of this case omit all references to Willie D. Gilbert, II and Willie D. Gilbert, II, P.A.

and Mr. Parker had been having personal differences. Mr. Parker called out to plaintiff, but plaintiff did not respond and instead waved his hand and walked away as had become his practice during the school year in order to avoid any conflict. Unbeknown to plaintiff, Mr. Parker had been asked to give him instructions from the school principal. Later that day, following the graduation ceremony, plaintiff was working in his classroom when he was approached by the school principal, Dr. Isaac Thomas (Dr. Thomas). Dr. Thomas stated that he needed to talk with plaintiff, and plaintiff inquired if it involved Mr. Parker. Dr. Thomas responded that it did, and plaintiff stated:

> This is ridiculous. I'm out of coaching. He's not my superior. He doesn't need to tell me anything. He needs to leave me alone, I'm going to kick some tail. If you're here to defend him, let me know. If you want to, I can add your name to the list. I can kick your tail too.

Dr. Thomas accused plaintiff of threatening him, ordered plaintiff to leave the school campus, and stated he would call "Personnel" to have plaintiff fired. Plaintiff testified he had no intention of threatening Dr. Thomas, that the phrase "kick some tail" was a coaching expression, and that he had meant he was going to get to the bottom of the problem. When plaintiff was subsequently informed that dismissal proceedings would be initiated, he employed Lischer and the firm to represent him in any such proceedings.

On 6 August 1997, plaintiff received a letter from Ann Denlinger, superintendent for Durham Public Schools, informing him of her intent to recommend to the school board that plaintiff be dismissed based on grounds of insubordination, neglect of duty, failure to fulfill duties and responsibilities of a teacher, and failure to comply with reasonable requirements prescribed by the school board. The letter further informed plaintiff he had fifteen days to request a review of the superintendent's recommendation by a panel of the Professional Review Committee (PRC). It also noted that if plaintiff did not request a hearing, the superintendent's recommendation would be submitted directly to the school board.

Plaintiff hand-delivered the superintendent's letter to Lischer the same day he received it and informed her of his desire to have a hearing before the PRC. Lischer drafted a letter requesting a hearing before the PRC and attached a list of PRC members plaintiff wished to strike from the panel together with a memorandum of law in sup-

port of plaintiff's position detailing how plaintiff's conduct did not support grounds for dismissal. This request for a PRC hearing was, however, never mailed or delivered to the superintendent. As a result, on 9 September 1997, the school board passed a resolution dismissing plaintiff. This resolution was forwarded to plaintiff by the superintendent with a covering letter stating, "in light of your failure to request a hearing on my recommendation for your dismissal, the Board of Education . . . voted to dismiss you from your position as a teacher within the Durham Public Schools." Lischer soon thereafter discovered her error and was unsuccessful in her attempt to seek to have the matter reopened. She ultimately terminated her employment by plaintiff, advising him to seek judicial review of the matter on his own. We note that defendants concede in their brief that, under section 115C-325(n) of the North Carolina General Statutes, judicial review was not available to a career status teacher who is dismissed without requesting a hearing before the board of education. *See* N.C.G.S. § 115C-325 (2001); *see also Hummer I*, 140 N.C. App. at 282-83, 536 S.E.2d at 357 (failure to request school board hearing precluded judicial review).

In regard to the claim for negligent infliction of emotional distress, plaintiff's wife testified in response to the question "How has this entire episode relating to the termination of your husband's career . . . made you feel?" "[I]t made me feel sad. It made me feel angry . . . . All [plaintiff] wanted was his hearing to be heard, and I know 'til the day I die he wouldn't have lost his job." In an effort to show mitigation of his damages, plaintiff also introduced evidence of his unsuccessful attempts to obtain other teaching positions.

Defendants sought to introduce expert testimony from several witnesses who had extensive experience in the practice of education law that the probable outcome of the dismissal proceedings would not have been different had Lischer, in fact, mailed the request for a hearing. The trial court refused to admit this evidence on the ground it invaded the province of the jury as the finder of fact. Defendants did, however, introduce expert testimony regarding the availability of teaching positions in counties around Durham, the difficulty in filling those positions, and plaintiff's potential earning capacity.

After the presentation of evidence, defendants' motion for directed verdict was denied, and the jury returned a verdict finding Lischer or the firm negligent and awarding damages to plaintiff in the total amount of $595,442.00. The jury, however, reduced the amount

of damages awarded to plaintiff by $124,800.00 based on plaintiff's failure to mitigate his damages. Following trial, defendants' motions for judgment notwithstanding the verdict or, in the alternative, a new trial were denied.

The issues on direct appeal are whether: (I) plaintiff presented sufficient evidence that Lischer's negligence was the proximate cause of his harm; (II) the trial court erred by not admitting defendants' expert testimony regarding the probable outcome had Lischer not been negligent; (III) admission of testimony by plaintiff's wife of her belief plaintiff would not have lost his job had he received a hearing was unfairly prejudicial; and (IV) admission of evidence of earlier proceedings and post-complaint pleadings in the case were unfairly prejudicial. The issues on cross-appeal are whether: (V) the trial court abused its discretion in allowing defendants' motion to amend the answer and (VI) there was sufficient evidence to support the reduction of damages by the jury.

Direct Appeal

I

[1] Defendants initially contend the trial court erred by denying their motions for directed verdict, judgment notwithstanding the verdict, and new trial. Defendants argue plaintiff presented no competent evidence that the school board would have decided not to dismiss plaintiff had a hearing been requested. As such, defendants claim plaintiff did not establish that the failure to request a hearing was the proximate cause of plaintiff's dismissal.

A motion for judgment notwithstanding the verdict is a motion for judgment to be "entered in accordance with an earlier directed verdict motion." *Smith v. Childs*, 112 N.C. App. 672, 682, 437 S.E.2d 500, 507 (1993). As such, the same standards are used in the review of both motions. *Id.* In ruling on these motions, "the trial court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor." *Summer v. Allran*, 100 N.C. App. 182, 183, 394 S.E.2d 689, 690 (1990). Motions for directed verdict and judgment notwithstanding the verdict should be denied where there is more than a scintilla of evidence to support each element of a plaintiff's case. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81 (1983).

In a legal malpractice case, a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney. *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985). A plaintiff in order to prove this causation element must establish three things: (1) the underlying claim, upon which the malpractice action is based, was valid; (2) the claim would have resulted in a judgment in the plaintiff's favor; and (3) the judgment would have been collectible or enforceable. *Id.* In other words, a legal malpractice plaintiff is required to prove the viability and likelihood of success of the underlying case as part of the present malpractice claim. This has been referred to as having to prove "a case within a case." *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E.2d 1, 8 (2001). This is true even if the negligent actions of the attorney resulted in a total foreclosure of the underlying case being heard on its merits. *See id.* at 211-12, 552 S.E.2d at 8-9.

Under the case within a case method of proof, the plaintiff in a legal malpractice action presents the evidence in support of the underlying claim before the jury (or fact-finder) in the malpractice action. *See Chocktoot v. Smith*, 571 P.2d 1255, 1258 (Ore. Sup. Ct. 1977). The malpractice jury, in essence, then determines the outcome of the underlying case and from that determination reaches the malpractice verdict. *See id.* A malpractice plaintiff is not required to prove what outcome a particular fact-finder in the underlying case (i.e. the original jury or, in this case, the school board) would have reached. Instead, the malpractice jury must substitute its own judgment in applying the relevant law, as instructed by the trial court, to the facts of the underlying case. *See id.* at 1258-59; *see also Smith*, 112 N.C. App. at 680, 437 S.E.2d at 506 ("[p]roof of legal malpractice necessitates an attempt to show what should have occurred without some error on the part of the attorney").

In this case, plaintiff's dismissal was grounded in allegations of insubordination, neglect of duty, failure to fulfill the duties and responsibilities of a teacher, and failure to comply with reasonable requirements of the school board. "The term insubordination imports a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders," *Crump v. Bd. of Educ.*, 79 N.C. App. 372, 374-75, 339 S.E.2d 483, 485 (1986) (citation omitted) (internal quotations omitted), and neglect of duty is a failure to perform a duty imposed either by law or contract, *Overton v. Bd. of Educ.*, 304 N.C. 312, 318, 283 S.E.2d 495, 499 (1981).

Plaintiff presented evidence he was performing his duties as a teacher and was not willfully disobeying any express or implied direction or refusing to obey an order of Dr. Thomas. Mr. Parker was not plaintiff's supervisor and, in fact, plaintiff did not know Mr. Parker was trying to give plaintiff instructions from Dr. Thomas. Plaintiff further testified Dr. Thomas approached him about Mr. Parker, while plaintiff was working in his classroom, and plaintiff had no intent to actually threaten anyone. Furthermore, the superintendent's letter to plaintiff notifying him of his dismissal specifically stated that "in light of [plaintiff's] failure to request a hearing on [the superintendent's] recommendation . . . the Board of Education voted to dismiss [plaintiff] from [his] position as a teacher." This is evidence tending to show plaintiff's dismissal was based more on procedural grounds, and not on the actual facts of the encounter with Dr. Thomas.

We conclude the facts surrounding plaintiff's dismissal as presented in the record, at best, only questionably support the allegations against him. Furthermore, even if we were to assume the school board would have dismissed plaintiff regardless of his efforts to dispute the charges against him, defendants' negligence also foreclosed plaintiff from judicial review and a chance to prove his case in that forum on the same facts. Thus, there was sufficient evidence, viewed in the light most favorable to plaintiff, that defendants' failure to request a hearing was the proximate cause of plaintiff's dismissal. *See Smith*, 112 N.C. App. at 682, 437 S.E.2d at 507.

II

[2] Defendants next contend the trial court committed error by not allowing defense expert testimony to the effect that the school board would have dismissed plaintiff even if defendants had requested a hearing before the PRC. As discussed in Part I, *supra*, it is not necessary to present evidence of what the particular fact-finder would have done in the underlying case. Moreover, expert testimony is inadmissible when the expert is testifying to the legal effect of specific facts. *See Smith*, 112 N.C. App. at 679-80, 437 S.E.2d at 506. Finally, expert testimony simply telling the jury the result they should reach is also inadmissible. *See Williams v. Sapp*, 83 N.C. App. 116, 120, 349 S.E.2d 304, 306 (1986). In this case, the expert testimony proffered by defendants was offered to tell the jury what result the school board would have reached and thus the result the jury should reach as a legal conclusion from the facts and circumstances of plaintiff's dismissal. Therefore, the trial court properly excluded defendants' expert testimony.

III

[3] Defendants also contend the trial court erred in allowing testimony from plaintiff's wife, in response to a question on how the circumstances surrounding her husband's dismissal made her feel, that "all [plaintiff] wanted was his hearing to be heard, and I know 'til the day I die he wouldn't have lost his job." Defendants contend this was an improper expression of opinion, was an attempt to inflame the jury, and unfairly prejudiced defendants on the issue of causation.

The record, however, clearly reveals this was the response of plaintiff's wife to a question directed toward plaintiff's claim for negligent infliction of emotional distress and mental anguish as a result of defendants' negligence, and not the proximate cause of the negligence. The probative value of this testimony on the issues of emotional distress and mental anguish was not substantially outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (2001). Thus, we find no abuse of discretion on the part of the trial court in admitting this testimony. *See Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 53, 524 S.E.2d 53, 61 (1999) (exclusion of evidence under Rule 403 is left to the sound discretion of the trial court and requires showing decision was so arbitrary it could not have been the product of a reasoned decision).

IV

[4] Defendants finally contend the trial court erred in admitting evidence of earlier proceedings in the case, including defendants' affirmative defenses of contributory negligence and insulating negligence, the third-party complaint against plaintiff's attorney and resulting grant of summary judgment against defendants on those issues, and the subsequent affirmation of summary judgment and sanctions against defendants by this Court in *Hummer I.*

The affirmative defenses and third-party complaint were founded upon defendants' assertion that plaintiff could have sought judicial review of his dismissal, despite statutory law to the contrary, *see Hummer I*, 140 N.C. App. at 282-83, 536 S.E.2d 349, 356-57, and were relevant to plaintiff's claim that defendants had failed to properly research the legal issues involved in his dismissal hearing, *see* N.C.G.S. § 8C-1, Rule 401 (2001). These pleadings were also relevant to plaintiff's negligent infliction of emotional distress claim as they tended to show the continuation of actions by defendants, which allegedly caused emotional distress and mental anguish to both plain-

tiff and his wife. Furthermore, during her testimony, Lischer gave her opinion that she was no longer representing plaintiff during the time for filing a petition for judicial review, and it was the responsibility of plaintiff's attorney to have filed any such petition. Accordingly, evidence of the prior decisions and pleadings in this case was also relevant to impeach Lischer's assertions during her testimony that plaintiff had the ability to seek judicial review, by demonstrating that these assertions were unfounded. Thus, the probative value of this evidence was not substantially outweighed by any danger of unfair prejudice against defendants. Therefore, the trial court did not abuse its discretion in admitting this evidence. *See Benton*, 136 N.C. App. at 53, 524 S.E.2d at 61 (1999).

Cross-Appeal

V

[5] On cross-appeal, plaintiff argues the trial court erred in allowing defendants' motion to amend their answer to include the defense of failure to mitigate damages. Plaintiff contends the trial court abused its discretion by granting the motion filed only twelve days before trial.

The decision to allow a motion to amend a pleading is left to the discretion of the trial court. *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282, 408 S.E.2d 885, 887 (1991). In this case, we find no abuse of discretion on the part of the trial court in allowing defendants' motion as there is no evidence this motion was filed in bad faith to cause delay and/or unfair prejudice to plaintiff. *See id.* at 282-83, 408 S.E.2d at 887. Further, plaintiff stated he had been made aware damages would be at issue in the case. Therefore, plaintiff's failure to obtain other employment being at issue in the case, plaintiff has failed to show any prejudice against him on this issue by allowance of the motion to amend the pleadings. Accordingly, we overrule this assignment of error.

VI

[6] Plaintiff also contends the trial court erred in allowing the issue of mitigation of damages to go to the jury. He argues there was no evidence to support a finding he did not mitigate his damages. We disagree. Defendants provided expert testimony detailing the wide availability of jobs in the counties around Durham, the difficulty those counties were having in filling vacancies, and plaintiff's earning capacity. Additionally, there was evidence plaintiff failed to obtain

other employment despite the wide availability of other teaching positions. From this, we conclude there was sufficient evidence to submit the issue of mitigation of damages to the jury. *See generally, Haas v. Warren*, 341 N.C. 148, 152-55, 459 S.E.2d 254, 256-58 (1995) (evidence sufficient to reach a jury in a legal malpractice claim). We thus conclude there was no error in the entry of judgment in favor of plaintiff and affirm the denial of defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

No error.

Judges TYSON and ELMORE concur.

STATE OF NORTH CAROLINA v. RONALD McCLARY

No. COA02-504

(Filed 1 April 2003)

1. Appeal and Error— preservation of issues—expert testimony—psychiatrist's report—motion in limine—failure to object at trial

Defendant did not preserve for appeal the issue of whether the trial court erred by allowing the State to use a psychiatrist's report and to question the chief of forensic psychiatry at Dorothea Dix Hospital (chief) about this report even though defendant's new legal counsel did not intend to rely on the report or to call the psychiatrist to testify as an expert witness, because: (1) although defendant made a pretrial motion to exclude evidence of the report, he did not object at the time the report first was discussed during the State's examination of the chief, nor did defendant object when the State inquired as to what the report indicated about defendant's mental state at the time of the shooting; (2) although defendant objected when the State asked whether the chief was able to form an opinion as to defendant's mental state at the time of the shooting, there is nothing in the record indicating that the grounds of the objection was the inadmissibility of the report; and (3) defendant failed to specifically and distinctly allege plain error.

2. Discovery— timing requirements—disclosure of statement on day of trial

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to continue or in the alternative his motion to suppress evidence of his statement to a jail administrator even though the State failed to meet the discovery timing requirements in N.C.G.S. § 15A-903(a) by providing defendant with the statement on the day his case was called for trial, because: (1) a recess was ordered to allow defense counsel the opportunity to discuss the discovery with his client and defendant's psychiatric expert before proceeding with jury selection; (2) the State did not call the jail administrator as a witness until eighteen days after it disclosed the statement to defendant; (3) the jail administrator testified as a rebuttal witness in response to testimony from defendant's psychiatric expert which put defendant's capacity to form the requisite intent to kill at issue; and (4) the trial court found that the district attorney's office disclosed the statement as soon as it became aware of it and that the State did not engage in bad faith in failing to disclose the statement at an earlier time.

3. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—intent to kill

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on alleged insufficient evidence of defendant's intent to kill, because: (1) the State presented testimony of several witnesses regarding the ill-will between defendant and the victim; (2) a witness testified that defendant told her he was going to shoot the victim and another witness testified that defendant stated he would rather see the victim dead; and (3) defendant shot the victim twice in the back as she tried to run away from him.

4. Constitutional Law— effective assistance of counsel— expert opinion on defendant's mental state

The trial court did not commit plain error in a first-degree murder case by allowing the chief of forensic psychiatry at Dorothea Dix Hospital (chief) to give his opinion as to defendant's mental state at the time of the shooting and defendant's sixth amendment right to effective assistance of counsel was not violated, because: (1) defendant placed his mental condition at issue first by moving to continue the trial due to his psychiatric

illness, and then by asserting the defense of diminished capacity and his inability to formulate the intent to kill; and (2) although the chief evaluated defendant by court order for the purpose of determining his capacity to proceed, his personal observations taken together with the other materials considered provided an adequate basis for his opinion that defendant was capable of forming the requisite intent to kill at the time of the shooting.

Appeal by the defendant from judgment entered 5 April 2001 by Judge Ronald L. Stephens in Alamance County Superior Court. Heard in the Court of Appeals 13 February 2003.

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

Miles & Montgomery, by Lisa Miles, for the defendant.

STEELMAN, Judge.

Defendant was indicted for and found guilty of first degree murder by a jury. The trial court sentenced him to life imprisonment without parole. Defendant appeals his conviction for first degree murder.

The State's evidence at trial tended to show that on 29 April 1999, the defendant shot Mary Mitchell ("Mitchell") twice in the back. In the weeks prior to the shooting, Mitchell had obtained warrants against defendant for making harassing phone calls and for assault by pointing a gun. Defendant also had obtained warrants against Mitchell in March 1999 for unauthorized use of his automobile and for communicating threats.

One or two days before the shooting, Mitchell told the manager of the laundry where she worked that defendant "had threatened her and she had told the police." Otis Blackwell, Mitchell's father, testified that the week before she was killed, Mitchell had told him that defendant was harassing her. He further testified that two nights before her death, Mitchell stayed with him because defendant "had pulled a gun on her."

Brenda Henderson ("Henderson"), Mitchell's co-worker, testified that defendant told her the night before the shooting that he would "rather see her [Mitchell] dead than for anyone else [to have her]." She also testified that defendant had pulled a gun on Mitchell in the past. Angela Rogers ("Rogers"), a relative of defendant, testified that on the morning of 29 April 1999, defendant told her he was "at the end

of his rope" and "he was on his way over there to . . . shoot Mary [Mitchell]."

Officer Kevin Crowder ("Crowder") of the Burlington Police Department testified that about two hours after Mitchell was shot, defendant telephoned to turn himself in to police. Crowder testified that during the call, defendant stated that Mitchell, her father and a man associated with Mitchell known as "Hawk" all had threatened to kill him.

Defendant's forensic psychiatry expert, Dr. George Corvin ("Dr. Corvin"), testified during defendant's evidence that in his opinion, defendant's capacity to form the specific intent to kill was "substantially reduced" at the time of the murder. Dr. Corvin based this conclusion on interviews with defendant and previous psychiatric evaluations performed by other psychiatrists, including Dr. Gary Hoover ("Dr. Hoover") who had been retained by defendant's previous counsel.

Dr. Robert Rollins ("Dr. Rollins"), chief of forensic psychiatry at Dorothea Dix Hospital, evaluated defendant on 23 January 2001 pursuant to the trial court's order and subsequently "saw [defendant] approximately eleven times while he was [at Dorothea Dix] for brief to longer interviews." Dr. Rollins testified for the State on rebuttal that in his opinion, defendant's mental disorder would not have prevented him from forming the specific intent to kill. Dr. Rollins based his opinion on his own interviews of defendant, interviews by a psychologist and reports of previous psychiatric evaluations by Dr. Corvin and Dr. Hoover.

Also on rebuttal, Todd Davis ("Davis"), an Alamance County jail administrator, testified for the State that defendant voluntarily stated "I'm not trying to get out of my charges, because I'm guilty of killing my girlfriend. I did it and meant to. But I need medical treatment for my mental problem now. I cannot make it without help." Davis sent a letter detailing defendant's statement to the lead investigator, Sergeant Doug Murphy, but did not send it to the district attorney's office.

At defendant's first trial in May 2000, the trial court granted a motion to withdraw by defendant's original counsel and declared a mistrial. At defendant's second trial in March 2001, he made a pretrial motion *in limine* to exclude any reference to or questioning regarding a report of Dr. Hoover's psychiatric evaluation of defendant. The trial court ruled that whether Dr. Hoover's report

could be used by the State at trial was an evidentiary matter and would not be ruled upon pre-trial.

I.

[1] Defendant first contends the trial court erred in allowing the State to use Dr. Hoover's report and to question Dr. Rollins about it. Specifically, defendant argues that the State should not have been permitted to use this evidence at trial because defendant's original counsel had voluntarily given the report to the State and his new legal counsel did not intend to rely on Dr. Hoover's report or to call him to testify as an expert witness.

A motion *in limine* will not preserve for appeal the issue of "the admissibility of evidence if the defendant fails to further object to that evidence *at the time it is offered* at trial. A criminal defendant is required to interpose at least a general objection to the evidence *at the time it is offered.*" *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46 (citations omitted) (emphasis added), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995); *Beaver v. Hampton*, 106 N.C. App. 172, 416 S.E.2d 8 (1992) (holding that plaintiffs failed to preserve for appeal the issue of the trial court's alleged error in denying their motion *in limine* to prohibit introduction of evidence where they failed to object when the evidence was introduced at trial and the trial judge did not conduct a full hearing of evidentiary matters underlying the motion), *modified on other grounds*, 333 N.C. 455, 427 S.E.2d 317 (1993). If defendant fails to object to the evidence at the time it is offered or otherwise to preserve the question for appeal, our review is limited to plain error. N.C.R. App. P. 10(c)(4) (2001). To receive plain error review, a defendant must "specifically and distinctly" allege plain error in his assignments of error, N.C.R. App. P. 10(c)(4), and a failure to do so results in waiver of plain error review. *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998).

Defendant did not object at the time Dr. Hoover's report first was discussed during the State's examination of Dr. Rollins. Nor did defendant object when the State inquired as to what Dr. Hoover's report indicated about defendant's mental state at the time of the shooting. Defendant did object when the State asked whether Dr. Rollins was able to form an opinion as to defendant's mental state at the time of the shooting, but there is nothing in the record indicating that the grounds of the objection was the inadmissibility of Dr. Hoover's report. Defendant also failed to specifically and distinctly allege plain error. Therefore, we dismiss this assignment of error.

II.

[2] Defendant next argues the trial court erred in denying his motion to continue or, in the alternative, his motion to suppress evidence of his statement to Davis.

N.C. Gen. Stat. § 15A-903(a)(2) (2001) requires the State to divulge any statement by defendant in its possession "no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial." N.C. Gen. Stat. § 15A-910 (2001) gives the trial court discretion to apply several remedies in the case of failure to comply with discovery requirements, including a grant of continuance or recess or suppression of evidence not properly disclosed. It is within the trial court's sound discretion whether to impose sanctions for a failure to comply with discovery requirements, including whether to admit or exclude evidence, and the trial court's decision will not be reversed by this Court absent an abuse of discretion. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). An abuse of discretion results from a ruling so arbitrary that it could not have been the result of a reasoned decision or from a showing of bad faith by the State in its noncompliance. *State v. Nolen*, 144 N.C. App. 172, 550 S.E.2d 783, *appeal dismissed and cert. denied*, 354 N.C. 368, 557 S.E.2d 531 (2001).

The State did not meet the timing requirements in N.C. Gen. Stat. § 15A-903(a)(2) since it provided defendant with the statement on the day his case was called for trial, 12 March 2001. After hearing defendant's motions to suppress and continue, the trial court found that discovery had not been provided in a timely manner and ordered that the trial be recessed until 14 March 2001. This recess was ordered to allow defense counsel the opportunity to discuss the discovery with his client and defendant's psychiatric expert before proceeding with jury selection. The State did not call Davis as a witness until 18 days after it disclosed the statement to defendant. Davis testified as a rebuttal witness in response to testimony from defendant's psychiatric expert which put defendant's capacity to form the requisite intent to kill at issue. The trial court further found that the district attorney's office disclosed the statement as soon as it became aware of it and found that the State did not engage in bad faith in failing to disclose the statement at an earlier time. Based on the foregoing, we hold that the trial court did not abuse its discretion in denying defendant's motions and admitting his statement to Davis into evidence.

III.

[3] Defendant next assigns as error the trial court's denial of his motion to dismiss for insufficient evidence of his intent to kill. When ruling on a motion to dismiss for insufficient evidence, the trial court must determine whether substantial evidence of each element of the crime charged has been presented by the State. *State v. Carr*, 122 N.C. App. 369, 470 S.E.2d 70 (1996). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted). The trial court must view all evidence in the light most favorable to the State and draw all reasonable inferences in the State's favor. *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994).

First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation. N.C. Gen. Stat. § 14-17 (2001); *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979).

> Premeditation means thought beforehand for some length of time, however short. Deliberation means an intention to kill executed by one in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation.

Ruof, 296 N.C. at 636, 252 S.E.2d at 728 (citations omitted). "Circumstances to consider in determining whether a killing was premeditated and deliberate include: the conduct and statements of the defendant before and after the killing, ill-will or previous difficulty between the parties, and evidence that the killing was done in a brutal manner." *State v. Coplen*, 138 N.C. App. 48, 59, 530 S.E.2d 313, 321 (citation omitted), *cert. denied*, 353 N.C. 677, 545 S.E.2d 438 (2000). "Since a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill." *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983) (citation omitted).

In this case, Mitchell and defendant had obtained warrants against each other, and the State presented testimony of several witnesses regarding the ill-will between Mitchell and defendant. Rogers testified that defendant told her he was going to shoot Mitchell, and Henderson testified defendant stated that he would rather see

Mitchell dead. Further, defendant shot Mitchell twice in the back as she tried to run away from him. This evidence, viewed in the light most favorable to the State, was sufficient to demonstrate defendant's premeditation and deliberation and, therefore, to show his intent to kill. We hold the trial court did not err in denying defendant's motion to dismiss for insufficient evidence.

IV.

[4] Finally, defendant contends the trial court committed plain error in allowing Dr. Rollins to give his opinion as to defendant's mental state at the time of the shooting since the opinion exceeded the scope of his evaluation of defendant and was without proper foundation. Defendant further argues that allowing Dr. Rollins to give his opinion deprived him of his sixth amendment right to assistance of counsel, citing *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed. 2d 359 (1981).

In *Estelle*, the defendant did not place his mental state at issue or otherwise present psychiatric evidence. *Id.* at 457 n.1, 468, 68 L. Ed. 2d at 365 n.1, 372. The trial court had ordered, *sua sponte*, a pre-trial psychiatric evaluation to determine defendant's capacity to stand trial. *Id.* at 456-57, 68 L. Ed. 2d at 365. The United States Supreme Court held that the defendant was denied his sixth amendment right to assistance of counsel when the State introduced the psychiatrist's testimony to show the defendant's future dangerousness because the defendant's counsel was not notified in advance that the evaluation would encompass that issue. *Id.* at 471, 68 L. Ed. 2d at 374. The *Estelle* Court reasoned that because the defendant's counsel did not have advance notice of the scope of the psychiatric evaluation, the defendant could not consult properly with his counsel regarding the decision to submit to the evaluation or the possible use of the results. *Id.* at 470-71, 68 L. Ed. 2d at 374.

In *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), our Supreme Court considered whether a defendant's sixth amendment right to effective assistance of counsel was violated by the admission of rebuttal testimony by the State's psychiatric expert who had performed an evaluation of the defendant pursuant to a court order. In *Huff*, the court relied upon the United States Supreme Court decision in *Buchanan v. Kentucky*, 483 U.S. 402, 97 L. Ed. 2d 336, *reh'g denied*, 483 U.S. 1044, 97 L. Ed. 2d 807 (1987). The defendant in *Buchanan* claimed his sixth amendment right to assistance of counsel had been denied because his counsel did not anticipate that the results of the

psychiatric examination requested by defendant would have been used at trial to rebut his affirmative defense of extreme emotional disturbance. *Buchanan*, 483 U.S. at 424, 97 L. Ed. 2d at 356. The *Buchanan* Court noted that the purpose of the sixth amendment is to protect a defendant's right to effective consultation with counsel, which is "based on counsel's being informed about the scope and nature of the proceeding." *Id.* at 424, 97 L. Ed. 2d at 357. However, the *Buchanan* Court found that the defendant's counsel was informed as to the scope and nature of the proceeding since he had placed the defendant's mental condition at issue by arguing the extreme emotional disturbance defense. *Id.* at 424-25, 97 L. Ed. 2d at 357. Counsel must have anticipated that the State would use psychiatric evidence of the defendant's mental condition to rebut this defense. *Id.* at 425, 97 L. Ed. 2d at 357. Therefore, the defendant's sixth amendment right to assistance of counsel had not been violated. *Id.*

Adopting the *Buchanan* rationale, the *Huff* Court stated that because the defendant placed his mental status at issue by arguing an insanity defense, " 'he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.' " *Huff*, 325 N.C. at 49, 381 S.E.2d at 662 (*quoting Buchanan*, *supra*, 483 U.S. at 425, 97 L. Ed. 2d at 357). Our Supreme Court also noted that there was no contention that the defendant did not have the opportunity to confer with his counsel and to discuss whether to submit to an examination. *Id.* at 49, 381 S.E.2d at 662-63. *Huff* held that there was no violation of the defendant's right to effective assistance of counsel. *Id.* at 49, 381 S.E.2d at 663.

The present case is controlled by our Supreme Court's decision in *Huff*, and not by *Estelle*. Here, defendant filed a motion to continue the trial in this case on 17 January 2001 based on the results of a psychiatric examination by defendant's own expert, Dr. Corvin. This examination concluded that defendant suffered from "psychotic symptoms" and "major depression" and that his trial should be delayed for treatment of his psychiatric illness. The trial court found that this motion raised the issue of defendant's capacity to proceed and allowed the motion to continue. On its own motion, the trial court ordered defendant committed to Dorothea Dix Hospital for evaluation of his capacity to proceed. Defendant and his counsel were present during the trial court's consideration of the motion to continue and its order for commitment and did not enter any objection.

Defendant placed his mental condition at issue first by moving to continue the trial due to his psychiatric illness, and then by asserting

the defense of diminished capacity and his inability to formulate the intent to kill. Defendant submitted affidavits and presented expert psychiatric testimony on these issues to the trial court. Defendant submitted to the psychiatric examination ordered by the trial court and did not allege that he did not have an opportunity to consult with his counsel regarding the scope of the examination. Based on our Supreme Court's ruling in *Huff, supra*, we find that defendant's right to counsel was not affected by the admission of Dr. Rollins' testimony on rebuttal.

N.C. Gen. Stat. § 15A-1226 allows each party to "introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party," N.C. Gen. Stat. § 15A-1226(a) (2001), and gives the trial court the discretion to allow "any party to introduce additional evidence at any time prior to the verdict." N.C. Gen. Stat. § 15A-1226(b); *see also State v. Johnston*, 344 N.C. 596, 605, 476 S.E.2d 289, 294 (1996) ("The State has the right to introduce evidence to rebut or explain evidence elicited by defendant. . . .") The trial court's decision to admit rebuttal evidence will not be reversed by this Court absent an abuse of discretion. *State v. Anthony*, 354 N.C. 372, 555 S.E.2d 557, *cert. denied*, 354 N.C. 575, 559 S.E.2d 184 (2001). Our review of the record reveals no such abuse of discretion where the defendant "opened the door" by introducing evidence on the issue of his capacity to formulate the intent to kill and had the opportunity to fully cross-examine and re-cross-examine Dr. Rollins.

As to defendant's contention that Dr. Rollins' opinion lacked proper foundation, we cannot agree. Defendant stipulated to Dr. Rollins' qualifications as a forensic psychiatrist. Dr. Rollins personally saw defendant approximately eleven times and reviewed psychiatric evaluations performed by other psychiatrists, including defendant's own experts. The opinions and evaluations of other doctors have been held to be a proper basis for an expert opinion under N.C. Gen. Stat. § 8C-1, Rule 703 (2001). *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995); *Donavant v. Hudspeth*, 318 N.C. 1, 347 S.E.2d 797 (1986); *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979). Although Dr. Rollins evaluated defendant by court order for the purpose of determining his capacity to proceed, his personal observations taken together with the other materials considered provided an adequate basis for his opinion that defendant was capable of forming the requisite intent to kill at the time of the shooting.

We find the trial court did not err in allowing Dr. Rollins to give his opinion as to defendant's mental state at the time of the shooting, and, therefore, we hold the trial court did not commit plain error.

NO ERROR.

Judges McGEE and HUDSON concur.

STATE OF NORTH CAROLINA v. SCOTTIE TERRILL BAILEY

No. COA02-511

(Filed 1 April 2003)

1. **Possession of Stolen Property— stolen vehicle—sufficiency of evidence—circumstantial evidence**

There was sufficient evidence of possession of stolen goods and possession of a stolen vehicle where defendant was found driving a Suburban several hours after it was stolen, defendant claimed that the vehicle belonged to a friend but would not give the friend's name, the employee driving the company-owned Suburban testified that he had not given anyone permission to drive the vehicle on that day, and defendant was found with the employee's keys. Although the evidence of knowledge that the vehicle was stolen was circumstantial, the rule for determining sufficiency of evidence is the same for circumstantial or direct evidence.

2. **Appeal and Error— plain error analysis—not necessary**

A plain error analysis was inappropriate for the introduction of testimony concerning drug paraphernalia being found on one of the passengers in a stolen vehicle where the challenged testimony did not constitute error at all.

3. **Constitutional Law— right to remain silent—defendant's assertion—officer's testimony**

A defendant's Fifth Amendment rights were not violated by admission of testimony that he refused to answer questions after hearing his Miranda rights where the testimony was not solicited by the prosecutor and was merely offered in response to a question about the chronology of events surrounding defendant's

arrest, there was no further reference to defendant asserting his right to remain silent, and there was strong evidence of defendant's guilt.

4. Constitutional Law— double jeopardy—possession of stolen property and possession of stolen vehicle—same stolen vehicle

Sentences for possession of stolen goods and possession of a stolen vehicle based on possession of the same stolen Suburban violated double jeopardy. Although one requires proof of a fact which the other does not, the Legislature did not intend to punish defendant twice for possession of the same property. While defendant could be indicted and tried for both offenses, he could be convicted only once, and the conviction for possession of stolen goods was vacated.

5. Sentencing— habitual felon—plea transcript—court's response

Defendant was properly adjudicated an habitual felon where the trial court simply said "okay" after going through the transcript of the plea with defendant. The necessary inquiries were made; while "okay" was not the most appropriate choice of words, it signified the court's approval of the stipulation of defendant's guilt.

Appeal by defendant from judgment entered 9 October 2001 by Judge James E. Ragan in Wayne County Superior Court. Heard in the Court of Appeals 30 January 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Jeffrey Evan Noecker for defendant-appellant.

HUNTER, Judge.

Scottie Terrill Bailey ("defendant") appeals his convictions and sentencing for possession of stolen goods, possession of a stolen motor vehicle, and being an habitual felon. We conclude defendant was properly adjudicated as an habitual felon; however, defendant's convictions for both possession offenses violated double jeopardy thereby requiring this Court to vacate his conviction for possession of stolen goods and remand this case to the trial court for resentencing.

On 6 August 2001, defendant was indicted by a Wayne County Grand Jury for possession of stolen goods and possession of a stolen motor vehicle (01CRS003182). Defendant was also indicted for being an habitual felon (01CRS007464) due to three prior felony convictions. Defendant's trial began on 8 October 2001, during which the following evidence was introduced.

On the morning of 2 April 2002, Tony Crain ("Crain") drove his company's vehicle, a black 2000 Chevrolet Suburban ("the Suburban") with a vanity tag that read " '1 ALLIED,' " to meet with a customer at a construction site in Raleigh, North Carolina. Upon arriving at the site, Crain parked the Suburban and left his keyring in the driver's seat. While conferring with the customer at a distance of approximately thirty feet from the Suburban, Crain noticed a man ride by on a bicycle. As Crain walked back towards the Suburban approximately fifteen minutes later, he saw the vehicle being driven away. He had not given anyone permission to drive the Suburban. A bicycle was found lying on the ground near where the Suburban had been parked.

The Suburban was equipped with OnStar, a computer tracking and roadside assistance system. Thus, Crain immediately called OnStar and reported the vehicle had been stolen. He also called the Raleigh police. Crain told the police he was unable to identify the bicyclist whom he believed had stolen the Suburban.

By that afternoon, the Suburban was spotted in Goldsboro, North Carolina, by Officer Dorothy Ardes ("Officer Ardes"). She and several other Goldsboro police officers pulled the Suburban over without incident. As Officer Ardes approached the vehicle, she saw defendant in the driver's seat and two other passengers in the Suburban. Defendant informed the officer that he had gotten the Suburban from a friend (whose name he would not give) and that he was in Goldsboro visiting his child. When defendant and the passengers asked why they had been stopped, the police indicated that the vehicle had been reported stolen.

Upon receiving confirmation that defendant was driving the stolen Suburban, the police placed him under arrest. Pursuant to the arrest, the police searched defendant and the two passengers. Crain's keyring, which included the Suburban key and Crain's residence key, was found in defendant's possession. Over defendant's objection, Officer Ardes and another officer, Officer Raymond Yeager ("Officer

Yeager"), testified that drug paraphernalia was found on one of the passengers. Officer Yeager also testified, over defendant's objection, that defendant invoked his right to remain silent after being read his *Miranda* rights.

Following the presentation of all the evidence, the trial court instructed the jury on the charges of felony possession of stolen goods, i.e. the Suburban, and felony possession of a stolen motor vehicle, also the Suburban. The jury returned with two guilty verdicts for these Class H felonies.

Thereafter, the trial court and the attorneys discussed the previously obtained habitual felon indictment, the existence of which had not been revealed to the jury prior to its verdicts on the possession offenses. Defense counsel indicated that defendant was prepared to admit his habitual felon status in order to forgo a second trial. However, the court stated that it was necessary to first go through a transcript of plea because defendant's stipulation alone was insufficient. Following his review of the transcript of plea in the courtroom, defendant pled guilty to being an habitual felon. This Class C felony conviction and defendant's two Class H felony convictions were consolidated for judgment as part of a plea agreement. Defendant was sentenced to a term of seventy-three months to ninety-seven months in the North Carolina Department of Corrections. Defendant appeals.

I.

[1] We first consider defendant's third assignment of error regarding whether the trial court erred in failing to dismiss both possession charges against him due to insufficiency of the evidence.

To withstand a motion to dismiss for insufficient evidence, the trial court is to consider the evidence in the light most favorable to the State, which entitles the State "to every reasonable intendment and every reasonable inference to be drawn from the evidence[.]" *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The evidence considered must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *Id.* at 65-66, 296 S.E.2d at 651. Whether the evidence presented is substantial is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956).

> A defendant charged with possession of stolen property under G.S. 14-71.1 or possession of a stolen vehicle under G.S.

> 20-106 may be convicted if the State produces sufficient evidence that defendant possessed stolen property (i.e. a vehicle), which he *knew or had reason to believe* had been stolen or taken.

State v. Lofton, 66 N.C. App. 79, 83, 310 S.E.2d 633, 635-36 (1984) (emphasis added). Defendant contends his motion to dismiss these charges should have been granted because there was insufficient evidence establishing that he "knew or had reason to believe" the Suburban was stolen. We disagree.

The evidence offered in the case at bar consisted of the following: (1) Defendant was found driving the Suburban several hours after it was stolen; (2) defendant claimed the vehicle belonged to a "friend," but would not give that friend's name; (3) Crain testified that he had not given anyone permission to drive the Suburban on the day in question; and (4) defendant was found with Crain's group of keys in his possession. This evidence establishing defendant's knowledge or reasonable belief that the Suburban was stolen was circumstantial at best because Crain could not identify defendant as the bicyclist whom he believed stole his vehicle. Nevertheless, "the rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981) (citations omitted). Regardless of the circumstantial nature of the evidence in this case, a strong inference can be deduced that defendant knew or had reasonable grounds to believe the vehicle was stolen. Therefore, the trial court did not err in denying defendant's motion to dismiss and submitting the case to the jury.

II.

[2] Defendant assigns plain error to testimony given by Officers Ardes and Yeager concerning drug paraphernalia being found on one of the passengers in the Suburban. Defendant contends that although his objection to that portion of each officer's testimony was sustained, his failure to move to strike or request an instruction that the jury disregard it may have resulted in the jury associating one illegal act with another, especially in the absence of "strong" evidence establishing defendant's guilty knowledge or reasonable belief that the Suburban was stolen. We disagree.

> A prerequisite to our engaging in a "plain error" analysis is the determination that the instruction complained of constitutes "error" at all. Then, "[b]efore deciding that an error by the trial

court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict."

State v. Torain, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). In light of (1) defendant's objection being sustained, (2) our analysis regarding defendant's third assigned error, and (3) clear evidence that the drug paraphernalia was *not* found on defendant, we fail to ascertain how the challenged testimony in this case constituted error at all. Thus, a "plain error" analysis is inappropriate.

III.

[3] Next, defendant argues his Fifth Amendment rights were violated by the admission of evidence that he refused to answer questions after being read his *Miranda* rights. "[A] defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial. However, such a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt." *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994) (citations omitted). We conclude the court's error in the instant case was harmless beyond a reasonable doubt.

During the trial, Officer Yeager testified that after defendant was read his *Miranda* rights and signed a waiver form acknowledging that he understood those rights, Officer Yeager "asked [defendant] did he wish to answer any questions . . . and he indicated no, he did not." Defendant contends the State improperly elicited this testimony from Officer Yeager. However, the officer's testimony was not solicited by the prosecutor, but was merely offered in response to a question requesting a chronology of the events surrounding defendant's arrest. Moreover, the record does not indicate that further reference was made at any other time during the trial to defendant asserting his post-arrest right to remain silent. Finally, as discussed earlier, there was strong circumstantial evidence establishing defendant's guilt. Therefore, any violation of defendant's constitutional right to remain silent was *de minimis*, resulting in defendant's argument being overruled. *See id.*

IV.

[4] Defendant also argues his sentence offends double jeopardy because his convictions for possession of stolen goods and posses-

sion of a stolen vehicle were both based on his possession of the Suburban. We agree.

The Double Jeopardy Clauses of "[b]oth the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution protect against multiple punishments for the same offense." *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997). When analyzing multiple offenses for double jeopardy purposes, our United States Supreme Court has held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932). However, the presumption raised by what is referred to as the *Blockburger* test:

> [I]s only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding on state courts nor conclusive. When utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test.

State v. Gardner, 315 N.C. 444, 455, 340 S.E.2d 701, 709 (1986). "The traditional means of determining the intent of the legislature where the concern is only one of multiple punishments for two convictions in the same trial include the examination of the subject, language, and history of the statutes." *Id.* at 461, 340 S.E.2d at 712.

In the case *sub judice*, defendant was convicted of possession of stolen property (the Suburban) pursuant to Section 14-71.1 and possession of a stolen vehicle (the Suburban) pursuant to Section 20-106. As previously stated (and further detailed here):

> The elements of a violation of G.S. 14-71.1 are: (1) possession of personal property, (2) which has been stolen, (3) the possessor knowing or having reasonable grounds to believe the property was stolen, and (4) the possessor acting with a dishonest purpose. The elements of a violation of G.S. 20-106 are: (1) possession of a vehicle, and (2) the possessor knowing or having reason to believe the vehicle has been stolen or unlawfully taken.

State v. Craver, 70 N.C. App. 555, 559, 320 S.E.2d 431, 434 (1984) (citations omitted).

When considering the subject of these statutes, it is clear that the Legislature sought to address a defendant's illegal possession of another's property. Yet, the language of the statutes clearly indicates their central focus is different because one "requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304, 76 L. Ed. at 309. The offense of possessing a stolen motor vehicle specifically requires a finding that the stolen property being possessed was a motor vehicle. Conversely, the offense of possessing stolen goods does not require that one of the "goods" stolen was actually a motor vehicle. Additionally, statutory history reveals Section 20-106 was enacted as part of the Motor Vehicle Act of 1937 to "discourage the possession of stolen vehicles by one who knows it is stolen or has reason to believe that it is stolen." *State v. Rook*, 26 N.C. App. 33, 35, 215 S.E.2d 159, 161 (1975). Sixty years later, our Legislature neither amended nor repealed Section 20-106, choosing instead to enact Section 14-71.1 to discourage the possession of *any* stolen property regardless of whether that property was a motor vehicle. *See generally State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). Thus, the distinctions in language and history between the two statutes suggest the Legislature intended possession of stolen goods and possession of a stolen vehicle to be separate crimes.

The fact that these possession statutes represent two separate and distinct offenses for which a defendant may be punished does not mean however that he is so punishable when possession of the same property is at issue. As our Supreme Court held in *Perry*, although "a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, [our Legislature intended that he] be *convicted* of only one of those offenses." *Id.* at 236-37, 287 S.E.2d at 817 (emphasis added). The Supreme Court reasoned that the Legislature did not intend to punish a defendant for possessing or receiving the same property which he himself stole. *Id.* By analogizing *Perry* to the present case, we also reason that the Legislature did not intend to punish a defendant for possession of the same property twice. Thus, while defendant could have been indicted and tried pursuant to Section 20-106 and Section 14-71.1 based on his possession of the stolen Suburban, he could only have been convicted once for possession of it.

Accordingly, since both possession statutes have the same class and record level, we vacate defendant's conviction under Section 14-71.1 because defendant's unlawful possession of a stolen vehicle is exactly the type of crime Section 20-106 was enacted to discourage.

V.

[5] Finally, defendant argues the trial court erred in entering a judgment against him based on his being an habitual felon. Specifically, defendant contends he was never properly adjudicated as an habitual felon because the trial court simply stated "[o]kay" after going through a transcript of the plea with defendant. Defendant further contends the judgment form contained fatal errors because it failed to indicate defendant was adjudged an habitual felon or that his punishment class was being enhanced from Class H to Class C. Defendant asks this Court to remand his case to the trial court with directions to vacate his habitual felon adjudication and re-sentence him as a Class H felon.

With respect to defendant's first contention, this Court holds that although a defendant's status as an habitual felon should be determined by a jury, a defendant may chose to enter a guilty plea to such a charge. *See State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 699 (2001). However, a trial court may not accept a defendant's plea of guilty as an habitual felon without first addressing the defendant personally and making the following inquiries of that defendant as required by Section 15A-1022 of our statutes:

(1) Informing [the defendant] that he has a right to remain silent and that any statement he makes may be used against him;

(2) Determining that he understands the nature of the charge;

(3) Informing him that he has a right to plead not guilty;

(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;

(5) Determining that the defendant, if represented by counsel, is satisfied with his representation;

(6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and

(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in depor-

> tation, the exclusion from admission to this country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2001).

Here, the necessary inquiries needed to establish a record of defendant's guilty plea were asked by the trial court, resulting in defendant's guilt as an habitual felon being duly stipulated. *See State v. Williams*, 133 N.C. App. 326, 330, 515 S.E.2d 80, 83 (1999). The trial court's response of "[o]kay[,]" although not the most legally appropriate word choice, signified the court's *approval* of this stipulation when considering the word's plain meaning. *See* Webster's New Word Dictionary 418 (2nd ed. 1987). Further, defendant's sentence clearly suggests he was adjudicated an habitual felon because the sentence was within the presumptive range for someone with a prior record level I convicted of a Class C felony with a prior record level I and not a Class H felony. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2002).

Defendant's second contention pertains to the judgment form's failure to indicate that he was adjudged an habitual felon or that his punishment class was being enhanced to Class C. However, this Court need not address this contention of defendant's because, having vacated one of his convictions, we remand defendant's case to the trial court for resentencing.

In conclusion, defendant was properly adjudicated as an habitual felon, but erroneously convicted twice for possession of the same stolen property. Thus, defendant's conviction of possession of stolen goods must be vacated and his case remanded to the trial court for resentencing.

Vacated in part and remanded for resentencing.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. RUDOLPH MARCEL HARGETT

No. COA02-710

(Filed 1 April 2003)

1. **Larceny— possession of stolen property—sentencing for both—improper**

   Sentencing defendant for both larceny and possession of the property that he stole was plain error, although the court did not err by submitting both charges to the jury.

2. **Larceny— stealing from multiple vans inside one fenced area—single transaction**

   Two larcenies were part of a single transaction where defendant took tools from multiple vans which had the same owner and which were in close proximity inside the same locked fence, and the larcenies occurred within the same general time period. The trial court erred by convicting and sentencing defendant for both larcenies.

3. **Evidence— prior convictions—admissible to challenge character testimony**

   The trial court did not abuse its discretion in a larceny prosecution by allowing a character witness to be cross-examined about his knowledge of defendant's convictions of similar crimes 30 years ago. Defendant placed his character in issue.

Appeal by defendant from judgment entered 20 September 2001 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Daniel S. Johnson, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant.

TYSON, Judge.

I. Background

On 10 June 2000, Charlotte-Mecklenburg Police Officer David Collins ("Collins") received a report around 10:20 p.m. of someone breaking into work vans parked inside a fenced lot off of Parkton Road.

Collins arrived at the location and observed several work vans, all belonging to Queen City Electric. Collins noticed an individual lying beside a van inside the fenced lot. After Collins instructed that person to stop, the person fled. Collins pursued the suspect into the woods past a graveyard.

Collins noticed Rudolph Marcel Hargett ("defendant") lying down in weeds in the woods, about forty or fifty yards from the parking lot. Collins placed defendant in handcuffs as he was not sure if defendant was the original suspect. While handcuffing defendant, Collins saw several tools, including saws etched with the name "Queen City Electric", on the ground near defendant. Collins recovered two circular saws, a reciprocating saw, a volt meter, and several drill bits from the scene.

Later, Collins recovered bolt cutters lying by the vans in the lot. It was apparent that entry was gained after a chain to the fence had been cut with the cutters. Three of the vans in the lot had been broken into by shattering windows. Collins found defendant's car that night on a dirt service road at a construction site about a tenth of a mile from the site of the arrest.

Defendant was indicted for three counts of breaking and entering of three motor vehicles, two counts of misdemeanor larceny of property from two of the motor vehicles, and one count of misdemeanor possession of stolen property.

Jerry Burleson ("Burleson"), owner of Queen City Electric, testified that on 10 June 2000 his company owned several vans, each containing a circular saw, reciprocating saw, and test meters. All tools inside the vans were engraved with the company name. Burleson closed the business on Friday evening, 9 June 2000, and stopped by the business on Saturday afternoon around 2:00 p.m. At that time, the vans were locked inside the fenced lot. Burleson learned of the break-in the following day, met with Collins, and identified the tools taken by the markings on them. The tools had been stored inside the vans.

Defendant testified on his own behalf that he stopped his car on 10 June 2000 about 10:00 p.m. to "use the bathroom." Defendant noticed a person in the graveyard and wanted to see what was happening. Defendant started to return to his car when he tripped and fell. Defendant stated that he did not take any of the equipment found near him.

Julian Hasse ("Hasse") testified to defendant's character for truthfulness and that he had no doubts about defendant's integrity. On cross-examination, Hasse admitted not knowing that defendant had been convicted previously of breaking and entering and larceny from an automobile.

Sylvester Goode ("Goode") testified that he had known defendant for twenty years. Goode employs defendant to work on his rental property and has entrusted him with equipment and money. Goode has never suspected defendant of stealing.

The jury returned a verdict of guilty on all charges. The convictions were consolidated into three judgments. Judge Oliver Noble sentenced defendant to three consecutive terms of six to eight months. These sentences were suspended and defendant was placed on supervised probation for a period of thirty-six months and was ordered to serve a fourteen-day active jail sentence. Defendant appeals.

II. Issues

Defendant assigns plain error to his convictions and sentences for both the larcenies and the possession of stolen goods where the goods allegedly possessed by defendant were the same goods allegedly stolen during the larcenies. Defendant also argues that the trial court erred: (1) in denying defendant's motion to dismiss and subsequently sentencing defendant for two separate larcenies when the items were stolen during one continuous transaction and (2) in allowing cross-examination of Hasse about defendant's alleged prior conviction. Defendant also requests this Court to remand the judgments suspending sentences to the Mecklenburg County Clerk of Court to correct a clerical error which added fifty hours of community service to the requirements of defendant's probation where no such condition was ordered.

III. Sentencing for Larcenies and Possession of Stolen Goods

[1] Defendant contends that the trial court erred in convicting and sentencing him for both larceny and possession of the same goods. Defendant failed to object to the sentencing at trial. N.C. Rule 10(b)(1) requires an objection at trial for preservation of an issue on appeal. Our Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991).

> [Rule 10(b)(1)] is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.

Id. at 401, 410 S.E.2d at 878 (citations omitted).

Our Supreme Court in *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982) answered the question of sentencing for both larceny and possession of stolen property in defendant's favor.

> While, as asserted by the Court of Appeals, it may be impossible to take and carry away goods without possessing them, it does not follow that our Legislature intended to punish a defendant for that possession as a separate crime. The intent of the Legislature controls the interpretation of a statute. *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980)[, *overruled by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993)]; *Burgess v. Brewing Co.*, 298 N.C. 520, 259 S.E. 2d 248 (1979). Our review of the legislative history and case law background against which our possession statutes were enacted and our analysis of its internal provisions lead us to the conclusion that, by its enactment, the Legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole.

Perry, 305 N.C. at 235, 287 S.E.2d at 816.

Different elements are involved to establish the crimes of possession of stolen goods and larceny. The trial court properly submitted both charges to the jury, but erred by sentencing defendant for both offenses. Because defendant's sentences for all of the convictions surrounding the alleged incident were consolidated into three judgments, we arrest judgment in 00 CRS 24587 for possession of stolen goods and remand the case to the trial court for a new sentencing hearing.

IV. Motion to Dismiss

[2] Defendant contends that the trial court erred by not granting his motion to dismiss a larceny charge when the evidence did not support more than one larceny charge. Defendant argues that the trial court should have dismissed one of the charges of misdemeanor larceny since the taking of the items was all part of a single transaction.

Defendant was convicted of two counts of misdemeanor larceny by breaking and entering a motor vehicle. Defendant relies upon several cases supporting his position of a continuous transaction including *State v. Froneberger*, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

In *Froneburger*, the defendant was convicted on four counts of felonious larceny of several silver pieces. *Id.* at 398, 344 S.E.2d at 345. The only evidence to support four separate larcenies was the fact that the defendant pawned the silver on separate occasions and had unlimited access to the victim's home where he stole the silver. *Id.* at 401, 344 S.E.2d at 347. This Court found the evidence insufficient to support four separate larcenies. *Id.* at 401-02, 344 S.E.2d at 346-47. It was equally possible that defendant had taken all of the silver at one time, rather than four separate times. *Id.* at 402, 344 S.E.2d at 347. "A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *Id.* at 401, 344 S.E.2d at 347.

Our Supreme Court addressed this issue in a different context in *State v. Adams*, 331 N.C. 317, 416 S.E.2d 380 (1992). In *Adams*, a defendant was charged with felonious larceny of a firearm and felonious larceny of property stolen during a breaking and entering. *Id.* at 332-33, 416 S.E.2d at 388-89. The defendant had broken into a home and stolen a pistol, some silver coins, and satellite equipment. *Id.* at 333, 416 S.E.2d at 389. The Court stated "[n]othing in the statutory language [of N.C.G.S. § 14-72] suggests that to charge a person with a separate offense for each firearm stolen in a single criminal incident was intended." *Id.* at 332, 416 S.E.2d at 388. The Court also cites *Froneberger* and analogizes that where the defendant and his brother stole the firearm, coins, and satellite equipment during the course of a single breaking and entering, the defendant had been improperly convicted and sentenced for two larcenies. *Id.* at 333, 416 S.E.2d at 389.

The N.C. Supreme Court reached a different result in *State v. Barton*, 335 N.C. 741, 441 S.E.2d 306 (1994). Barton was convicted of and sentenced for first-degree murder, armed robbery, and larceny of a firearm. *Barton*, 335 N.C. at 743, 441 S.E.2d at 307. Barton argued *Adams* to hold that the robbery of the victim's wallet, automobile, and the subsequent larceny of victim's firearm from the automobile were part of "single continuous criminal transaction." *Id.* at 745-46, 441 S.E.2d at 309. The Court rejected defendant's analogy.

> *Adams* does not alter our conclusion. We held in *Adams* that the defendant "was improperly convicted and sentenced for both larceny of a firearm and felonious larceny *of that same firearm* pursuant to a breaking or entering." *Id.* (emphasis added). The two convictions at issue in *Adams* thus did not involve separate takings, but rather involved the same taking of the same firearm. *Adams* is easily distinguishable from the present case, where the armed robbery of the victim—resulting in the taking of his wallet and automobile—and the subsequent larceny of the victim's firearm from his automobile constituted separate takings for double jeopardy purposes. Accordingly, we conclude that this assignment of error is without merit.

Id. at 746, 441 S.E.2d at 309. The Court concluded that multiple "takings" from the same victim at or around the same time did not merge the crimes into a "single continuous criminal transaction." *Id.* at 745-46, 441 S.E.2d at 309.

In *State v. Marr*, 342 N.C. 607, 467 S.E.2d 236 (1996), the issue arose again. Marr was convicted as an accessory before the fact of four separate larcenies, including larceny after entering a mobile home, larceny after entering a shop, larceny by taking a Volvo automobile, and larceny by taking a Ford truck. *Marr*, 342 N.C. at 610-11, 467 S.E.2d at 237. Judgment was arrested at trial on the conviction of larceny after entering the mobile home. *Id.* at 613, 467 S.E.2d at 239. The principals in the case had broken and entered the victim's mobile home and shop, taking tools from the shop and other items from the mobile home before taking the vehicles. *Id.* at 610, 467 S.E.2d at 237. Our Supreme Court found that the evidence only supported one larceny conviction. *Id.* at 613, 467 S.E.2d at 239.

> In *State v. Adams*, 331 N.C. 317, 416 S.E.2d 380 (1992), we held that a single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place. That is the case here. Although there was evidence of two enterings, the taking of the various items was all part of the same transaction. We arrest judgment on two of the convictions of larceny.

Id.

The Supreme Court in *Marr* did not cite or distinguish *Barton*. *Barton* upheld two takings in the context of a robbery and a larceny, not two separate larcenies within the same criminal transaction. We

are constrained to follow the most recent statement of our Supreme Court in *Marr*.

Here, sufficient evidence was presented to show that defendant took various tools from various vans. Queen City Electric placed a skill or circulating saw and reciprocating saw in each of its vans. Defendant took two circulating saws and one reciprocating saw. Defendant could not have physically taken all of the tools at the same time, because all tools could not have been stolen out of the same van.

We find *Marr* controlling. The trial court erred in convicting and sentencing defendant for two separate larcenies. Defendant took tools from multiple vans owned by Queen City Electric, but the vans were parked inside the same locked fence in close proximity. The larcenies from the separate vans occurred within the same general time period. We hold the larcenies were part of a single continuous transaction. We arrest judgment on Count 2 of 00 CRS 24585, larceny of a circular saw and volt meter. The other sentences will be reconsidered at the new sentencing hearing previously ordered.

V. Cross-examination of Witness Hasse

[3] Defendant assigns error to the State's inquiry whether Hasse knew of defendant's prior convictions, which were entered nearly thirty years ago. Defendant argues a lack of basis for its admission. N.C. Rule of Evidence 405(a) provides:

> (a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.* Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

N.C.G.S. § 8C-1, Rule 405(a) (2001) (Emphasis supplied).

Defendant chose to introduce evidence of his character through two character witnesses: Hasse and Goode. Hasse gave his opinion of defendant's good character based upon his knowledge of defendant. The State cross-examined Hasse by inquiring into a specific instance of defendant's conduct, defendant's prior conviction of a crime similar to that charged here. This cross-examination is explicitly permitted by the language of Rule 405(a).

Defendant objected at trial to the questioning. While no basis for that objection appears in the record, it suggests that defendant objected on remoteness of the conviction. This objection may have been proper if the prior conviction was used for impeachment of the defendant under Rule 609. Here, the prior conviction was used by the State to cast doubt upon Hasse's opinion of defendant's good character.

This Court in *State v. Rhue*, 150 N.C. App. 280, 563 S.E.2d 72 (2002), rejected a defendant's argument that his 1980 conviction was too remote to use in cross-examining a character witness.

> "A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character." *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). Under N.C. Gen. Stat. § 8C-1, Rule 405(a) (1999), the State may do so by cross-examining a defendant's character witnesses as to "relevant specific instances of conduct." Thus, where the defendant in *Roseboro* introduced testimony from family members regarding his reputation for peacefulness, the State was entitled to cross-examine the witnesses as to whether they knew of any accusations that the defendant acted violently towards his wife. *Roseboro*, 351 N.C. at 553, 528 S.E.2d at 12.
>
> Moreover, unlike evidence of prior bad acts being offered under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999), Rule 405(a) does not contain any time limit or rule regarding remoteness, and our Supreme Court has explicitly refused to impose one. *See State v. Cummings*, 332 N.C. 487, 507, 422 S.E.2d 692, 703 (1992). Rather, "[a] 'relevant' specific instance of conduct under Rule 405(a) would be any conduct that rebuts the earlier reputation or opinion testimony offered by the defendant." *Id.*

Rhue, 150 N.C. App. at 284, 563 S.E.2d at 75.

Cross-examination regarding defendant's prior conviction of similar crimes to those charged was proper after defendant placed his character in issue. Defendant failed to show that the trial court abused its discretion in allowing the cross-examination under Rule 403. The possibility of prejudice did not substantially outweigh the probative value of the evidence.

VI. Remand for New Sentencing Hearing

Defendant argues that the trial court erred in imposing a community service requirement on the suspension of sentence. The State alleges that the community service is a requirement of defendant's "Intensive Probation" program. Although the community service requirement was not specifically mentioned at the sentencing hearing, it is explicitly stated in the judgments suspending sentences.

We decline to address this assignment of error because a new sentencing hearing has been ordered. The judge is free to deviate from the terms of the original sentence. *See* N.C.G.S. § 15A-1331(a) (2001), *State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984). "[However,] on resentencing, a trial judge cannot impose a term of years greater than the term of years imposed by the original sentence, regardless of whether the new aggravating factors occurred before or after the date of the original sentence." *Id.* There is no need to address any alleged error concerning conditions of the old sentences.

Defendant and the State agree that the sentencing worksheet is facially flawed. Defendant argues that the trial court erred in listing the breaking and entering charges as Class F felonies. The State assigns error to listing the convictions of breaking and entering as Class H felonies when they are Class I felonies. We overrule defendant's assignment of error as we agree with the State that the "F" referred to the "felony" and not the class type. The listing of the breaking and entering felonies as Class H was error and should have been listed as Class I. On remand during resentencing, these errors should be corrected.

VII. Summary and Mandate

No error in trial. Judgment arrested on possession of stolen goods, 00 CRS 24587. Judgment arrested on the larceny of a circular saw and volt meter, Count 2 of 00 CRS 24585. A new sentencing hearing is ordered on the remaining convictions.

No. 00 CRS 24584, breaking and entering a motor vehicle—remanded for resentencing.

No. 00 CRS 24585, Count 1, breaking and entering a motor vehicle—remanded for resentencing.

No. 00 CRS 24585, Count 2, misdemeanor larceny—judgment arrested.

No. 00 CRS 24586, Count 1, breaking and entering a motor vehicle—remanded for resentencing.

No. 00 CRS 24586, Count 2, misdemeanor larceny—remanded for resentencing.

No. 00 CRS 24587, possession of stolen goods—judgment arrested.

Judges McCULLOUGH and CALABRIA concur.

MICHAEL LEMLY, EMPLOYEE, PLAINTIFF v. COLVARD OIL COMPANY, EMPLOYER, AND FEDERATED MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-1529

(Filed 1 April 2003)

Workers' Compensation— mediated settlement conference—memorandum of settlement—clincher agreement

The Industrial Commission erred in a workers' compensation case by concluding that a memorandum of settlement arising out of a mediated settlement conference was not enforceable as a compromise settlement agreement and by awarding plaintiff employee total disability benefits, because: (1) the parties signed the written memorandum of settlement at the mediation, and plaintiff agreed to execute a clincher agreement which would set out the terms of the settlement; and (2) plaintiff has not alleged that the clincher agreement contained terms different than what was agreed to at the mediation.

Appeal by defendants from opinion and award entered 5 September 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 February 2003.

Crosswhite, Edwards & Crosswhite, by Joseph N. Crosswhite, for plaintiff-appellee.

Ball Barden & Bell, P.A., by Thomas R. Bell, for defendant-appellants.

EAGLES, Chief Judge.

Colvard Oil Company and Federated Mutual Insurance Company ("defendants") appeal from an opinion and award of the full Commission concluding that a memorandum of settlement arising out of a mediated settlement conference was not enforceable as a compromise settlement agreement and awarding Michael Lemly ("plaintiff") total disability benefits. After careful consideration of the briefs and record, we reverse and remand.

The plaintiff worked for defendant Colvard Oil Company ("Colvard Oil") as a truck driver. On 6 May 1997, the plaintiff was hauling gravel when tree limbs became entangled in the bed of his truck. The plaintiff "wrestle[d]" with a tarp covering the bed of his truck. As the plaintiff lifted a tree limb from the bed of the truck, he "felt a real sharp pain" in his back and "a real bad burning sensation." The following day, the plaintiff went to the emergency room and then to his family physician.

Defendants filed a Form 60 dated 5 June 1997 admitting plaintiff's right to compensation and began paying plaintiff temporary total disability benefits. Plaintiff participated in physical therapy and received treatment from several doctors until he was cleared to return to light duty work in January 1998. Plaintiff returned to work for Colvard Oil on 26 January 1998 at a filling station subject to work restrictions. After work on 26 January, the plaintiff "could barely walk" and he proceeded to the emergency room. Dr. Mark Scott, a physician in the emergency room, advised the plaintiff to remain out of work. Dr. Charles Branch, Jr., a neurosurgeon, performed surgery on the plaintiff's back in May 1998. Plaintiff has not returned to work since 26 January 1998.

The Industrial Commission ordered the parties to participate in a mediated settlement conference which occurred on 12 August 1998. At the conclusion of the conference, the parties all signed a "Memorandum of Settlement" which stated:

The Parties agree that:

1. Defendants shall pay claimant $40,000.00 in settlement of this claim; and

2. Claimant shall pay out of the settlement proceeds all unpaid medical bills and satisfy all medical liens; and

3. Claimant shall execute clincher setting out above terms and other standard language. Upon approval by [the Industrial Commission], settlement will be paid.

4. Defendants shall pay all mediation fees.

The day after the mediation, the defendants sent the plaintiff a clincher agreement. The plaintiff did not execute the clincher agreement and filed a Form 33 dated 15 September 1998 seeking a hearing because of "the Defendants refus[al] to provide necessary medical treatment." Defendants filed a Form 24 on 12 October 1998 seeking to terminate or suspend payment of benefits and moved to "Require Compliance with Mediated Settlement."

In an opinion and award, the Deputy Commissioner denied defendants' motion to enforce the settlement agreement. The Deputy Commissioner awarded plaintiff temporary total disability compensation from 28 January 1998 through 26 May 1999 and permanent partial disability compensation for a period of seventy-five weeks. The plaintiff and defendants appealed.

The full Commission concluded that the signed settlement agreement was "not enforceable as a Compromise Settlement Agreement." The full Commission awarded the plaintiff temporary total disability benefits from 28 January 1998 through 26 May 1999 and ongoing total disability benefits "until further order of the Commission." Defendants appeal.

On appeal, defendants contend that the full Commission erred in refusing to allow defendants to stop paying disability benefits to the plaintiff because plaintiff wrongfully refused light duty work and that the full Commission erred in failing to enforce the settlement agreement. After careful consideration, we agree.

Defendants first contend that the full Commission erred by failing to enforce the settlement agreement. Defendants argue that the parties participated in a Commission ordered mediation which resulted in an agreement to settle, signed by both parties. The plaintiff agreed to execute a clincher agreement which would set out the terms of the settlement. Defendants argue that the plaintiff has not alleged that the clincher agreement contained terms different than what was agreed to at the mediation. We agree.

"[O]ur role in reviewing decisions of the Commission is strictly limited to the two-fold inquiry of (1) whether there is competent evi-

dence to support the Commission's findings of fact; and (2) whether these findings of fact justify the Commission's conclusions of law." *Foster v. Carolina Marble & Tile Co.*, 132 N.C. App. 505, 507, 513 S.E.2d 75, 77, *disc. review denied*, 350 N.C. 830, 537 S.E.2d 822 (1999). "The Commission's findings will not be disturbed on appeal if they are supported by competent evidence even if there is contrary evidence in the record. However, the Commission's conclusions of law are reviewable *de novo* by this Court." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272, *disc. review denied*, 355 N.C. 211, 558 S.E.2d 868 (2001) (citations omitted).

Here, the full Commission found that:

> The parties participated in a mediated settlement conference pursuant to an Order of the Commission dated 25 March 1998. On 12 August 1998, the *mediation was held and an agreement was reached between the parties. The parties signed a handwritten memorandum of the settlement*, pending the execution by plaintiff of a clincher agreement. While returning home from the conference, plaintiff determined that he did not wish to follow through with the agreement, and did not prepare a clincher agreement.

(Emphasis added.) The full Commission then concluded that "[t]he handwritten Memorandum of Settlement signed by the parties on 12 August 1998 is not enforceable as a Compromise Settlement Agreement under Industrial Commission Rule 502."

Pursuant to G.S. § 97-80(c), "[t]he Commission may order parties to participate in mediation." The duties of the parties if an agreement is reached in the mediation are:

> (d) Finalizing agreement. If an agreement is reached in the mediation conference, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted in proper form for Industrial Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference.

Mediated Settlement and Neutral Evaluation Conferences R. of N.C. Indus. Comm'n 4(d), 2003 Ann. R. (N.C.) 866. "All compromise settle-

ment agreements must be submitted to the Industrial Commission for approval. Only those agreements deemed fair and just and in the best interest of all parties will be approved." Workers' Comp. R. of N.C. Indus. Comm'n 502(1), 2003 Ann. R. (N.C.) 834. "A 'clincher' or compromise agreement is a form of voluntary settlement used in contested or disputed cases." *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 546, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 550 (1997). The settlement agreement "must contain specified language or its equivalent" to be approved by the Industrial Commission. *Id.*; *see also* Workers' Comp. R. of N.C. Indus. Comm'n 502(2), 2003 Ann. R. (N.C.) 834.

Compromise settlement agreements, including mediated settlement agreements, "are governed by general principles of contract law." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500, *reh'g denied*, 354 N.C. 75, 553 S.E.2d 36 (2001). "It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995). "To be enforceable, the terms of a contract must be sufficiently definite and certain." *Miller v. Rose*, 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000).

Here, at the mediation the parties signed a written "Memorandum of Settlement." Plaintiff, plaintiff's attorney, defendants' attorney, and a representative of defendant Federated Mutual Insurance Company all signed this memorandum. The memorandum began with the language "[t]he parties agree that: (1) Defendants shall pay claimant $40,000.00 in settlement of this claim." It further stated that the "[c]laimant shall pay out of the settlement proceeds all unpaid medical bills and satisfy all medical liens" and that "[d]efendants shall pay all mediation fees." The memorandum also stated that "[c]laimant shall execute clincher setting out above terms and other standard language. Upon approval by [the Industrial Commission], settlement will be paid."

The language of this signed memorandum indicates that the parties agreed to settle this matter for $40,000.00 and provides for the payment of plaintiff's unpaid medical bills and medical liens. It references a clincher agreement that "[plaintiff] shall execute." The defendants, in accordance with the signed "Memorandum of Settlement," prepared a clincher agreement and sent it to the plaintiff the day after the mediation. This clincher agreement contained

the standard terms required by Rule 502(2) of the Workers' Compensation Rules of the North Carolina Industrial Commission.

In addition, the "Report of Mediator" states that the "parties reached: X agreement on all issues." It further states that the "[i]ssues settled to be disposed of by: X clincher." Defendants' "Motion to Require Compliance with Mediated Settlement" provides that:

> 4. On 12 August 1998 mediation occurred which resulted in a mediated settlement agreement. . . .
>
> 5. On 12 August 1998, as a result of mediation, the parties settled all issues between them. A written memorandum of this agreement prepared at mediation is attached . . . to this Motion.
>
> 6. As a result of this settlement agreement, the undersigned attorney for Employer and Carrier prepared a Clincher Agreement and mailed it to Employee's attorney. In early September telephone conversations occurred between attorneys for the parties indicating that Employee would not go through with the settlement. On 15 September 1998 Employee's attorney wrote attorney for Employer and Carrier a letter . . . indicating that his client would not go through with settling this claim and that he was, in fact, filing an additional Form 33.

"Plaintiff's Response" to this motion stated that "[p]laintiff does not dispute the facts as set forth in the Defendant's Motion."

While the better practice would be for the parties to execute a clincher agreement which contains all the required terms and language at the conclusion of the mediated settlement conference if an agreement is reached, the signed "Memorandum of Settlement" here fully complies with Rule 502(2) of the Workers' Compensation Rules and is a valid compromise settlement agreement subject to approval by the Industrial Commission pursuant to Rule 502(1).

Because we have concluded that the written "Memorandum of Settlement" is a valid compromise settlement agreement, we need not address defendants' remaining assignments of error.

Accordingly, the opinion and award of the full Commission is reversed and the matter remanded to the full Commission in order for the full Commission to consider its approval of the mediated settlement agreement pursuant to Rule 502(1) of the Workers' Compensa-

tion Rules, i.e., is the agreement "deemed fair and just and in the best interest of all parties."

Reversed and remanded.

Judges MARTIN and GEER concur.

TIM JACOBS, EMPLOYEE-PLAINTIFF v. SARA LEE CORPORATION, EMPLOYER-DEFENDANT AND KEMPER INSURANCE COMPANIES, CARRIER-DEFENDANT

No. COA02-413

(Filed 1 April 2003)

Workers' Compensation— personal deviation from business— return begun

A workers' compensation plaintiff remained on a personal deviation from a sales incentive trip when he fell and injured his knee while leaving a baseball game which was not on the itinerary. Although he had decided to leave, he had not in fact exited the stadium when he was injured.

Appeal by plaintiff from an opinion and award entered 7 January 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2003.

Frederick R. Stann, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Kadis and Hope F. Smelcer, for defendants-appellees.

CALABRIA, Judge.

Plaintiff appeals asserting the North Carolina Industrial Commission ("Commission") erred by determining that plaintiff was on a personal deviation from employment related activities when he was injured and therefore is not entitled to compensation under the Workers' Compensation Act. Commissioner Laura Kranifeld Mavretic dissented from the majority's opinion, agreeing with Deputy Commissioner Amy L. Pfeiffer's determination that plaintiff was not on a personal deviation but rather was returning to work when he was injured, and therefore his injury is compensable.

Pertinent to this appeal, the Commission found the following facts. Plaintiff was employed by defendant Sara Lee Corporation ("Sara Lee") as a salesman for eighteen years before he was injured. His job duties "consisted mostly of outside sales activities" which "involved traveling to the places of business of customers and prospective customers to promote defendant-employer's products and to take orders." Sara Lee offered trips to food shows as an incentive to its sales force. Plaintiff "had taken approximately twenty such trips during his employment with [Sara Lee]." Sara Lee provided transportation and spending money for the employees, and the employees were paid their normal salaries. Plaintiff won such a trip in May 1999, and Sara Lee provided plaintiff with a program of the food show events. On 23 May 1999, while plaintiff was in Chicago on one such trip, plaintiff bought a ticket to the White Sox-Yankees game and "personally chose to attend the ball game." "While exiting the ballpark, plaintiff slipped and fell, twisting and rupturing a tendon in his right knee." In finding of fact number six, the Commission found:

> Plaintiff indicated that he left the ball game early because it started to rain and that he intended to go to a 'Dave & Busters' party which was listed on a program of events available to salespeople who, like plaintiff, had won the privilege of taking the trip to Chicago. Defendant-employer did not expect plaintiff to attend the ball game; the baseball game was not on the itinerary of events related to the food show; and travel to and from the ball game was [] entirely for plaintiff's benefit and did not serve any interests of defendant-employer. Plaintiff was free to attend, or not attend, events on the itinerary that was provided to him; defendant-employer anticipated that Plaintiff would attend some portion of the food show only. Plaintiff was free to travel to baseball games, take city tours, site see, or to remain in his hotel; plaintiff was not required to attend any particular function, and plaintiff was not required to attend a 'Dave & Busters' party, which was scheduled to begin several hours after the time plaintiff left the ball park. The greater weight of the evidence is that the attendance [at] the ball game was a deviation from any benefit the employer could have anticipated from plaintiff's attendance at any food show event, and plaintiff was still on his deviation to the ballgame when he fell.

The Commission concluded as a matter of law, "[p]laintiff's injury while on a deviation to a baseball game is not compensable. Plaintiff

had not ended his personal deviation when he was injured leaving the ballpark."

Plaintiff appeals asserting the Commission erred by finding as fact and concluding as a matter of law that plaintiff's injury arose while he was on a personal deviation. Defendant asserts the Commission properly determined that plaintiff was on a personal deviation, and, alternatively, his injury is not compensable because plaintiff's attendance at the Dave & Busters party was not work related and did not benefit Sara Lee.

This Court's review of workers' compensation cases is "limited to the consideration of two questions: (1) whether the Full Commission's findings of fact are supported by competent evidence; and (2) whether its conclusions of law are supported by those findings." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). "This Court does not weigh the evidence and decide the issue on the basis of its weight; rather, this Court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Devlin v. Apple Gold, Inc.*, — N.C. App. —, —, 570 S.E.2d 257, 261 (10-15-2002). "If there is competent evidence to support the findings, they are conclusive on appeal even though there is evidence to support contrary findings." *Boles v. U.S. Air Inc.*, 148 N.C. App. 493, 498, 560 S.E.2d 809, 812 (2002). "The Industrial Commission's conclusions of law, however, are reviewable *de novo*." *Holley v. ACTS, Inc.*, 152 N.C. App. 369, 371, 567 S.E.2d 457, 459 (2002).

In the case at bar, there is competent evidence to support the Commission's findings of fact. Plaintiff admits "it was certainly reasonable for the Commission to find that the ballgame was a personal departure." Plaintiff asserts the Commission erred in finding of fact number six, finding that "plaintiff was still on his deviation to the ballgame when he fell." This finding is supported by competent evidence. Plaintiff's testimony explains, "I was going to catch a cab, leaving the stadium to go [to the Dave & Busters party]—almost on the sidewalk to catch a cab. And I was walking down a ramp at about a forty-five degree angle." Plaintiff elaborated, "we walked down the first [cement ramp] from the third level to the second level okay. And I got about [a] third or halfway down the second level and my leg just went up in the air . . . [a]ll the weight came down on my knee and I just twisted my knee." This is competent evidence to support the finding that plaintiff was still at the stadium, on a deviation, at the time of the

injury. This finding of fact, in turn, supports the conclusion of law that "[p]laintiff's injury while on a deviation to a baseball game is not compensable."

Plaintiff argues, however, that the Commission's opinion should be reversed because the conclusion of law that "[p]laintiff's injury while on a deviation to a baseball game is not compensable" results from an error of law. Plaintiff asserts North Carolina law provides for compensation for an employee who is injured on a business trip after starting to return to work from a personal deviation because the deviation is deemed to have ended. We hold the Commission did not err.

Generally,

> '[a]n identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be regarded as insubstantial.' 1 Larson § 19.00, at 4-352. However, an injury occurring after 'the personal deviation has been completed and the direct business route has been resumed' is compensable. Id. at § 19.32.

Creel v. Town of Dover, 126 N.C. App. 547, 557, 486 S.E.2d 478, 483 (1997). In *Creel*, plaintiff, on an errand for his employer, made a personal deviation, and was injured upon returning to complete the errand. Plaintiff and defendant disagreed as to where, precisely, plaintiff was injured. Plaintiff asserted he was on Carmichael Street, in furtherance of the errand, and had resumed the business route. Defendant argued that plaintiff was injured "before [he] ever ma[de] it onto the roadway," and therefore his deviation had not ended because "he had not yet resumed travel upon the roadway" where the employment required him to travel. *Creel*, 126 N.C. App. at 557-58, 486 S.E.2d at 484. This Court found sufficient evidence supported the Commission's finding that plaintiff "was injured while riding . . . on Carmichael Street at a point when his 'personal deviation ha[d] been completed and the direct business route ha[d] been resumed' " and therefore affirmed the Commission's award for plaintiff. *Creel*, 126 N.C. App. at 558, 486 S.E.2d at 484 (quoting 1 Larson § 19.32). As *Creel* demonstrates, unless the deviation is determined to be insubstantial, an argument not asserted by plaintiff in this case, compensability depends on whether the employee is "on the direct business route" or "on a personal deviation" when he is injured.

Plaintiff asserts *Chandler v. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981), is controlling. In *Chandler*, this Court noted, a "traveling employee is compensated for injuries received while returning to his hotel, while going to a restaurant or *while returning to work* after having made a detour for his own personal pleasure." *Chandler*, 53 N.C. App. at 770, 281 S.E.2d at 721 (emphasis added). In *Chandler*, the employee was compensated for injuries occurring while returning to work from a personal deviation. Plaintiff asserts that, like *Chandler*, he was returning to work from a personal deviation, and therefore on injury occurring on the return trip from his deviation should be compensable. However, the Court, in *Chandler*, explained that recovery was based on North Carolina's "rule that an employee injured while traveling to and from his employment *on the employer's premises* is covered by the Act. . . . [And] it [wa]s undisputed that [the plaintiff] was back within the confines of [the job site] when the accident occurred." *Chandler*, 53 N.C. App. at 769, 281 S.E.2d at 720 (emphasis added). Therefore, the plaintiff's injury was compensable in *Chandler* not because the plaintiff was "returning to work," but rather because he had "returned to the route of the business trip," and was, in fact, on the job site. Although the Court used the general language "returning to work," *Chandler* highlights that the operative fact is not when the employee *decided* to return from a deviation and travel towards the business route, but rather whether *in fact* he had returned to the business route or site when he was injured. In the case at bar, although plaintiff *decided* to leave his personal deviation and return to the business route, the Commission, based upon competent evidence, found as fact that plaintiff had not *in fact* exited the ball park and this finding supports the Commission's conclusion that plaintiff was still on a deviation when he was injured.

The test developed by our case law is whether, at the time of the injury, the employee was on a substantial personal deviation, and therefore his injury is not compensable, or whether the employee had returned to the business route, and therefore his injury is compensable under the Workers' Compensation Act. We hold the Commission did not commit an error of law in determining that plaintiff was still on his personal deviation at the ball game when he was injured and therefore his injury is not a compensable injury.

Although the Commission made findings of fact regarding plaintiff's attendance at the events listed by Sara Lee on the weekend's itinerary, the Commission made no findings of fact or conclusions of law as to whether the Dave & Busters party was work related. However,

since this case is controlled by personal deviation analysis, we, like the Commission, need not reach the issue of whether the Dave & Busters party was work related.

Since competent evidence supports the Commission's findings of fact, which in turn support the conclusions of law, and the conclusions of law are consistent with applicable law, we affirm the decision of the Commission.

Affirmed.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA v. MARKIE DEVON JONES

No. COA02-738

(Filed 1 April 2003)

1. Search and Seizure— traffic stop—failure to make motion to suppress prior to trial

The trial court did not err in a robbery with a dangerous weapon case by overruling defendant's objection to the admission of evidence gathered at a traffic stop, because: (1) defendant objected at trial to the admission of the evidence, and as a general rule a motion to suppress must be made before trial unless defendant did not have a reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under N.C.G.S. § 15A-975(b) or (c); (2) defendant failed to bring himself within any of the exceptions to the general rule; and (3) a miscalculation of the strength of the State's case is not a sufficient excuse for failure to make a motion to suppress prior to trial.

2. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence—acting in concert

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, because: (1) defendant was convicted under the theory of acting in concert to commit the armed robbery; (2) a coparticipant testified that he,

defendant, and another person all participated in the planning and execution of the robbery; (3) the coparticipant testified that he told defendant and another person that he had a gun before the robbery; (4) the coparticipant testified that defendant entered the store first to assess conditions within the store, returned to report to the other two men, and defendant waited in the vehicle as the designated getaway driver; and (5) although defendant's evidence tended to contradict the coparticipant's testimony, contradictions and discrepancies must be resolved by the jury and do not warrant dismissal.

Appeal by defendant from judgment entered 23 October 2000 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 17 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Grady L. Balentine, Jr., for the State.

John T. Hall for defendant appellant.

TIMMONS-GOODSON, Judge.

Markie Devon Jones ("defendant") appeals from his conviction entered upon a jury verdict finding him guilty of robbery with a dangerous weapon. For the reasons stated herein, we find no error by the trial court.

The State presented evidence at trial tending to show the following: On 16 May 2000, Jeremy Bowser ("Bowser") was working at a convenience store located in Raleigh, North Carolina. At approximately 2:30 a.m., defendant entered the store and asked Bowser the location of the bathroom. After using the bathroom, defendant left the store. A few minutes later, two African-American men wearing masks entered the store and approached Bowser. One of the men held a gun, while the second intruder accompanied Bowser behind the store counter and ordered him to empty the cash register.

After Bowser emptied the cash register, the robbers moved Bowser to the back of the store and inquired about the store's surveillance videotapes. Bowser explained that he had no access to the surveillance videotapes because they were locked in a box and he did not have the key. While they were in the back of the store, the front door alert sounded, indicating that someone had entered the store. One of the men put the gun to Bowser's head and ordered him to lie

down on the floor. While Bowser lay on the floor, his cellular telephone rang. The men then took Bowser's telephone, surveyed the store to ensure that no one was watching them, and exited the store. Bowser immediately summoned law enforcement officers to the scene.

Officer V.C. Sjostedt of the Raleigh Police Department testified that he responded to an alert about the convenience store robbery, which included a brief description of the suspects as being two black males. As he drove toward the store, Officer Sjostedt observed an approaching vehicle driving in excess of the speed limit. Officer Sjostedt followed the vehicle, and it slowed down considerably. Following the vehicle, Officer Sjostedt observed two individuals in the front seat and one in the rear seat. One of the occupants of the vehicle looked back several times, and another occupant held something over his head. Officer Sjostedt believed the occupants to be three African-American males.

Officer Sjostedt signaled the vehicle to stop by activating his emergency equipment. Once the vehicle pulled over, Officer Sjostedt requested additional law enforcement assistance when the passenger in the rear seat began making movements Officer Sjostedt considered to be suspicious. Utilizing the public address system on his patrol car, Officer Sjostedt ordered the occupants of the vehicle to step out of the car and place their hands above their heads. Officer Sjostedt observed the rear seat occupant "doing something under the seat and behind the right front passenger seat," and he repeated the command. Defendant, the driver of the vehicle, was the first person to step out of the car.

Upon searching the vehicle, law enforcement officers recovered an automatic pistol, as well as a carton of cigarettes bearing the specific markings of the convenience store that had been robbed. When officers brought Bowser to the scene of the traffic stop, he identified defendant as the man who entered the store just prior to the robbery, and the other two passengers, Gary Whitley and Theodore Stroud, as the two men who carried out the robbery. After Bowser identified the three men, one of the arresting officers dialed Bowser's cellular telephone number, and the telephone rang from inside defendant's vehicle.

At the close of the evidence, the jury found defendant guilty of robbery with a dangerous weapon, and the trial court sentenced him

to a minimum term of eighty-four months' imprisonment and a maximum term of 110 months. Defendant appeals.

Defendant presents two assignments of error on appeal, arguing that the trial court erred by (1) allowing the State to introduce evidence gathered pursuant to the traffic stop, and (2) denying defendant's motion to dismiss. We find no error by the trial court.

[1] Defendant first argues that the trial court erred by overruling his objection to the admission of evidence gathered at the traffic stop. Defendant contends that the police lacked a reasonable and articulable suspicion to justify stopping the vehicle, and that the evidence was thus unlawfully seized. Section 15A-974 of the North Carolina General Statutes provides for the suppression of evidence if the exclusion of the evidence "is required by the Constitution of the United States or the Constitution of the State of North Carolina." N.C. Gen. Stat. § 15A-974 (2001). "The exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974 is a motion to suppress evidence which complies with the procedural requirements of G.S. § 15A-971 *et seq.*" *State v. Conard*, 54 N.C. App. 243, 244, 282 S.E.2d 501, 503 (1981); *see also* N.C. Gen. Stat. § 15A-979(d) (2001) (stating that "[a] motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974"); *State v. Joyner*, 54 N.C. App. 129, 132, 282 S.E.2d 520, 522 (1981), *disc. review denied*, 304 N.C. 730, 287 S.E.2d 903 (1982); *State v. Drakeford*, 37 N.C. App. 340, 345, 246 S.E.2d 55, 59 (1978) (same). "The burden is on the defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of G.S. § 15A-971 *et seq.*; failure to carry that burden waives the right to challenge evidence on constitutional grounds." *Conard*, 54 N.C. App. at 245, 282 S.E.2d at 503.

In the instant case, defendant objected at trial to the admission of the evidence, citing lack of reasonable suspicion. "As a general rule, motions to suppress *must be made before trial.*" *State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980); *see also* N.C. Gen. Stat. § 15A-975(a) (2001) (providing that a defendant may move to suppress evidence "only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c)").

> A defendant may move to suppress evidence at trial *only* if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (twenty working days) of its intention to use certain types of evidence; or that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion.

Satterfield, 300 N.C. at 625, 268 S.E.2d at 514 (emphasis added). Defendant failed to bring himself within any of the exceptions to the general rule. Defendant's stated reason for bringing the motion at trial, rather than prior to trial, was that he "figured that the evidence that the State had would be thicker than it was." Only when defendant discovered the alleged weakness of the State's case did he object to admission of the evidence. A miscalculation of the strength of the State's case is not a sufficient excuse for failure to make a motion to suppress prior to trial. Thus, defendant's objection at trial to the admissibility of the evidence is without merit because the objection, treated as a motion to suppress, was not timely made. *See id.* We therefore overrule this assignment of error.

[2] We next consider whether there was sufficient evidence to support the charge of robbery with a dangerous weapon. Defendant argues that the evidence was insufficient because it was contradictory and inherently incredible. Defendant notes the testimony of one of the co-defendants, Whitley, who initially told police that defendant had not participated in the robbery. An additional witness, Latoya Bethea, testified that Whitley told her that the defendant was not involved in the robbery. Defendant also introduced the testimony of Thomas Stroud, Sr., father of co-defendant Thomas Stroud, Jr., who testified that his son told him that defendant was not involved in the robbery. Defendant further argues that, even under a theory of acting in concert, the evidence does not support an inference that he had an intent to commit armed robbery. Specifically, defendant contends there was insufficient evidence that he knew Whitley had a firearm, and that he had the intent to commit armed, rather than common law robbery. We are not persuaded.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *See State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). " 'Substantial evidence is relevant evidence that a reasonable mind

might accept as adequate to support a conclusion.' " *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

> In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

In the case *sub judice*, defendant was convicted under the theory that he acted in concert to commit the armed robbery. This Court has stated that

> [a] defendant may be convicted for a crime committed by another if the State proves the defendant acted "in concert" with the other to commit the crime. . . . In addition to the proof requirements associated with acting in concert, if the crime is a specific intent crime, such as robbery with a dangerous weapon, the defendant, like the actual perpetrator, must be shown to have the requisite specific intent. "The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan."

State v. Robinson, 136 N.C. App. 520, 523, 524 S.E.2d 805, 807 (2000) (quoting *State v. Blankenship*, 337 N.C. 543, 558, 447 S.E.2d 727, 736, (1994), *overruled on other grounds*, *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998)). Here, Whitley testified that he, defendant and Stroud all participated in the planning and execution of the robbery. Specifically, Whitley testified that he told defendant and Stroud that he had a gun before the robbery. Whitley stated that, when they arrived at the store, defendant entered first in order to assess conditions within the store. Upon his return, defendant informed Whitley and Stroud that Bowser was the only person present in the store. Whitley and Stroud then placed bandanas over their faces and went inside, while defendant waited in the vehicle as the designated "getaway driver." After Whitley and Stroud left the store, defendant drove them away in his vehicle. Although defendant's evidence tended to contradict Whitley's testi-

mony, contradictions and discrepancies must be resolved by the jury and do not warrant dismissal. *See State v. Bumgarner*, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327-28 (2001). In the light most favorable to the State, the evidence permits an inference that defendant acted in concert to commit armed robbery. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss, and we overrule this assignment of error.

No error.

Judges TYSON and BRYANT concur.

LARRY CARROLL, EMPLOYEE, PLAINTIFF v. LIVING CENTERS SOUTHEAST, INC., EMPLOYER, AND RSKCO, CARRIER, DEFENDANTS

No. COA02-647

(Filed 1 April 2003)

Workers' Compensation— compromise settlement agreement—late payment penalty

Plaintiff employee was entitled to a ten percent late payment penalty under N.C.G.S. § 97-18(g) where plaintiff received payment of the amount owed him pursuant to a workers' compensation compromise settlement agreement thirty-six days after the agreement was approved by the Industrial Commission, because: (1) amended N.C.G.S. § 97-17, effective 15 June 2001, expressly removed the right to review or collateral attack, thus eliminating the right to appeal within fifteen days and thereby shortening the time for payment from thirty-nine days to twenty-four days; and (2) payment of a compromise settlement award must be made within twenty-four days to avoid imposition of a late payment penalty unless a party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence, or mutual mistake.

Appeal by plaintiff from Order entered 19 March 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 January 2003.

Scudder & Hedrick, by Samuel A. Scudder, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Melissa R. Garrell, for defendant-appellees.

LEVINSON, Judge.

Larry Carroll (plaintiff) appeals from an order of the Full Commission upholding the denial of plaintiff's motion for a ten percent (10%) late payment penalty to be added to the amount owed him under a compromise settlement agreement.

The relevant facts are as follows: Plaintiff suffered a workplace injury on 23 October 1996. His employer accepted the claim as compensable, and filed a Form 60 with the Industrial Commission. On 10 September 2001, a compromise settlement agreement was approved. The agreement provided that defendants would pay plaintiff $90,264.34, and pay $22,500.00 to plaintiff's attorney. On 24 September 2001, plaintiff's counsel received the attorney's fees. On 10 October 2001, plaintiff filed a motion for a late payment penalty on the $90,264.34, which had not been received. Plaintiff received a payment of $90,000.00 on 16 October 2001, leaving only $264.34 unpaid. On 7 November 2001, Deputy Commissioner Rowell issued an Order denying plaintiff's motion for a late payment penalty. Plaintiff appealed to the Full Commission, which issued its Opinion on 19 March 2002. The Full Commission affirmed the denial of plaintiff's motion, holding as follows:

. . . .

> Having found that plaintiff received the settlement funds thirty-six (36) days following Industrial Commission approval of his compromise settlement agreement and that the June 15, 2001, *amendments to N.C.G.S. § 97-17 do not remove the right of either party to appeal within fifteen (15) days of approval pursuant to N.C.G.S. § 97-85* for the reasons enumerated in N.C.G.S. § 97-17 which include fraud, misrepresentation, undue influence or mutual mistake, the Full Commission AFFIRMS the Order of the Deputy Commissioner denying plaintiff's motion for a ten percent (10%) late payment penalty.

(emphasis added). From this Order plaintiff appeals. We reverse the Commission's holding that the right of automatic appeal from an

order approving a compromise settlement agreement survives the 2001 amendments to N.C.G.S. § 97-17 (2001).

The sole issue presented is the number of days within which payment must be tendered pursuant to a compromise settlement agreement for it to be deemed timely and avoid being subject to a late payment penalty. Several statutes are relevant to our determination of this issue. N.C.G.S. § 97-18(g) (2001) provides that a ten percent (10%) late payment penalty "shall be added" to any payment not made within fourteen (14) days after it becomes due. Under N.C.G.S. § 97-18(e) (2001), the first installment of compensation "shall become due 10 days from the day following expiration of the time for appeal from the award[.]" N.C.G.S. § 97-85 (2001) provides that appeal of a workers' compensation award must be made to the Full Commission within fifteen (15) days of the date that notice of the award was given. Finally, N.C.G.S. § 97-17 (2001) provides in part:

> This article does not prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. . . . No party to any agreement for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Commission may set aside the agreement. *Except as provided in this subsection, the decision of the Commission to approve a settlement agreement is final and is not subject to review or collateral attack.*

G.S. § 97-17(a) (emphasis added). In 1998, this Court interpreted the above referenced statutes as providing thirty-nine (39) days for payment of a compromise settlement award, applying the following formula: "to calculate the date upon which the 10% penalty applies, . . . consider the fifteen day appeal time provided under N.C.G.S. § 97-85, then add ten days as provided under N.C.G.S. § 97-18(e), and finally add fourteen (14) days as provided under N.C.G.S. § 97-18(g)." *Felmet v. Duke Power Co.*, 131 N.C. App. 87, 90, 504 S.E.2d 815, 816 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999). This Court's inclusion of a fifteen day time period for appeal was based on its reasoning that, although G.S. § 97-17 allows the Industrial Commission to set aside a compromise settlement agreement only upon a finding of, *e.g.*, fraud, mutual mistake, etc., the statute "in no way implies that a

compromise settlement cannot be appealed to this Court." *Felmet*, 131 N.C. App. at 91, 504 S.E.2d at 817.

Following our decision in *Felmet*, the N.C. General Assembly amended G.S. § 97-17, effective 15 June 2001, and thus applicable to the case *sub judice*.[1] The present statute includes the following sentence, which was not a part of the statute as interpreted by the *Felmet* court: "Except as provided in this subsection, the decision of the Commission to approve a settlement agreement is final and is not subject to review or collateral attack." Plaintiff argues that by removing the right to "review or collateral attack" the statute eliminates the right to appeal within fifteen (15) days, thereby shortening the time for payment from 39 to 24 days. We agree.

"First, 'it is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application.' " *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 304, 554 S.E.2d 634, 638 (2001) (quoting *State ex rel. Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969)) (where statutes cannot be reconciled, the statutory provision "dealing with a specific situation" governs, rather than more general statutory sections). *See also Bowling v. Combs*, 60 N.C. App. 234, 298 S.E.2d 754, *cert. denied*, 307 N.C. 696, 301 S.E.2d 389 (1983). While G.S. § 97-85 addresses the general right of parties to appeal from an opinion of a deputy commissioner to the Full Commission, G.S. § 97-17 governs the specific rights of parties to a compromise settlement agreement and, thus, controls the present situation. N.C.G.S. § 97-17(a), as amended in 2001, expressly removes any right of automatic appeal from an approved compromise settlement agreement.

Notwithstanding the statutory language stating that an approved settlement agreement "is final and is not subject to review or collateral attack," the Full Commission held that the fifteen (15) day period for appeal was still applicable, because the Commission retains the right to set aside an agreement procured through, *e.g.*, undue influence or fraud. However, the Commission's authority to set aside an agreement under the limited circumstances enumerated in the statute does not derive from a party's right to appeal. Rather, it is a part of the Commission's inherent judicial authority:

1. The Act "applies to all cases pending on or after the effective date except those cases in which a health benefit plan has intervened before the Industrial Commission prior to the effective date. . . ." S.L. 2001-487, section 102(b).

> [T]he Commission has the power to set aside a judgment when there is 'mistake, inadvertence, surprise, or excusable neglect[,]' or . . . 'on the grounds of mutual mistake, misrepresentation, or fraud.' The power of the Commission 'to set aside former judgments is analogous to that conferred upon the courts by N.C.R. Civ. P. 60(b)(6)' and the remedy the Commission may provide is 'related to that traditionally available at common law and equity and codified by Rule 60(b).' This power includes the ability to set aside judgments even when a party has not made a motion to do so.

Jenkins v. Piedmont Aviation Servs., 147 N.C. App. 419, 424, 557 S.E.2d 104, 108 (2001) (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985), and *Moore v. City of Raleigh*, 135 N.C. App. 332, 520 S.E.2d 133 (1999), *cert. denied*, 351 N.C. 358, 543 S.E.2d 131 (2000)), *disc. review denied*, 356 N.C. 303, 570 S.E.2d 724 (2002). Thus, N.C.G.S. § 1A-1 Rule 60(b) (2001) "confers upon the Commission the ability to set aside a judgment" *Jenkins*, 147 N.C. App. at 424, 557 S.E.2d at 108, procured through fraud, misrepresentation, undue influence or mutual mistake. Rule 60(b) does not require that a motion be made within a particular time period such as fifteen (15) days, but only "within a reasonable time," and "not more than one year after the judgment, order, or proceeding was entered or taken."

"When confronting an issue involving statutory interpretation, this Court's 'primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000) (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)). The reasoning of *Felmet*, 131 N.C. App. at 91, 504 S.E.2d at 817, was predicated upon the existence of a right to direct appeal from an order approving a compromise settlement agreement (although "the Full Commission cannot set aside a compromise settlement except under limited circumstances[, t]his statement in no way implies that a compromise settlement cannot be appealed to this Court"). The subsequent amendment to G.S. § 97-17(a) erected such a bar to that right of appeal. We conclude, therefore, that the fifteen (15) day period for appeal is no longer properly part of the calculation of when a compromise settlement payment is timely. To the extent that this was the holding of *Felmet*, it is superceded by the statutory change. We hold that payment of a compromise settlement award must be

made within 24 days to avoid imposition of a late payment penalty unless a "party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake." G.S. § 97-17(a).

For the reasons discussed above, the decision of the Commission, that payment of a compromise settlement agreement is timely if made within 39 days, is reversed. The Commission's decision not to impose a penalty on the present defendants is reversed and this case is remanded for the Industrial Commission to impose the statutory penalty.

Reversed and remanded.

Judges TIMMONS-GOODSON and TYSON concur.

JAMES R. BROWN AND WIFE, KAY N. BROWN; CCTD, INC., A NORTH CAROLINA CORPORATION, PLAINTIFFS v. WOODRUN ASSOCIATION, INC., DEFENDANT

No. COA02-704

(Filed 1 April 2003)

1. Deeds— restrictive covenants—provision for alteration—ambiguous

A provision for alteration of restrictive covenants was ambiguous as to whether the expiration date of the covenants could be extended and the trial court did not err by granting partial summary judgment for plaintiffs in an action challenging the validity of the restrictions.

2. Deeds— restrictive covenants—acquiescence—implied waiver of challenge

There are no North Carolina authorities stating that equitable remedies are available where homeowners challenge the continued validity of restrictive covenants and the homeowners' association claims an implied waiver in the homeowners' acquiescence in and benefit from the covenants.

3. Trials— remand—claim not raised at trial—separate action

The trial court did not err by denying defendant's motion to clarify the issues for trial after a remand where defendant's

remaining claim was not raised as a counterclaim at trial, but was a separate issue which could be determined in a separate action.

Appeal by defendant from orders entered 6 October 1999 and 15 October 1999 by Judge Howard R. Greeson, Jr., and 11 February 2002 by Judge Peter M. McHugh in Montgomery County Superior Court. Heard in the Court of Appeals 9 January 2003.

Thomas D. Windsor for plaintiff-appellees.

McNair Law Firm, P.A., by Allan W. Singer, for defendant-appellant.

HUNTER, Judge.

Woodrun Association, Inc. ("defendant") appeals various orders including and stemming from a grant of partial summary judgment in favor of Mr. and Mrs. James R. Brown and CCTD, Inc. (collectively "plaintiffs") regarding the enforcement of restrictive covenants for the Woodrun subdivision ("Woodrun"). We affirm for the reasons stated herein.

Woodrun is located in Montgomery County, North Carolina. Defendant is a North Carolina nonprofit corporation that was set up to act as the homeowners' association for Woodrun. In 1971, defendant filed a Declaratory Statement of Covenants and Restrictions to Run with Land ("Declaration") with the Montgomery County Register of Deeds. The Declaration required defendant to maintain the common areas of the subdivision, as well as allowed defendant to enforce restrictive covenants as they applied to all lot owners in the subdivision. Furthermore, Paragraph 11 of the Declaration provided, *inter alia*:

> All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1992, except that they may be changed, altered, amended or revoked in whole or in part by the record owners of the lots in the sub-division whenever the individual and corporate record owners of at least 2/3 of said platted lots so agree in writing.

Pursuant to Paragraph 11, defendant executed a Restatement of Declaratory Statement of Covenants and Restrictions to Run with Land ("Restatement") on 5 December 1991. The Restatement was filed on 7 April 1992 in the Montgomery County Register of Deeds. The Restatement was substantially the same as the Declaration

except that all of the restrictions, conditions, covenants, and agreements contained in the Restatement continued until 1 January 2002 instead of 1 January 1992, "after which time said covenants and restrictions [would] be automatically extended for successive periods of ten years each" unless a two-thirds vote of the lot owners provided otherwise.

In his capacity as President of plaintiff CCTD, Inc., plaintiff James Brown ("Brown") bought two lots in Woodrun in April of 1997. In June of 1997, Brown and his wife also bought a lot in Woodrun. The development of those lots, directed by Brown, subsequently created problems between the parties regarding whether proposed construction plans of plaintiffs complied with restrictions set forth in the Declaration and the Restatement.

On 14 July 1998, plaintiffs filed an action challenging the validity of the restrictions. In their complaint, plaintiffs alleged that the restrictive covenants in the Declaration had expired and could not be extended by the Restatement due to their ambiguity. Thus, plaintiffs sought (1) a declaration that the restrictive covenants in the Restatement were unenforceable, (2) injunctions to prevent defendant from enforcing the restrictions, and (3) monetary damages resulting from defendant's alleged enforcement of the restrictions. In defendant's answer, it denied plaintiffs' allegations and asserted the affirmative defenses of statute of limitations, laches, waiver, estoppel, and unclean hands. Defendant also counterclaimed for (1) overdue assessments "in a sum to be determined[,]" and (2) an injunction to prevent plaintiffs "from commencing or carrying on any construction on their lots in Woodrun [that was] not in compliance with the terms and conditions of the Declarations[.]" The counterclaim was later voluntarily dismissed without prejudice.

Defendant filed a motion for summary judgment on 7 April 1999. On 4 October 1999, the Montgomery County Superior Court denied defendant's motion, but granted partial summary judgment in favor of plaintiffs on all issues other than damages. After the court also denied defendant's motion for rehearing, reconsideration, and relief from the grant of partial summary judgment, defendant appealed to this Court. We remanded the case to the lower court as interlocutory and not appealable because there were remaining factual issues to decide. On 22 January 2002, defendant filed a Rule 56(f) motion asking the trial court to clarify the remaining factual issues for trial. In response, plaintiffs voluntarily dismissed their damages claim without prejudice on 5 February 2002. After hearing arguments from all parties, the

court denied defendant's motion, holding it no longer had jurisdiction over the parties because plaintiffs had voluntarily dismissed their damages claim. Thereafter, defendant gave notice of appeal to this Court from (1) the partial summary judgment order; (2) the order denying its motion to rehear, reconsider, and grant relief from the grant of partial summary judgment; and (3) the order denying its motion to clarify issues for trial.

I.

[1] In its first assignment of error, defendant argues the trial court erred in granting partial summary judgment in favor of plaintiffs because genuine issues of fact existed as to the termination of the Declaration on 1 January 1992. Plaintiffs argue, however, that the ambiguous language in Paragraph 11 of the Declaration prevented it from being extended by the Restatement. We agree with plaintiffs.

As cited by plaintiffs in their brief, this case is controlled by *Allen v. Sea Gate Assn.*, 119 N.C. App. 761, 460 S.E.2d 197 (1995). The issue in *Allen* was whether provisions regarding dues and assessments in a restrictive covenant that affected subdivision lots owned by the plaintiffs were void and unenforceable. Specifically, those plaintiffs argued the following provision was ambiguous and therefore unenforceable:

> 12. . . . All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1992, *except that they may be changed, altered, amended or revoked in whole or in part* by the record owners of the lots in the Subdivision whenever the individual and corporate record owners of at least 2/3 of said platted lots so agree in writing.

Id. at 765, 460 S.E.2d at 200 (emphasis added). We concluded:

> The provision allowing alteration, amendment, or revocation follows a provision stating emphatically that all restrictions will end on 1 January 1992. There is no provision that clearly permits an extension. As phrased, the expiration date deals with the ending of all restrictions; it is not of the same nature as the other restrictions. At most, the phrase allowing alteration, amendment, or revocation creates an ambiguity as to whether the expiration date may be extended. Since we must construe any ambiguity in favor of limited duration and against restricting property . . . we read these provisions as failing to provide for extension of the expiration date. Such a construction is reasonable in light of the clearly established expiration date and the lack of a provision

permitting extension. Accordingly, the original Declaratory expired on 1 January 1992, and could not be extended.

Id.

The provision at issue in the present case is virtually identical to the provision in *Allen*. Having previously held in *Allen* that a declaration containing the language in Paragraph 11 of the Declaration is ambiguous as to whether the expiration date may be extended, we may not now hold otherwise. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court"). Therefore, the Declaration is unenforceable and cannot be extended by the Restatement because its ambiguity must be construed in favor of limited duration and against restricting property.

[2] In the alternative, defendant argues that even if the Declaration cannot be extended by the Restatement, equitable defenses bar plaintiffs' claims challenging the validity of the restrictions. Specifically, defendant contends that because plaintiffs both benefitted and acquiesced to the restrictions, they impliedly waived the right to challenge them, are estopped to assert that right, and are barred by unclean hands from asserting it. However, none of the cases cited by defendant in support of this contention involved the application of equitable remedies as a means of recovery when restrictive covenants were deemed void. In fact, we have found no North Carolina authority stating that equitable remedies are available to a party in this particular situation. Thus, we decline to do so now.

II.

[3] Defendant also assigns error to the trial court's denial of its Rule 56 motion to clarify issues for trial. Defendant contends the issue of whether it could collect assessments and fees for the maintenance of roads and common areas under a theory of implied contract was still left to be decided despite the court's conclusion that the restrictions were unenforceable. Defendant supports his contention by citing *Miles v. Carolina Forest Ass'n*, 141 N.C. App. 707, 541 S.E.2d 739 (2001).

In *Miles*, a declaration containing a provision with language similar to that in Paragraph 11 in this case was at issue. By relying on

Allen, the *Miles* Court held the declaration was unenforceable because the ambiguous provision did not clearly authorize an extension. *Id.* at 713, 541 S.E.2d at 742. However, unlike *Allen*, the trial court in *Miles* had found that an implied contract existed between the defendant and several of the plaintiffs, which required those plaintiffs to contribute to the maintenance, repair, and upkeep of their subdivision for a specific period of time. *Id.* at 711, 541 S.E.2d at 741. Thus, on appeal, this Court remanded the case to the trial court for a determination as to whether all plaintiffs had impliedly agreed to pay for maintenance, repair, and upkeep of the subdivision, and if so, in what amount. *Id.* at 714, 541 S.E.2d at 742.

Unlike *Miles*, the trial court in the case *sub judice* never found that an implied contract existed. This theory of relief was never raised by defendant at the trial level as a counterclaim even though defendant had raised two other counterclaims which it later voluntarily dismissed. Therefore, defendant's failure to raise an implied contract theory as a counterclaim limits our review on appeal to whether defendant had the ability to enforce restrictions and dues based on the 1991 Restatement. Nevertheless, as plaintiffs' counsel stated in oral arguments, the possible existence of an implied contract between the parties raises a separate issue that can be determined in a separate action.

For the aforementioned reasons, we affirm the trial court's grant of partial summary judgment in favor of plaintiffs and its subsequent denial of defendant's (1) motion to rehear, reconsider, and grant relief from the grant of partial summary judgment, and (2) motion to clarify issues for trial.

Affirmed.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. DANIEL GRAYSON ROGERS, DEFENDANT

No. COA02-374

(Filed 1 April 2003)

1. **Sentencing— aggravating factors—leadership role**

The trial court correctly found in aggravation that defendant assumed a leadership role in a kidnapping and rape where defendant initiated the abduction, forced the victim into a truck, and initiated and completed the sexual assault.

2. **Sentencing— aggravating factors—joining with more than one other person**

The defendant did not join with more than one other person in committing a kidnapping and rape, and the trial court erred by finding this aggravating factor, where defendant joined with one accomplice in committing the offense.

3. **Sentencing— aggravating factors—position of trust or confidence**

Defendant did not take advantage of a position of trust or confidence in committing a kidnapping and rape, and the trial court erred by finding that aggravating factor, where the evidence showed that defendant and the victim were no more than acquaintances.

Appeal by defendant from judgment entered 29 November 2001 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 22 January 2003.

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

Michael E. Casterline, for defendant-appellant.

HUDSON, Judge.

On 9 October 2001, defendant was indicted on charges of first degree kidnapping and first degree rape. He pled guilty to both charges. The charges were consolidated for sentencing. The trial court determined that defendant was at a prior record level II and also found three aggravating factors and two mitigating factors, and concluded that the factors in aggravation outweighed factors in mitigation. The trial court then sentenced defendant in the aggravated

range to a minimum term of 320 months and a maximum term of 393 months incarceration. Defendant appeals. For the reasons explained below, we remand for resentencing.

The summary of evidence forming the factual basis for the plea included, in part, the following. On 19 August 2000, defendant and co-defendant, Sammy Sechrist, drove to the Wal-Mart store in Kernersville in Sechrist's pick-up truck. They went inside the store and spoke with the victim, Jennifer Davis, who was working as a cashier at the time. As Davis left work, she met defendant and Sechrist in the Wal-Mart parking lot. After some conversation about buying cigarettes, Davis drove in her own car to a nearby gas station, and defendant and Sechrist followed in Sechrist's truck. After they bought cigarettes, the three were outside of the gas station when defendant took Davis' keys from her and gave them to Sechrist. Sechrist refused to return the keys, at which point defendant picked up Davis and put her on his lap in the passenger seat of Sechrist's truck. Sechrist then began to drive, telling Davis that they were going to take her "four-wheeling." Sechrist drove the truck to a wooded area approximately one mile off of the paved road. They got out of the truck, and defendant began to force himself on Davis. Sechrist then held Davis down while defendant struck her in the face and forcibly raped her. Afterwards, Sechrist drove Davis back to her car.

At the guilty plea and sentencing hearing, the defendant stipulated to the State's summary of the evidence, and presented no evidence, although defense counsel argued for a mitigated sentence. The court found three aggravating factors (that defendant induced others or occupied a position of leadership in committing the offense, that defendant joined with more than one other person in the commission of the offense, and that defendant took advantage of a position of trust or confidence to commit the offense) and two mitigating factors (that defendant voluntarily acknowledged wrongdoing in connection with the offense, and that defendant accepted responsibility for his conduct).

Defendant argues that there is insufficient evidence in the record to support the finding of the three aggravating factors found by the trial court. We agree with respect to two of the factors.

Under the Structured Sentencing Act, the trial court must consider evidence of aggravating and mitigating factors and may then impose a sentence in its discretion. N.C. Gen. Stat. § 15A-1340.16(a)

(2001). The State bears the burden of proving aggravating factors by a preponderance of the evidence. *Id.* A trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion. *See State v. Wampler*, 145 N.C. App. 127, 133, 549 S.E.2d 563, 568 (2001); *see also, State v. Daniels*, 319 N.C. 452, 454, 355 S.E.2d 136, 137 (1987).

An aggravating factor should be found by the trial court only if the defendant behaved in a manner that increases his culpability for the offense. *State v. Bates*, 76 N.C. App. 676, 678, 334 S.E.2d 73, 74 (1985). The trial court's finding of an aggravating factor must be supported by "sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence." *State v. Hayes*, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991). "When a convicted felon is given a sentence in excess of the presumptive range, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing." *State v. Weary*, 124 N.C. App. 754, 759, 479 S.E.2d 28, 32 (1996).

The trial court found the following aggravating factors: (1) that defendant induced others to participate in the commission of the offense and occupied a position of leadership or dominance of other participants in the commission of the offense; (2) that defendant joined with more than one other person in committing the offense; and (3) that defendant took advantage of a position of trust or confidence to commit the offense. We address each of these findings separately below.

A. *Defendant induced others or had a leadership role in the commission of this offense.*

[1] In *State v. Lattimore*, this Court held that the focus of this aggravating factor "is not on the role of the 'participants' in the crime, but on the role of the defendant in inducing others to participate or in assuming a position of leadership." *State v. Lattimore*, 310 N.C. 295, 299, 311 S.E.2d 876, 879 (1984); *see also, State v. SanMiguel*, 74 N.C. App. 276, 278, 328 S.E.2d 326, 328 (1985).

Here, the evidence showed that defendant initiated the abduction when he took Davis' keys from her and gave them to Sechrist. Then, when Sechrist refused to return the keys to Davis, defendant forced Davis into the truck. Although Sechrist drove the truck and helped to restrain Davis, it was defendant who initiated and completed the sex-

ual assault. Taking these facts as true, we believe this evidence does support the court's finding that defendant assumed a leadership role in these events. Thus, the trial court did not err in finding this aggravating factor.

B. Defendant joined with more than one other person in the commission of this offense.

[2] The trial court found as a second aggravating factor that "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2) (2001). The plain language of this factor clearly requires the participation of more than one person in addition to the defendant. While there is sufficient evidence that defendant was joined by Sechrist in committing the offense, there is no evidence that defendant acted with more than one other person. Thus, the record does not support this factor.

C. Defendant took advantage of a position of trust or confidence to commit the offense.

[3] In *State v. Daniel*, our Supreme Court considered the "trust or confidence" factor in the context of the relationship between a mother and her newborn child. *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987). The Supreme Court held that a finding of this aggravating factor did not require that the victim consciously regard the defendant as one in whom she placed her trust or confidence, but instead that "such a finding depends . . . upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *Id.* at 311, 354 S.E.2d at 218.

Our courts have upheld a finding of the "trust or confidence" factor in very limited factual circumstances. *See, e.g., State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) (factor properly found where nine-year-old victim spent great deal of time in adult defendant's home and essentially lived with defendant while mother, a long-distance truck driver, was away); *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991) (factor properly found in husband-wife relationship); *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *disc. review denied*, 311 N.C. 406, 319 S.E.2d 278 (1984) (factor properly found where defendant shot best friend who thought of defendant as a brother); *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984) (factor properly found where adult defendant sexually assaulted his

ten-year-old brother); *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985) (factor properly found where defendant raped nineteen-year-old mentally retarded female who lived with defendant's family and who testified that she trusted and obeyed defendant as an authority figure). *But see State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (factor not properly found where defendant shared an especially close relationship with his drug dealer, the murder victim); *State v. Carroll*, 85 N.C. App. 696, 355 S.E.2d 844, *disc. review denied*, 320 N.C. 514, 358 S.E.2d 523 (1987) (factor not properly found where defendant and victim had met only one and a half days before the murder and had decided to take a trip together in defendant's car).

By contrast, this Court has held that this aggravating factor was not properly found where defendant and victim had been acquainted for approximately one month before the murder and where victim had once asked defendant to join her and her sister for breakfast at victim's apartment. *State v. Midyette*, 87 N.C. App. 199, 360 S.E.2d 507 (1987), *affirmed per curiam*, 322 N.C. 108, 366 S.E.2d 440 (1988). The Court concluded that such evidence showed only that the defendant and the victim were acquaintances, and that no relationship existed through which the defendant occupied a position of trust or confidence. *Id.* at 203, 360 S.E.2d at 509.

Here, the record shows that Davis and defendant had an "informal introduction" prior to the date of the offense. Their only previous contact was several apparently casual encounters at the Wal-Mart store where Davis worked. There is no evidence in the record that defendant and Davis had ever spoken to one another or met one another outside of the store, other than on the date of the offense.

This evidence shows, at most, that defendant and Davis were merely acquaintances. We do not believe that this evidence demonstrates "the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *Daniel*, 319 N.C. at 311, 354 S.E.2d at 218.

The trial court's error in finding these aggravating factors entitles defendant to a new sentencing hearing. *State v. Moses*, 154 N.C. App. 332, 340, 572 S.E.2d 223, 229 (2002) ("When the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing").

Remanded for resentencing.

Judges MARTIN and STEELMAN concur.

JOYCE CAMERON, PLAINTIFF v. GREGORY CANADY, DEFENDANT

No. COA02-573

(Filed 1 April 2003)

Premises Liability— contributory negligence—fall on stairs— j.n.o.v.

Contributory negligence is generally for the jury and the trial court erred by granting plaintiff's motions for a new trial and judgment notwithstanding the verdict after the jury found plaintiff contributorily negligent in her fall on defendant's garage stairs. There was evidence that plaintiff had both hands occupied by a rolodex and bank bag, had suffered from inner ear problems for years, and did not trip on the steps but fell when her leg gave way after she reached the garage.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 7 December 2001 by Judge James F. Ammons, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 29 January 2003.

Musselwhite, Musselwhite, Musselwhite & Branch, by W. Edward Musselwhite, Jr., for plaintiff-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for defendant-appellant.

LEVINSON, Judge.

Plaintiff's complaint alleged she sustained physical injury when she "slipped and fell" on defendant's garage stairs, which she alleges were negligently maintained in dangerous condition. Defendant asserted plaintiff was contributorily negligent in failing to keep a reasonable lookout and in failing to use proper care in exiting defendant's garage.

The case was tried, and a jury returned a verdict finding (1) plaintiff was injured by the negligence of defendant, and (2) plaintiff, by her own negligence, contributed to her injuries. Therefore, the plaintiff was barred from recovering damages against defendant. *See Love v. Singleton*, 145 N.C. App. 488, 550 S.E.2d 549 (2001).

Subsequently, plaintiff filed motions for judgment notwithstanding the verdict and for a new trial. The trial court granted plaintiff's motions concluding in pertinent part:

1. That there was no evidence before the Court that the Plaintiff failed to keep a proper lookout or was otherwise contributorily negligent in her fall.

. . . .

3. That the fact that the Plaintiff fell, in and of itself, is not adequate for submission of the issue of contributory negligence to the jury and contributory negligence cannot be presumed from the mere fact that the Plaintiff fell.

4. That this Court erred in failing to direct a verdict in favor of the Plaintiff on the issue of contributory negligence at the conclusion of the evidence and in submitting the issue of contributory negligence to the jury over Plaintiff's objection.

5. That such error was prejudicial and Plaintiff is entitled to a new trial.

Defendant contends the trial court erred in granting plaintiff's motion for judgment notwithstanding the verdict and a new trial. Specifically, he argues there was sufficient evidence to present the issue of plaintiff's contributory negligence to the jury.

A motion for a new trial under Rule 59(a) is left to the sound discretion of the trial court. N.C.G.S. § 1A-1, Rule 59(a) (2001); *Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E.2d 558 (1980). However, where the trial court commits an error of law, we review that decision *de novo*. *Eason v. Barber*, 89 N.C. App. 294, 365 S.E.2d 672 (1988) (citing *Jacobs v. Locklear*, 310 N.C. 735, 736-37, 314 S.E.2d 544, 545 (1984)). Because defendant assigned as error the trial court's determination that as a matter of law there was insufficient evidence upon which to submit the issue of contributory negligence to the jury, we review that determination *de novo*. *Id.*

Contributory negligence acts as a complete bar to a plaintiff's recovery and is:

> the breach of the duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains, and if his failure to exercise due care for his own safety is one of the proximate contributing causes of his injury, it will bar recovery.

Champs Convenience Stores v. United Chemical Co., 329 N.C. 446, 455, 406 S.E.2d 856, 861 (1991) (quoting *Holderfield v. Rummage Brothers Trucking Co.*, 232 N.C. 623, 625, 61 S.E.2d 904, 906 (1950)). The issue of contributory negligence is generally one for the jury, not to be decided as a matter of law. *Id.* at 456, 406 S.E.2d at 862.

Here, contributory negligence was submitted to the jury, and it found for defendant on that issue. Defendant presented evidence that plaintiff (1) had both hands occupied by her rolodex and her bank bag; (2) admitted to her doctor that she had suffered from "inner ear problems for years"; and (3) did not trip on defendant's steps but only fell after she reached the garage and her leg gave way. Viewing the evidence in the light most favorable to defendant and giving him the benefit of every reasonable inference, we find there were sufficient issues concerning contributory negligence that it was properly left to the jury. *See West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985); *Cook v. Wake County Hospital System*, 125 N.C. App. 618, 482 S.E.2d 546 (1997). Therefore, as a matter of law, the trial court erred in granting plaintiff's motions for judgment notwithstanding the verdict and for a new trial. *Jacobs*, 310 N.C. at 736-37, 314 S.E.2d at 545. The trial court's grant of judgment notwithstanding the verdict and for a new trial are reversed, and we remand for entry of judgment on the jury verdict.

Reversed and Remanded.

Judge TIMMONS-GOODSON dissents.

Judge TYSON concurs.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that the trial court properly determined that there was no evidence that plaintiff "failed to keep a proper lookout

or was otherwise contributorily negligent in her fall," I respectfully dissent.

The majority opinion cites the following facts in support of its conclusion that there was evidence from which a reasonable jury could find that plaintiff contributed to her own injury: (1) plaintiff was holding a Rolodex-brand desktop rotary file in one hand and a "bank bag" in her other hand when she fell; (2) plaintiff had informed her physician that she "suffered from inner ear problems for years;" and (3) plaintiff did not fall on defendant's steps. The majority fails to explain how these facts, standing alone, support a finding of contributory negligence, nor is such an explanation obvious. There was no evidence, for example, that the fact that plaintiff was holding a bag and a rotary file caused her to become imbalanced. There was no evidence concerning the size or weight of these items, nor was there any evidence that plaintiff's attention was diverted by these items. Further, there was no evidence that plaintiff could have prevented or stopped her fall by, for instance, holding onto a handrail, had her hands not been occupied. In fact, the evidence showed that defendant's steps had no handrail.

Plaintiff's statement to her physician one year after her accident that she "had inner ear problems for years" likewise provides no basis for a finding of contributory negligence. Plaintiff specifically denied that these "inner ear problems" had ever affected her balance, and defendant presented no evidence to the contrary. Nor was there any evidence that plaintiff was suffering from an inner ear problem the day of the incident.

Finally, the majority contends that, because defendant testified that plaintiff did not fall on the steps, but only after having reached the floor of the garage when her "knee gave way," a reasonable jury could find that plaintiff was contributorily negligent. This statement is illogical, however, given the fact that the jury found defendant negligent. The only evidence of defendant's negligence presented at trial, and the only possible basis for the jury's finding of negligence on defendant's part, was the evidence tending to show that defendant's brick steps violated applicable building code requirements and otherwise constituted a hidden and dangerous condition. Thus, if the jury believed defendant's testimony that plaintiff did not fall on the steps, but only after having reached the floor of the garage, there would have been no basis upon which to find defendant negligent. Defendant's testimony regarding the location of plaintiff's fall did not demonstrate that plaintiff failed to keep a proper lookout; rather, it

was evidence of a factual dispute properly and necessarily resolved by the jury in plaintiff's favor.

Because there was no evidence that plaintiff failed to act as a reasonably prudent person regarding her own safety, I conclude that the trial court properly determined that it erred in submitting the issue of contributory negligence to the jury. *See Jacobs v. Locklear*, 310 N.C. 735, 736-37, 314 S.E.2d 545, 545 (1985) (holding that where there is no evidence of contributory negligence, the trial court errs in submitting the issue to the jury). I would therefore affirm the judgment of the trial court.

MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA, PLAINTIFF v. GARY EUGENE MAULDIN, M.D. AND SYLVA ANESTHESIOLOGY, P.A., DEFENDANTS

No. COA02-533

(Filed 1 April 2003)

Contribution— prejudgment interest—contribution not compensatory

Prejudgment interest was not available for a contribution award, even though the underlying award was designated as compensatory (a requirement for prejudgment interest), because contribution derives from equitable remedies and is not the equivalent of compensatory damages. N.C.G.S. § 24-5(b).

Appeal by plaintiff from judgment entered 14 February 2002 by Judge James U. Downs in Superior Court in Macon County. Heard in the Court of Appeals 8 January 2003.

Roberts & Stevens, P.A., by James W. Williams and Dennis L. Martin, Jr., for plaintiff-appellant.

Wade E. Byrd and Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Stephen B. Williamson, for defendant-appellees.

HUDSON, Judge.

This case arises out of a wrongful death suit in which Mary E. Houston, administratix of the Estate of Donald Gordon Houston, alleged that Mr. Houston died as a result of the negligence of Dr. John

Erdman, Dr. Gary Mauldin, and Sylva Anesthesiology. After a jury verdict in favor of the plaintiff, the court entered judgment against all defendants as joint tortfeasors in the amount of $725,000.00 in compensatory damages plus interest at the legal rate of eight percent accruing from the date the lawsuit was filed. All defendants appealed.

In August 1994, while the appeal was pending, St. Paul Insurance Company ("St. Paul"), the professional liability insurance carrier for Dr. Mauldin and Sylva Anesthesiology (hereafter "appellees"), entered into a settlement agreement with the Houston estate. In that agreement, St. Paul agreed to pay $225,000 to settle the estate's claims against the appellees, the estate agreed not to enforce the judgment against the appellees, and the estate agreed that "payment constitutes a full release and discharge of all monies owing or which might be owing . . ." by reason of the judgment. The settlement agreement was approved by the trial court, apparently outside the district and without notice to Dr. Erdman or his liability carrier, appellant Medical Mutual Insurance Company of North Carolina ("Medical Mutual"). The appellees withdrew their appeal shortly thereafter.

In October 1996, this Court rendered its decision in which it found no error in the trial and remanded the case on the issue of costs. *Houston v. Douglas*, 124 N.C. App. 230, 477 S.E.2d 97 (1996), *disc. review denied*, 345 N.C. 342, 483 S.E.2d 167 (1997). Then, in April 1997, Medical Mutual, on behalf of its insured, Dr. Erdman, paid $692,168.80 in full payment of the principal amount of the judgment and accrued interest, less the amount previously paid by St. Paul. Having become subrogated to Dr. Erdman's rights to contribution, if any, Medical Mutual in June 1997 sued the appellees for contribution to recover the amount paid in excess of its pro rata share. The trial court granted summary judgment in favor of the appellees, concluding that Medical Mutual was not entitled to contribution because the appellees' post-judgment settlement extinguished Medical Mutual's contribution rights. Medical Mutual again appealed to this Court.

This court reversed. *Medical Mut. Ins. Co. v. Mauldin*, 137 N.C. App. 690, 529 S.E.2d 697 (2000). We explained that the purpose of the Uniform Contribution Among Tortfeasors Act, N.C. Gen. Stat. § 1B-1 et seq., was to "distribute the burden of responsibility equitably among those who are jointly liable." *Id.* at 697, 529 S.E.2d at 701. The Act

> does not permit one of multiple torfeasors to avoid liability for contribution to other joint tortfeasors by a settlement, after judg-

> ment, for less than his pro rata share of the judgment. To hold otherwise would allow an allocation of liability among joint tortfeasors to be decided by the injured party and permit a disproportionate share of the injured party's recovery to be inequitably borne by less than all of the parties equally responsible under the law, the very dangers the Uniform Contribution Among Tortfeasors Act was designed to prevent.

Id. at 700, S.E.2d at 703.

The Supreme Court then heard the matter on discretionary review. With one justice not participating, three members of the Court voted to affirm the Court of Appeals decision, while three voted to reverse. *Medical Mut. Ins. Co. v. Mauldin*, 353 N.C. 352, 543 S.E.2d 478 (2001). As a result, the Court of Appeals decision was left undisturbed but without precedential value, *id.*, and remanded to the superior court for further proceedings.

In the superior court, all parties agreed that appellees owed Medical Mutual $233,584.40, a sum that represented the rest of appellees' pro rata share of the contribution award, including the interest awarded thereon. Medical Mutual also argued, however, that it was entitled to prejudgment interest on the $233,584.40 from April 30, 1997, the date it satisfied the underlying judgment. The court disagreed and, on February 14, 2002, denied Medical Mutual's request for prejudgment interest, finding that an "action for contribution is derivative and based upon principles of equity and falls within neither of the categories specified in N.C.G.S. 24-5 that allow for prejudgment interest."

Medical Mutual appeals, and, for the reasons set forth below, we affirm.

ANALYSIS

Medical Mutual argues that it is entitled to interest on the amount that it paid in excess of its pro rata share of the underlying contribution award. In Medical Mutual's view, because the award in the underlying action was designated by the finder of fact (the jury) as compensatory damages, the contribution that Medical Mutual recovered in the trial court likewise constitutes compensatory damages for purposes of N.C. Gen. Stat. § 24-5.

We disagree. The statute addressing prejudgment interest, N.C. Gen. Stat. § 24-5(b) (2001), indicates in pertinent part that "[i]n an

action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." "Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574-75, 573 S.E.2d 118, 121 (2002) (citation and quotation marks omitted). Accordingly, for Medical Mutual to receive prejudgment interest pursuant to § 24-5, it must demonstrate (1) that the judgment below is compensatory damages and (2) that the superior court designated the damages as compensatory damages.

This Medical Mutual cannot do. First, the trial court did not designate any portion of the judgment as compensatory damages. Second, an award of contribution is not the equivalent of compensatory damages. Contribution, unlike compensatory damages, originated as an equitable remedy. *Harvey v. Oettinger*, 194 N.C. 483, 484, 140 S.E. 86, 87 (1927). Whereas compensatory damages denote "damages in satisfaction of, or in recompense for, loss or injury sustained" (*Dobrowolska v. Wall*, 138 N.C. App. 1, 12, 530 S.E.2d 590, 598 (2000)), contribution under our statute is a form of restitution that distributes the burden of payment among joint obligors. *Medical Mut. Ins. Co. v. Mauldin*, 137 N.C. App. 690, 697-98, 529 S.E.2d 697, 701 (2000), *affirmed*, 353 N.C. 352, 543 S.E.2d 478, *reh'g denied*, 353 N.C. 456, 548 S.E.2d 527 (2001).

This court has held repeatedly that equitable remedies which require the payment of money do not constitute compensatory damages as set forth in N.C. Gen. Stat. § 24-5(b). In *Hieb v. Lowery*, 134 N.C. App. 1, 516 S.E.2d 621, *disc. review denied*, 351 N.C. 103, 541 S.E.2d 144 (1999), a workers' compensation carrier held a statutory lien against proceeds of a claimant's recovery from a third-party tortfeasor. Because the lien was neither an action in contract nor an amount designated by the finder of fact as compensatory damages but rather a statutory claim based upon the codification of an equitable remedy, we held that the trial court erred in awarding prejudgment interest. *Id.* at 19-20, 516 S.E.2d at 632-33; *see also Applebe v. Applebe*, 76 N.C. App. 391, 394, 333 S.E.2d 312, 313 (1985) (trial court erred in awarding prejudgment interest in equitable distribution action because prejudgment interest under 24-5(b) is "limited to sums due by contract and to sums designated by the jury or other fact

finder as compensatory damages in certain non-contract cases; but the sum involved here is neither due plaintiff by contract, nor is it compensatory damages"). Likewise, here, even though the underlying judgment awarded compensatory damages, the apportionment of that judgment among the tortfeasors did not. Thus, we agree with the trial court that this action for contribution is derivative and based upon the codification of equitable principles and that prejudgment interest was properly denied.

Affirmed.

Judges MARTIN and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

EATMON v. SAFFERMAN No. 02-395	Wake (01CVD13130)	Reversed
GIBSON v. BILDON, INC. No. 02-618	Ind. Comm. (916154)	Affirmed
GUNTER v. CITY OF RALEIGH No. 02-225	Ind. Comm. (733184)	Affirmed
HALL v. FORSYTH MED. CTR. No. 02-785	Ind. Comm. (035365)	Affirmed
HILL v. THE SUMMIT No. 02-771	Ind. Comm. (844755)	Affirmed
IN RE MASON No. 02-1241	Cumberland (01J369)	Affirmed
IN RE McKINNEY No. 02-319	Rockingham (99J79)	Affirmed
IN RE SIMS No. 02-692	Union (01J74) (01J75)	Affirmed
MILLER v. MILLER No. 02-501	Union (84CVD1045)	Affirmed
PRATT v. RAYNOLDS No. 02-670	Transylvania (00CVD495)	Dismissed
RESUN LEASING, INC. v. DONWAY TRUCKING, INC. No. 02-208	Guilford (00CVS3865)	Affirmed
SMITH v. GOLD KIST, INC. No. 02-1031	Ind. Comm. (956389)	Affirmed
SPRUILL v. B & B STAFFING, INC. No. 02-735	Ind. Comm. (902116)	Affirmed
STATE v. BALDWIN No. 02-917	Columbus (01CRS52581)	No error
STATE v. BARRETT No. 02-999	Brunswick (01CRS53723)	Motion allowed; appeal dismissed; petition denied
STATE v. BASH No. 02-928	Forsyth (01CRS22045) (01CRS22180)	No error
STATE v. CARTER No. 02-696	Nash (01CRS52394) (01CRS52395)	Vacated and remanded in part; no error in part

STATE v. COOPER No. 02-776	New Hanover (01CRS52413) (01CRS52414)	No error
STATE v. CRAWFORD No. 02-922	Mecklenburg (01CRS8979) (02CRS6776)	Affirmed
STATE v. CROWDER No. 02-509	Cabarrus (01CRS4695) (01CRS50100) (01CRS50101)	No error
STATE v. DINKINS No. 02-863	New Hanover (01CRS50540)	No error
STATE v. FELIX No. 02-780	Wake (01CRS45942)	No error
STATE v. FUTRELL No. 02-496	Hertford (01CRS1516)	No error
STATE v. GRIFFITH No. 02-1332	Buncombe (01CRS54140)	No error
STATE v. HICKS No. 02-753	Lenoir (01CRS53244)	No error
STATE v. HUNTER No. 02-1050	Lincoln (01CRS52402)	No error
STATE V. JOHNSON No. 02-172	Johnston (96CRS12316)	Defendant received a fair trial free of prejudicial error
STATE v. KENNEDY No. 02-587	Henderson (99CRS53292) (99CRS53293) (00CRS1561) (00CRS1562) (00CRS1563) (00CRS1564) (00CRS1565) (00CRS1566) (00CRS1567) (00CRS1568)	Dismissed
STATE v. LYLES No. 02-1139	Halifax (00CRS553)	No error
STATE v. MEUSHAW No. 02-186	Haywood (01CRS4303) (01CRS4304) (01CRS4305)	Affirmed

STATE v. MURPHY No. 02-311	Pitt (01CRS57744)	No error
STATE v. MURRAY No. 02-653	Guilford (00CRS110575) (01CRS23140)	No error
STATE v. PASILLAS No. 02-975	Sampson (02CRS1134)	Remanded
STATE v. PHILSON No. 02-921	Lenoir (01CRS1765)	No error
STATE v. PORTER No. 02-950	Mecklenburg (00CRS37488) (00CRS141811) (00CRS141812) (00CRS141813)	Affirmed
STATE v. REED No. 02-1024	Mecklenburg (01CRS27862) (01CRS145422)	No error
STATE v. SIGMON No. 02-437	Jackson (99CRS1899)	Affirmed
STATE v. STORER No. 02-1012	Forsyth (01CRS29257) (01CRS29258)	No error
STATE v. WALL No. 02-115	Stanly (00CRS3499)	No error
STATE v. WILLIAMS No. 02-597	Forsyth (01CRS29391) (01CRS54910)	Affirmed
STATE v. WILLIAMS No. 02-920	Lenoir (00CRS52912)	No error
SUTTLES v. SOUTHEASTERN HEALTH FACILS. No. 02-940	Ind. Comm. (902686)	Affirmed
THOMPSON v. LEE CTY. No. 02-711	Lee (98CVS371)	Affirmed

IN THE MATTER OF THE PURPORTED LAST WILL AND TESTAMENT OF FRANCIS M. BARNES, DATED NOVEMBER 22, 1989 AND IN THE MATTER OF THE PURPORTED LAST WILL AND TESTAMENT OF FRANCIS M. BARNES, DATED MAY 25, 1967

No. COA01-1437

(Filed 15 April 2003)

1. Wills— caveat—Dead Man's Statute—revocation of will

The trial court did not abuse its discretion in a will caveat proceeding by concluding that a witness's testimony on the ultimate issue of the revocation of decedent's 1967 will was not barred by the Dead Man's Statute, because the witness's testimony was inherently admissible since it was against her pecuniary interest when she knew she would take twenty percent under the 1967 will but only ten percent under the 1989 will.

2. Appeal and Error— preservation of issues—failure to object—failure to present issue at trial—failure to make offer of proof

Although the 1967 will beneficiaries contend that the trial court erred in a will caveat proceeding by excluding evidence related to a testamentary trust created under decedent's 1989 will, this assignment of error was not preserved for appellate review, because: (1) there is evidence of neither an objection nor that the 1967 beneficiaries ever presented this issue to the trial court; and (2) the 1967 beneficiaries failed to preserve the issue by making an offer of proof as required by N.C.G.S. § 8C-1, Rule 103(a)(2), and the substance of the evidence is not apparent from the context within which the questions were asked.

3. Wills— caveat—standing—copy of will

The trial court erred in a will caveat proceeding by permitting the 1967 will beneficiaries to proceed against a 1989 will without first rebutting the presumption that they lacked standing to caveat attendant to their production of a mere copy of the 1967 will.

4. Wills— caveat—rights of heirs-at-law

The trial court erred in a will caveat proceeding by failing to dismiss under N.C.G.S. § 31-33 decedent's heirs-at-law from the proceeding, because the heirs-at-law neither aligned them-

selves as parties nor did they timely file a caveat against decedent's 1989 will.

Judge HUDSON concurring in part and dissenting in part.

Appeal by Propounders of the 1989 Will of Francis M. Barnes; Caveators-Beneficiaries of 1967 Will of Francis M. Barnes; and State of North Carolina, from judgment entered 9 March 2001 by Judge John B. Lewis, Jr. in Superior Court, Martin County. Heard in the Court of Appeals 31 October 2002.

Bass, Bryant & Fanney, by John Walter Bryant, and Batts, Batts, & Bell, LLP, by Jeffrey A. Batts, Joseph L. Bell, Jr., and Wendy P. Wilson, for Propounders of 1989 Will of Estate of Francis M. Barnes, appellant-appellee.

Poyner & Spruill, LLP, by Nancy Bentson Essex and Gregory S. Camp, for Church of the Advent (aligned Propounder of 1989 Will of Estate of Francis M. Barnes), appellant-appellee.

The Blount Law Firm, PLLC, by Marvin K. Blount, Jr., Ted E. Mackall, Stephen J. Batten, for Caveators to 1989 Will of Francis M. Barnes/Beneficiaries of 1967 Will of Francis M. Barnes, appellee-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles J. Murray, for the State of North Carolina, appellee-appellant.

Gaylord, McNally, Strickland, Snyder, & Holscher, LLP, by Danny D. McNally, Emma S. Holscher, and Browning & Hill, LLP, by Myron T. Hill, Jr., and Emmanuel & Dunn, by Stephen A. Dunn, and Dunn & Dunn, by Raymond E. Dunn, for Heirs-at-law to Estate of Francis M. Barnes, appellees.

WYNN, Judge.

This appeal arises from a jury determination that two wills purportedly executed by Francis M. Barnes were invalid, thus resulting in a determination that Mr. Barnes died intestate leaving his estate valued at over $24 million to his heirs-at-law. Following the presentation of a will executed by Francis M. Barnes in 1989 ("the 1989 Will)[1]

1. In the 1989 Will, Mr. Barnes devised $10,000 to his wife, Lucille Barnes; $10,000 to St. Labre School for Indians; and established the Francis M. Barnes Trust. Mr. Barnes devised the net income of the trust: (1) $500,000 to his wife, Lucille, for life; (2) forty percent to the Francis M. Barnes Memorial Trust for college scholarships "for the

and issuance of testamentary letters by the Clerk of the Superior Court, Martin County, the beneficiaries under a copy of a will executed by Mr. Barnes in 1967 ("the 1967 Will")[2] filed a caveat against the 1989 Will.

After several days of trial, the jury agreed with the caveators ("the 1967 Will Beneficiaries") that the 1989 Will had been procured by undue influence; however, the jury gave the 1967 Will Beneficiaries a short-lived victory by further finding that the 1967 Will had been revoked by Mr. Barnes. Both parties appeal; furthermore, the heirs-at-law to the Estate of Francis M. Barnes join in this appeal in support of both verdicts of the jury.

After carefully reviewing this appeal, we hold that the trial court erred by permitting the 1967 Will Beneficiaries to proceed against the 1989 Will without first rebutting the presumption that they lacked standing to caveat attendant to their production of a mere copy of the 1967 Will. For the reasons stated herein, we vacate the judgment of the trial court and remand this matter for entry of judgment in favor of the propounders of the 1989 Will ("the 1989 Will Propounders").[3]

I. Facts and Procedural Posture

The underlying facts show that Mr. Barnes died on 17 October 1996; thereafter, a will, dated 22 November 1989, was offered for probate with testamentary letters issued on 30 November 1996. On 17

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deserving people of Martin County"; (3) thirty percent to charitable organizations or purposes, with at least $10,000 for ten years to the East Carolina University School of Medicine; and (4) a ten percent, ten year, interest to: Charley Anne Peele Hopkins, The Church of the Advent, and equally divided among Hugh, Frances, and Arthur Long.

2. In the 1967 Will, Mr. Barnes left his wife, Lucille Barnes, $7,000 and created the Francis Barnes Trust. Under the trust, he bequeathed the net income on $400,000 of the trust to Mrs. Barnes for life, the net income on $100,000 to Charles, Mary, and Charley Anne Peele for ten years, and divided the remainder equally to: (1) Mary and Monte Toler, (2) Caveator Rebecca Boyd, (3) Caveators John Hunter and Alethia Dailey, (4) Caveator W.B. Long, and (5) Hugh, Frances and Arthur Long for ten years.

If any of these shares lapsed, however, the 1967 Will automatically shifted the lapsed shares to a second trust: The Francis M. Barnes Memorial Trust. Assuming shares lapsed, Mr. Barnes devised: (1) forty percent of the net income to East Carolina University "for the purpose of providing athletic scholarships for white football players," and (2) sixty percent of the net income "for the purpose of providing scholarships for needy and competent white children of Martin County."

3. Throughout the proceeding, the heirs-at-law to the Estate of Francis M. Barnes neither aligned themselves with the parties to the action nor did they file a caveat to the validity of either will. *Infra*, we address the potential standing of the heirs-at-law on remand.

September 1998, the beneficiaries to a will, executed on 25 May 1967, offered a copy of the 1967 Will and sought to file a caveat against the 1989 Will. On 12 July 1999, the Clerk of the Superior Court, Martin County, gave notice of the caveat proceeding to all interested parties under the 1989 and 1967 Wills pursuant to N.C. Gen. Stat. § 31-33 (2002). In July 1999, the Athletic Fund of East Carolina University aligned itself with the Propounders of the 1967 Will, and The Church of the Advent aligned itself with the Propounders of the 1989 Will.

On 4 August 2000, Superior Court Judge Jerry Tillet ordered the parties to mediate the dispute; as a result, the parties reached a preliminary settlement on 4 September 2000. Thereafter, a copy of the agreement was circulated, minor changes made, and all parties, including Judge Tillet, signed the settlement except the 1967 Will Beneficiaries. On 19 September 2000, the 1967 Will Beneficiaries fired their attorney; hired Attorney Marvin Blount as counsel; and rejected the settlement offer. In January 2001, the Chief Justice of the Supreme Court of North Carolina designated the caveat proceeding as "exceptional," and assigned the matter to special emergency Superior Court Judge John B. Lewis, Jr. Thereafter, Judge Lewis denied the 1989 Will Propounders' Motion to Enforce Settlement and set the dispute for trial.[4]

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4. Although Propounders, Caveators, and the Intestate Heirs have been presented with at least four opportunities to settle and mediate this dispute, the parties have been unable to reconcile.

First, on 1 September 2000, the parties conducted a settlement conference in the presence of Judge Jerry R. Tillett. The parties reached a tentative agreement. On 18 September 2000, a final draft was formalized and the document was executed by Caveators' and Propounders' counsel. Although the individual Caveators remained to sign the final version of the settlement agreement, Judge Tillett conditionally accepted and signed the agreement. However, on 19 September 2000, the individual Caveators informed the court that they did not intend to sign the settlement agreement.

Second, in December 2000 and January 2001, Propounders and Caveators participated in a mediation session at the Duke Private Adjudication Center. Professor Bob Beason, a skilled mediator and a Senior Lecturing Fellow at Duke University Law School, acted as the mediator. Notwithstanding, Propounders and Caveators were unable to reach an agreement.

Third, in August 2001, after the trial, Propounders, Caveators, and the Intestate Heirs participated in a sixteen-hour mediation in Raleigh before two professional mediators: Richard Boyette and Neill McBryde. At this mediation, McBryde gave an independent appraisal of the monetary value and tax consequences attendant to each represented interest. This mediation did lead to an executed agreement between the Propounders and the Intestate Heirs, however the Propounders and Intestate Heirs were unable to reach an agreement with the Caveators.

Finally, on 31 October 2002, during oral argument before the North Carolina Court of Appeals, we informed the parties of the potential benefits of the pilot mediation pro-

On 23 January 2001, the Clerk of the Superior Court, Martin County, mailed a Supplemental Citation to Mr. Barnes' heirs-at-law: Lucy Tull (first cousin once removed), Riley S. Coddry (lineal descendant of Barnes' paternal aunt), and Diane Barnes Grau (lineal descendant of Barnes' paternal aunt). The Supplemental Citation gave Mr. Barnes' heirs-at-law notice of the caveat, and informed them of their statutory right to "appear and align [themselves] with the Propounder of the 1989 Will, the Caveators of [the] 1989 Will . . . or [to] identify [themselves] as a Caveator to the 1967 Will." The heirs-at-law neither aligned themselves with any of the parties to the proceeding, nor did they identify themselves as Caveators to the 1967 Will.

In pretrial motions, the 1989 Will Propounders argued, as a preliminary question of standing, that the 1967 Will Beneficiaries should have to overcome the presumption that the 1967 Will was revoked by Mr. Barnes, and, therefore, the 1967 Beneficiaries did not have standing to challenge the 1989 Will by caveat. The 1989 Will Propounders argued that "if this jury finds [that the 1967 Will] was intentionally revoked, then the [caveat proceeding should] stop[] there." The trial court, however, did not address the issue of standing, and, instead, declared that the 1967 Will Beneficiaries were clearly "interested parties" under the statute. Accordingly, the trial court bifurcated the trial and allowed the jury to first determine whether the 1989 Will was valid; if not, then the jury would secondly determine whether the 1967 Will had been revoked.

At the trial, held 29 January 2001 through 22 February 2001, the 1989 Will Propounders offered evidence that the 1989 Will was valid and attested. Joseph Thigpen testified he assisted Mr. Barnes in drafting the 1989 Will. Mr. Thigpen, and two attorneys (James Bachelor and Melvin Bowen), testified that Attorney James Bachelor who drafted the 1989 Will, read aloud each provision of the 1989 Will to Mr. Barnes and received his approval before making any changes or moving on to a subsequent provision. Moreover, all three witnesses testified that Mr. Barnes, on the day of execution, knew his property, who he wanted to have that property, and the natural objects of his bounty.

Francis Long, a longtime friend of Lucille and Francis Barnes, testified for the 1989 Will Propounders that Mr. Barnes "had a fit and

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gram at the Court of Appeals and its potential to facilitate a non-judicial resolution of their dispute. Moreover, we informed the parties that we intended to "hold" this opinion for twenty days in order to give the parties time to use the pilot mediation program. However, like other efforts, this effort at settlement proved ineffective.

tore up the [1967] Will" in 1983 or 1984. The 1989 Will Propounders offered this testimony, over the objection of the 1967 Will Beneficiaries, to establish the chain of events leading up to the writing and drafting of the 1989 Will. The trial court rejected the 1967 Will Beneficiaries' contention that Mrs. Long's testimony was barred by North Carolina's Dead Man's Statute. Instead, the trial court held that Mrs. Long's "testimony [was] inherently admissible" because it was against her pecuniary interest since she would take twenty percent under the 1967 Will, but only ten percent under the 1989 Will.

Thus, the 1989 Will Propounders established a *prima facie* case that the 1989 Will was valid, attested, and properly in probate. To rebut the *prima facie* case of the 1989 Will's validity, the 1967 Will Beneficiaries presented evidence that Mr. Barnes was unduly influenced by Mr. Thigpen and lacked testamentary capacity. Specifically, the 1967 Will Beneficiaries elicited evidence tending to show that Mr. Thigpen occupied a fiduciary relationship with Mr. Barnes, and he substantially benefitted from the 1989 Will which he helped draft. The evidence showed that the 1989 Will named Mr. Thigpen as executor and trustee of the testamentary trust, with compensation for both positions. Moreover, Mr. Thigpen was granted complete discretion in the amount, type, and organizations to fund with the charitable contributions. In addition, the 1989 Will named Mr. Thigpen as a member of the "scholarship selection committee," and gave him the discretionary power to appoint one of the other two members of the committee. Mr. Thigpen used this discretion to appoint his son, Joel Thigpen, as the other member of the scholarship selection committee.

Accordingly, the 1967 Will Beneficiaries argued that the 1989 Will gave Mr. Thigpen *defacto* authority over a substantial portion of Mr. Barnes' multi-million dollar estate, as well as an unprecedented position of authority and power in Martin County to donate to charities of his choice, and to award scholarships to children and families of his choice. The 1967 Will Beneficiaries contended that Mr. Barnes did not bestow this power upon Mr. Thigpen independently. Rather, they argued, Mr. Thigpen took advantage of a mentally incapacitated man, and, through undue influence, created a will making him one of the most powerful individuals in Martin County.

Second, the 1967 Will Beneficiaries offered the testimony of nine witnesses who opined that Mr. Barnes lacked testamentary capacity to make the 1989 Will. For instance, John Roney, Mr. Barnes' stockbroker and close friend, testified that he had a consistent

relationship with Mr. Barnes between 1969 and 1989. Mr. Roney testified that, in his opinion, Mr. Barnes lacked mental capacity in 1989 to understand the effect of a will or the natural objects of his bounty. In support of this opinion, Mr. Roney testified he had contact with Mr. Barnes two or three times a week and, after 1980, Mr. Barnes began a process of slow mental deterioration resulting in Mrs. Barnes taking control of all important decisions related to his estate. The 1967 Will Beneficiaries also offered the expert testimony of two physicians who testified that in 1989 Mr. Barnes likely suffered from dementia.

In response to this attack on Mr. Barnes' testamentary capacity, the 1989 Will Propounders offered the testimony of seven lay witnesses; Mr. Barnes' treating physician; and one expert, who testified that on or around the day of executing the 1989 Will, Mr. Barnes knew the nature and extent of his property and the natural objects of his bounty. Dr. Michael McLeod, who was Mr. Barnes' treating physician, testified that in 1990, Mr. Barnes might have had "mild dementia but was capable of taking care of himself." To support this conclusion, Dr. McLeod testified that "even in [1990] . . . [Mr. Barnes] was able to report his general unhappiness with the fact that he had lost most of his friends through death."

After a three-week trial, evidenced by over three-thousand pages of transcript, the first phase of the trial concluded. At the charge conference, the 1989 Will Propounders again raised the question of the 1967 Will Beneficiaries' standing to caveat the 1989 Will. The 1989 Will Propounders stated:

> Our position from the outset has been that the only reason they're here is because of this alleged 67' Will. And we believe the case law says that if the jury were to find first that it was revoked or destroyed with the intention to revoke it, [then the 1967 Will Beneficiaries] no longer have standing. . . . They are not heirs judge. They're not heirs. The only reason they're here is because they happened to be named in the 67' document [for] which they do not have an original.

Accordingly, the 1989 Will Propounders' proposed jury instructions which would have required the jury to answer "yes" or "no" to the preliminary question: "Did the deceased, Francis M. Barnes, destroy the purported paper writing dated May 25, 1967 with the intention of revoking it?" The trial court, however, did not adopt the 1989 Will Propounders' proposed jury instructions. Instead, the trial

court maintained the complete bifurcation, did not instruct the jury to consider the 1967 Will in the first phase, and permitted the 1989 Will to go to the jury on the issues of attestation, testamentary capacity, and undue influence.

On 22 February 2001, the jury returned a verdict regarding the 1989 Will. Although the jury found that the 1989 Will satisfied the formalities of attestation, the jury found the 1989 Will to be invalid on the grounds that Mr. Barnes lacked testamentary capacity.

Having reached the determination that the 1989 Will was invalid, the trial court next allowed the jury to consider evidence regarding whether the 1967 Will had been revoked. After an opening statement, the 1967 Will Beneficiaries presented three witnesses and a short closing argument. During this second phase of the trial, no adverse party existed, and, consequently, the evidence of the 1967 Will Beneficiaries was neither cross-examined nor rebutted. However, the jury was instructed that "all of the evidence [heard in the first phase], you may consider in [the second phase]." Accordingly, the jury was permitted to consider the testimony of Francis Long pertaining to the alleged destruction of the 1967 Will.

Following the second hearing, the jury concluded that the 1967 Will was executed according to the requirements of law, and was, therefore, a valid and attested will; however, the jury found that Mr. Barnes destroyed the 1967 Will with the intent to revoke it. Accordingly, the trial court concluded, as a matter of law, that the copy of the 1967 paper-writing was not the Last Will and Testament of Mr. Barnes.

II. The 1967 Will

We first consider the appeal by the 1967 Will Beneficiaries from the jury's determination that the 1967 Will had been revoked. They primarily contend that the trial court committed error by denying their motion to exclude the testimony of Francis Long relating to Mr. Barnes' destruction of the 1967 Will. They argue that Francis Long was an "interested" witness and, consequently, her testimony was barred under North Carolina's Dead Man's Statute. They further contend that the trial court allowed the jury to decide the issue of revocation without the benefit of hearing relevant and admissible evidence questioning Mrs. Long's credibility, bias, and motive. Thus, the 1967 Will Beneficiaries ask this Court to remand this matter for a "new" jury finding on the question of revocation of the 1967 Will.

However, after carefully reviewing the record, we find no error in the jury's verdict.

[1] First, the 1967 Will Beneficiaries contend that Francis Long's testimony was barred by the Dead Man's Statute, and, therefore, the trial court committed prejudicial error by permitting the jury to consider the testimony on the "ultimate issue" of revocation. Under North Carolina's Dead Man's Statute a witness' testimony is excluded "when it appears (1) that such a witness is a party, or interested in the event, (2) that his testimony relates to . . . a communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest." *Breedlove ex rel. Howard v. Aerotrim, U.S.A, Inc.*, 142 N.C. App. 447, 451, 543 S.E.2d 213, 216 (2001) (citing *In re Will of Lamparter*, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998)) (quoting *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963)); *see also* N.C. Gen. Stat. § 8C-1, Rule 601(c) (2002).

Our Supreme Court has made it eminently clear that: "In caveat proceedings, in the absence of a clear exception to the Dead Man's Statute, . . . testimony as to oral communications between the decedent and a beneficiary under the purported will" is not admissible. *Will of Lamparter*, 348 N.C. at 51, 497 S.E.2d at 695. One clear exception permits a witness to testify about the oral communications between the decedent and a beneficiary when the testimony is against the pecuniary interests of that witness. *Sanderson v. Paul*, 235 N.C. 56, 69 S.E.2d 156 (1952). Accordingly, "[t]estimony which would diminish one's share would not be disqualifying under the statute." *Fender v. Fender (In re Fabian)*, 1997 S.C. App. LEXIS 39, at *9 (1997); *see also In re Fowler's Will*, 159 N.C. 203, 74 S.E. 117 (1912) [hereinafter "Fowler"] (holding that witness' testimony was admissible, where witness "[would] receive less as an heir, if the Will [was] set aside, than she [would] if it [was] sustained").

"The ruling on competency of a witness is within the trial court's discretion and its decision is not reversible except for clear abuse of discretion." *State v. Sills*, 311 N.C. 370, 377, 317 S.E.2d 379, 383 (1984). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

In this case, the trial court held that Francis Long's "testimony [was] inherently admissible" because it was against her pecuniary interest; Mrs. Long knew she would take twenty percent under the 1967 Will, but only ten percent under the 1989 Will. The trial court made this decision only after permitting an extended voir dire in which Mrs. Long admitted she would take twice the amount under the 1967 Will as she would inherit under the 1989 Will. An examination of both wills bears the truth of Mrs. Long's superior pecuniary interest in the 1967 Will. Moreover, the trial court's decision to permit Mrs. Long to testify was in accordance with our Supreme Court's long-standing precedents in *Fowler* and *Sanderson*. Accordingly, the trial court properly admitted Mrs. Long's testimony under an exception to the Dead Man's Statute, and, therefore, this assignment of error is without merit.

[2] By their next assignment of error, the 1967 Will Beneficiaries contend the trial court erred by excluding evidence related to the Testamentary Trust created under the 1989 Will, through which Francis Long and her son had already received $140,986.00. The 1967 Beneficiaries argue that, by precluding mention of the Trust, the trial court prejudicially limited their ability to cross-examine Mrs. Long exposing the bias, motive, and inherent lack of credibility to Mrs. Long's testimony. After carefully reviewing the record, we hold that this assignment of error was not properly preserved for appellate review.

Indeed, although the 1967 Will Beneficiaries argue that the trial court precluded all mention of the Trust, this assertion is not reflected in the trial transcript referenced in their assignment of error. The referenced sections in the transcript do reflect the trial court's exclusion of such evidence as it pertained to Mr. Thigpen and the 1967 Will Beneficiaries' theories of undue influence and testamentary capacity; however, the record does not reflect any discussion or trial court ruling related to the Trust and Mrs. Long's possible influence and testimony. "Our Supreme Court and this Court have held that . . . appropriate objections must be made at trial to preserve the question of admissibility of the evidence on appeal." *Morin v. Sharp*, 144 N.C. App. 369, 375, 549 S.E.2d 871, 874 (2001). Here, there is evidence of neither an objection nor that the 1967 Beneficiaries ever presented this issue to the trial court.

Moreover, the 1967 Beneficiaries failed to preserve the issue by making an offer of proof. N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) provides:

> (a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . . .
>
> (2) Offer of Proof—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Here, the 1967 Beneficiaries were given a voir dire examination of Mrs. Long. Significantly, the 1967 Beneficiaries did not, at any time during the voir dire, cross-examine Mrs. Long about the money she or her son received from the trust. The 1967 Will Beneficiaries did not attempt to elicit this information during cross-examination within the presence of the jury. Accordingly, the 1967 Will Beneficiaries did not object to the trial court's exclusion or make an offer of proof. Therefore, because (1) the 1967 Will Beneficiaries "made no offer of proof to the witness' possible answers," and (2) "the substance of the [evidence is not] apparent from the context within which the questions [were] asked" (because no questions were asked), the 1967 Will Beneficiaries "failed to preserve this issue for appellate review." *State v. Braxton*, 352 N.C. 158, 208, 531 S.E.2d 428, 457 (2000).

III. The 1989 Will

[3] Having determined that the trial court committed no error in entering judgment on the jury's determination that the 1967 Will had been revoked by Mr. Barnes, we now address the dispositive issue presented by the Propounders of the 1989 Will: Did the trial court err by permitting caveators, claiming an interest under a *copy* of a prior will, which under North Carolina law is presumptively revoked and invalid, to proceed against a subsequent attested will, without first rebutting the presumption of revocation and invalidity?

"Standing is a requirement that the plaintiff [has] been injured or threatened by injury or have a statutory right to institute an action." *Matter of Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986). " 'Standing' to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (quoting *Sierra Club v. Morton*, 405 U.S. 727 (1972)). "Standing is a jurisdictional issue[,] . . . [and] does not generally concern the ultimate

merits of a lawsuit." *Town of Ayden*, 143 N.C. App. at 140, 544 S.E.2d at 824 (quoting *Sierra Club*, 405 U.S. 727).

Accordingly, because standing is jurisdictional in nature, even if the alleged irregularities would, if proved, render the 1989 Will voidable by an appropriate caveator, this does not eliminate the requirement that the particular caveators in this case have standing. *Town of Ayden*, 143 N.C. App. at 140, 544 S.E.2d at 824. Consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of case are judicially resolved. To discern whether the beneficiaries under the revoked 1967 Will had standing to caveat, we must first examine the general origin of standing to caveat articulated in our probate laws.

North Carolina statutory law provides that: "No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court . . ." N.C. Gen. Stat. § 31-39 (2002). "The purpose of probate is to establish that the will in question has been executed in a proper manner and that it constitutes the last will of the deceased." *North Carolina Nat. Bank v. C.P. Robinson Co., Inc.*, 319 N.C. 63, 67, 352 S.E.2d 684, 687 (1987).

After a will is submitted for probate, the "right to contest the validity of a writing offered for probate . . . is by statute . . . limited to 'any person entitled under such will, or interested in the estate.' " *In re Belvin's Will*, 261 N.C. 275, 276, 134 S.E.2d 225, 226 (1964) [hereinafter "*Belvin*"] (citing N.C. Gen. Stat. § 31-32). "An interest resting on sentiment or sympathy, or any basis other than the gain or loss of money or its equivalent, is not sufficient" to establish standing as a caveator, otherwise any person could protest a testator's disposition of property and frustrate "the freedom of testation." *In re Thompson's Will*, 178 N.C. 540, 542, 101 S.E. 107, 108 (1919). Moreover, by statute, a potential caveator has three years to file a caveat after probate. N.C. Gen. Stat. § 31-32.

"The purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded." *In re Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970). "An attack upon a will offered for probate must be direct and by caveat; a collateral attack is not permitted." *Baars v. Campbell University, Inc.*, 148 N.C. App. 408, 419, 558 S.E.2d 871, 878 (2002); *see also In re Will of Charles*, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965); *Johnson v. Stevenson*, 269 N.C. 200, 202, 152 S.E.2d 214, 216 (1967); *Casstevens v. Wagoner*, 99 N.C. App.

337, 338, 392 S.E.2d 776, 778 (1990). The right to contest a will by caveat is statutory and in derogation of the common law; accordingly, the section authorizing caveats must be strictly construed. *In re Will of Winborne*, 231 N.C. 463, 466, 57 S.E.2d 795, 799 (1950).

In North Carolina, our courts have generally recognized three fundamental classes of individuals that have standing as caveators based on their interest in the estate: "heirs-at-law, the next of kin, and persons claiming under a prior will." James B. McLaughlin, Jr., and Richard T. Bowser, *Wiggins* Wills and Administration of Estates in North Carolina § 124 (2000); *see e.g.*, *Sigmund Sternberger Foundation, Inc. v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E.2d 116, 127 (1968) (persons claiming under a prior will); *Brissie v. Craig*, 232 N.C. 701, 705, 62 S.E.2d 330, 333 (1950) (heirs-at-law); *Randolph v. Hughes*, 89 N.C. 428, 1883 WL 2544, *2 (1883) (next of kin). For many years, the case law in North Carolina did not address whether beneficiaries under a prior will had standing as caveators if they were not related by blood or marriage to the testator. However, in *Belvin* and *Tannenbaum*, our Supreme Court clarified this ambiguity by holding that "beneficiaries under a prior paper writing are persons interested . . . and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased." *Tannenbaum*, 273 N.C. at 674, 161 S.E.2d at 127; *see also Belvin*, 261 N.C. at 276-77, 134 S.E.2d at 226-27.

Here, the 1967 Will Beneficiaries were neither the heirs-at-law nor the next of kin of Mr. Barnes. Rather, the 1967 Will Beneficiaries claimed standing as persons benefitting under a prior will; thus, they claimed standing as caveators under the reasoning in *Tannenbaum* and *Belvin*. Moreover, the 1967 Beneficiaries rely on our reasoning in *In re Will of Hester*, 84 N.C. App. 585, 353 S.E.2d 643 (1987) [hereinafter "*Hester*"], *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987), to support the claim that they had standing to challenge the 1989 Will as caveators. In *Hester*, we noted and held that:

> Propounders contend that '[a] beneficiary under a prior will does have standing to caveat a will but such a beneficiary must, in the same proceeding, prove the interest alleged.' We disagree. . . . Here, . . . the caveators alleged the probated will was invalid on grounds of undue influence and lack of mental capacity and alleged that they are beneficiaries under a will of the deceased made at a time when the testator possessed mental capacity. If the facts be as caveators allege, they are interested in the estate. [However,] [b]ecause the proceeding is *in rem*, the proceed-

ing must go on until the issue *devisavit vel non* is appropriately answered.

Accordingly, the 1967 Will Beneficiaries urge this Court to accept the same reasoning, which does not require a showing of standing pursuant to a prior will until the issue of *devisavit vel non* is resolved pursuant to the subsequent and probated will.

However, the case *sub judice* presents one wrinkle that neither *Tannenbaum*, *Belvin* nor *Hester* contained: The 1967 Will Beneficiaries did not produce the original will. Instead, the 1967 Beneficiaries produced only a copy of an alleged 1967 Will. "It is well established [in North Carolina] that when a will last seen in the testator's possession cannot be found at death a rebuttable presumption arises that the will was revoked." *Matter of Will of Jolly*, 89 N.C. App. 576, 577, 366 S.E.2d 600, 601 (1988) (citing *In re Will of Hedgepeth*, 150 N.C. 245, 63 S.E. 1025 (1909)). Following the logic of this presumption, namely that the will has been revoked, most assuredly the presumption extends to the beneficiaries under that will such that they are presumed by law not to be beneficiaries unless they overcome that presumption that the will was not revoked.[5] Consequently, the 1967 Will Beneficiaries are not beneficiaries at all, rather they are "alleged beneficiaries." In essence, they are individuals who must rebut the presumption that the 1967 Will was not revoked in order to gain the status of being beneficiaries. Otherwise, they are no more than beneficiaries under a will that is presumed to have been revoked. Whereas the beneficiaries in *Hester* did, in fact, benefit under a prior will, the alleged 1967 Will Beneficiaries are claiming an interest in Barnes' estate by virtue of a paper writing that was presumptively invalid as a will under North Carolina law. Indeed, the jury determined that the 1967 Will Beneficiaries did not present evidence to overcome that presumption; accordingly, the trial court entered judgment holding that the 1967 Will had been revoked.

It seems an obvious waste of judicial economy, an affront to the sacred right of testation, and an unreasonable and unjust expectation to require executors and beneficiaries of a will to defend that will upon a caveat from individuals who carry a legal presumption of invalidity. Rather, such "alleged beneficiaries" must, at the very minimum, rebut the presumption and establish standing before a trial on the merits can ensue.

5. The presumption that the will has been revoked would also extend to any property to be distributed by the will. Surely, one would not first distribute the property under a will before determining whether that will had been revoked by the testator.

The dissent contends that "even though . . . [a] caveator[] [with merely a copy of a prior will has] the burden of overcoming a presumption that the . . . will had been revoked . . . they [still have] standing to bring [a] caveat." In support of this proposition, the dissent makes two fundamental arguments: (1) "No authority has been cited and none found holding that in a North Carolina will caveat proceeding, the standing of individuals claiming under a copy of a will must be determined first"; and (2) "The presumption [of revocation] tends to support the logic of first determining the validity of the later will, since it makes it more likely that the later will is the last will."

As to the dissent's first argument, in North Carolina, as well as in every other court in this country, standing is the threshold issue in every proceeding. *See e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (noting that "standing [is] a 'threshold inquiry' that 'in no way depends on the merits' of the case."). Seemingly, the dissent proffers that in caveat proceedings the requirement of standing is quite different than in ordinary proceedings. As noted, however, N.C. Gen. Stat. § 31-32 precisely defines who has standing to caveat a will. Section 31-32 specifically limits standing to caveat to "any person entitled under such Will, or interested in the estate." In the case *sub judice*, as noted, the caveators claim standing under a *copy* of a prior will. Apparently, the dissent believes that there is no tenable legal distinction that can be made between a prior will, and a copy of a prior will, for purposes of standing. Although North Carolina has not squarely faced this issue, decisions from other jurisdictions are instructive. In *Werner v. Frederick*, 94 F.2d 627, 630 (D.C. 1937), for instance, the United States Court of Appeals, in holding that a caveator must first rebut presumptions of revocation before attacking the validity of a will, noted that:

> The reason for requiring [the caveator to prove] an interest . . . before an attack upon the will may proceed, is that the estate of a decedent ought not be subjected to the trouble and expense of an attack, except by one who, if the attack prove successful, would have some legal claim upon the estate. And if the former will relied upon, though executed, had been revoked by the testator in some manner other than by the later will, if valid, whatever interest might have arisen in the beneficiary by virtue of execution of the prior will would have ceased, so that at the time of his attack upon the later will he would have no standing.

Thus, the *Werner* Court concluded that in the interest of the propounders, and in the interest of judicial economy, a caveator must

prove a "legal interest" in the estate, before a forum is provided to challenge the will.

As to the dissent's second observation, namely that "logic" dictates resolving the validity of the last will before determining whether the caveators have standing to challenge that will's validity"; we disagree. What purpose would a presumption of revocation serve if the caveators, the individuals burdened by that presumption, were not required, at a minimum, to rebut that presumption before requiring the propounders and the state judicial system to enter into protracted litigation? Our Supreme Court, in the case of *In re Wellborn's Will*, made this point quite succinctly in finding that:

> When [a] will [is] produced without the name of [the testator], this [is] prima facie evidence of a revocation, and the law presumed that it had been revoked. It is true this presumption might be repelled, but the burden of doing so was on the propounder. If this was not so, it would be to require the caveator to rebut the presumption that was in his favor.

165 N.C. at 640, 81 S.E. at 1025. *See also McBride v. Jones*, 494 S.E.2d 319, 321 (Ga. 1998) (where propounder produced a copy of the will, propounder was required to rebut presumption of invalidity before the "the burden shifted to the caveator to prove that the proffered will [was] not valid."). Accordingly, in our view, logic dictates that the one who is burdened by a presumption of invalidity should be required to shed that presumption before gaining the right to challenge a properly probated original will that is presumed to be valid.

Here, neither the trial court nor the jury made a preliminary finding that the 1967 Will Beneficiaries had rebutted the presumption that they did not have standing to caveat the 1989 Will as interested parties. Instead, in the second phase of the jury trial, the jury returned a verdict invalidating the 1967 Will because Barnes destroyed the 1967 Will with an intent to revoke it. Indeed, the jury in effect found that the 1967 Will Beneficiaries did not have standing to file a caveat against the subsequently made 1989 Will.

In this light, we hold that the trial court erred by not first allowing the jury to determine whether the 1967 Will Beneficiaries had presented sufficient evidence to rebut the legal presumption that the 1967 Will had been revoked.[6] Moreover, since we uphold the jury's

6. The dissent argues: "To hold that whenever a caveator claims under a prior will, which is later determined to have been revoked, the court thereby loses jurisdiction over the issue of the later will to which the caveat was addressed, would render

determination that the 1967 Will Beneficiaries did not rebut the presumption of invalidity of the 1967 Will, then the 1989 Will must be upheld because the 1967 Will Beneficiaries lacked standing to prosecute a caveat against the 1989 Will.[7] Accordingly, we vacate the trial court's judgment resulting from the caveat proceeding against the 1989 Will.[8]

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meaningless all of [the] cases in which that has happened." Our holding is not that broad. Instead, we narrowly hold, in accordance with the relevant statute, that standing is a pre-requisite to filing a caveat against a will that is presumed to be valid. Indeed, a caveator producing an *original* prior will is presumed to have standing under Section 31-32. Accordingly, the trial court does not err, nor is the trial court divested of jurisdiction, by a subsequent jury determination of revocation of the prior *original* will. However, when individuals present only a *copy* of an alleged prior will, the law is clear that the prior will is presumed to have been revoked. If the will is presumed to be revoked, the individuals who would have taken under that will must be presumed to have a revoked interest. It follows that in the case *sub judice*, the purported caveators, because they produced only a *copy* of a prior will (meaning the prior will was presumed to have been revoked), were burdened by a presumption of invalidity and lack of standing. Thus, fairness dictates that when individuals can only produce a *copy* of a prior will, they must first show the court that there actually was a prior will before taking issue with an original will that is presumed to be valid.

7. At oral argument, the 1967 Will Beneficiaries conceded that if the jury had been allowed to first determine that the 1967 Will had been revoked, they would not have had standing to challenge by caveat the 1989 Will.

8. The dissent argues that "because [a] will caveat is a proceeding *in rem*, . . . the jury's ultimate determination that the 1967 will had been revoked should [not] be held to erase the subject matter jurisdiction of the superior court over the entire proceeding *ab initio*." We agree. Today, we do not hold that the jury's determination that the 1967 Will was revoked deprived the court of jurisdiction. Instead, we hold only that, because the individuals produced a *copy* of a prior will, which meant that will was presumed to have been revoked, the individuals had to first overcome that presumption of invalidity in order to acquire standing to challenge the probated original will that was presumed to be valid. Thus, as was held by this Court in *Casstevens v. Wagoner*,

> Although it is often stated that, '[w]hen a caveat is filed the Superior Court acquires jurisdiction of the whole matter in controversy,' . . . such a pronouncement does not alter the affirmative statutory requirement that caveat proceedings can only be instituted by due filing of the cause before the clerk of superior court. . . . When a purported caveat is fatally defective from its inception, the superior court acquires no jurisdiction over the cause.

Casstevens, 99 N.C. App. 337, 339, 392 S.E.2d 776, 778 (1990). Simply put, once an individual with standing files a caveat, the superior court acquires jurisdiction over the whole controversy; however, this jurisdiction can not be conferred upon the superior court until a caveat is properly filed. In the case *sub judice*, the individuals asserting an interest in the presumptively revoked prior will, had to overcome the presumption that their interest in the estate was presumed to have been revoked. In short, they had to overcome the presumption that they lacked standing to file a caveat. Thus, the superior court's jurisdiction over the "whole controversy" was contingent on caveators' standing, in fact.

IV. The Heirs-At-Law

[4] A final question remains: On remand, do the heirs-at-law have any legal recourse? The dissent contends the heirs-at-law do have recourse. For the reasons stated herein, we disagree.

As noted, pursuant to N.C. Gen. Stat. § 31-32, any person (1) interested in an estate, (2) within three years of an application for probate, (3) may appear before the clerk of the Superior Court and (4) enter a caveat. In the case *sub judice*, the Propounders of the 1989 Will filed an application for probate on 30 November 1996. Accordingly, on 30 November 1999 the statute of limitations expired for any interested party to appear before the clerk of the Superior Court and file a caveat.

On 17 September 1998 the Propounders of a 1967 Will filed a caveat to the 1989 Will. Pursuant to Section 31-33:

> Such caveator shall cause notice of the caveat proceeding to be given to all devisees, legatees, or other persons interested . . . . The notice . . . shall call upon [the interested parties] to appear and make themselves *proper parties* to the proceeding if they so chose. . . . [T]he judge shall require any [interested party] . . . to align themselves and to file bond . . . . Upon the failure of any party to file such bond, the judge shall dismiss that party from the proceeding but that party shall be bound by the proceeding.

On 23 January 2001, the Clerk of the Superior Court mailed a Supplemental Citation to Mr. Barnes' heirs-at-law. The Supplemental Citation gave Mr. Barnes' heirs-at-law notice of the caveat, and informed them of their statutory right to "appear and align [themselves] with the Propounder of the 1989 Will, the Caveators of [the] 1989 Will . . . or [to] identify [themselves] as a Caveator to the 1967 Will." The heirs-at-law chose not to align themselves with any of the parties to the proceeding, identify themselves as Caveators to the 1967 Will, actively participate in the first or second phase of the trial, and failed to file a bond.

Accordingly, pursuant to Section 31-33, the trial judge should have dismissed the heirs-at-law from the proceeding for not filing a bond, although the heirs-at-law would have retained the prospect of benefitting from the proceeding. The trial court, however, did not dismiss the heirs-at-law from the proceeding. Accordingly, although the heirs-at-law had the faint hope, which materialized, of taking under

the laws of intestate succession if both wills were invalidated, the heirs-at-law did not retain the right to file a separate caveat.[9]

The North Carolina Supreme Court, as well as this Court, has consistently held that "the statute permitting caveats is in derogation of the common law," and, therefore, "must be strictly construed." *In re Winborne's Will*, 231 N.C. at 466, 57 S.E.2d at 799; *In re Will of Evans*, 46 N.C. App. 72, 74, 264 S.E.2d 387, 388 (1980). Moreover, these same cases hold that the statute of limitations "is a condition attached to the right. Hence, upon the expiration of the [three year statue] . . . the right [to caveat] ceases to exist." *Id.* Accordingly, on remand, the heirs-at-law do not have legal recourse against the 1989 Will.

In sum, we uphold the jury's finding that the 1967 Will Beneficiaries failed to rebut the presumption that the 1967 Will had been revoked, and therefore, the 1967 Will Beneficiaries did not have standing to challenge by caveat the 1989 Will. It follows that since the 1967 Beneficiaries did not have standing to challenge the 1989 Will, and the heirs-at-law neither aligned themselves as parties nor did they timely file a caveat against the 1989 Will, the judgment arising from the caveat proceeding against the 1989 Will is vacated.

No error in part, vacated in part.

Judge TIMMONS-GOODSON concurs.

Judge HUDSON concurring in part, dissenting in part.

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

I concur with the analysis of the issues pertaining to Frances Long's testimony and the Testamentary Trust. However, because I believe that the trial judge properly exercised his discretion in the management of the trial by having the jury first consider the validity of the 1989 will, and because I see no reversible error in the trial, I would affirm the judgment.

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9. This is not the case, as *In re Will of Hester*, 84 N.C. App. 585, 593-94, 353 S.E.2d 643, 650, *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987), where we held that: "[T]he heirs at law of a deceased testator who have no knowledge of a caveat proceeding and who [were] not cited under [Section] 31-33 are not estopped to file a second caveat nor are they bound by the former judgment sustaining the validity of the script." In the case *sub judice*, the heirs-at-law had notice of the caveat proceeding and were duly notified pursuant to Section 31-33.

The majority asserts that, in managing the litigation of the caveat to the 1989 will, the trial judge should have first had the jury determine whether the 1967 will had been revoked. Had the jury ruled that the 1967 will was revoked, goes the reasoning, the caveators, who claimed an interest in the estate as beneficiaries of that will, would have had no standing to litigate the caveat. Since the jury ultimately determined that the 1967 will had been revoked, the caveators had no standing to bring the caveat in the first place, and thus, the court lacked subject matter jurisdiction over the entire caveat proceeding. As a result, the majority reasons, we should treat this matter as if no caveat had been filed, so that the 1989 will stands unchallenged as the last will and testament of Mr. Barnes.

I disagree with this analysis for several reasons. First, I believe that, even though the caveators carried the burden of overcoming a presumption that the 1967 will had been revoked (because they possessed only a copy), under North Carolina case law as it existed at the time, it appeared that they had standing to bring the caveat. When they filed it, they thereby invoked the jurisdiction of the court. Second, by bringing the caveat, the caveators triggered the court's duty to determine the validity of the 1989 will, which is the one the caveat challenged, and the court acted within its discretion in having the jury first address the issues pertaining to that will. Third, because the will caveat is a proceeding *in rem*, I do not believe that the jury's ultimate determination that the 1967 will had been revoked should be held to erase the subject matter jurisdiction of the superior court over the entire proceeding *ab initio*. Fourth, I believe that the heirs here could have timely filed a caveat, because they were not timely notified of the proceedings here. And finally, whether or not they could have filed or did in fact file such a caveat or align with a pending caveat is irrelevant, because if neither will was valid, they would inherit by operation of law.

According to the applicable statute any person "interested in the estate" may file a caveat within three years after the will is submitted for probate. N.C. Gen. Stat. § 31-32 (2001). Persons claiming under a prior will, such as the caveators here, are such interested persons. *Sternberger v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E. 2d 116, 127 (1968). Whenever persons claiming under a prior will institute a caveat, they are potential, not certain, beneficiaries of the estate in question. Even if their claimed interest in the estate ultimately is not upheld, they nonetheless have standing to litigate the issues. Similarly, the caveators here, who claimed an interest in the estate by

virtue of an earlier will, had standing to litigate the issues, even though their interest ultimately was not upheld. Thus, by filing the caveat, the 1967 Will Beneficiaries properly instituted these proceedings, and invoked the subject matter jurisdiction of the clerk and the superior court.

When they did so, they placed at issue the validity of the 1989 will.

> "When a caveat is filed the superior court acquires jurisdiction of the whole matter in controversy, including both the question of probate and the issue of devisavit vel non (citation omitted). Devisavit vel non requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987) (citing *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965)). Thus, in a case such as this one, where there are presented multiple scripts purporting to be the decedent's last will and testament, the issue of devisavit vel non should be resolved in a single caveat proceeding in which the jury may be required to answer numerous sub-issues . . . [T]he trial court is vested with broad discretion to structure the trial, including the discretion to sever the issues and submit them separately to the same jury . . . .

In re Will of Dunn, 129 N.C. App. 321, 325-26, 500 S.E.2d 99, 102 (1998), *disc. review denied*, 348 N.C. 693, 511 S.E.3d 645 (1998). It is well established that the trial court has broad discretion in the management of the trial, and I believe that the trial judge here exercised that discretion properly. As in *Dunn* and *Hester*, the trial court properly took up the matter of the later will first, since if that will were found valid, it would constitute the last will and testament of the decedent, thereby mooting the issues pertaining to the earlier will. As the Supreme Court pointed out in *Hester*:

> [T]he interests of judicial economy and convenience were well served by separate presentation of issues as to the 1983 script. Had the jury determined that the 1983 script was in fact a valid last will and testament, the issues as to the earlier scripts would have been mooted and the proceeding need not have continued. The judge logically may have considered submission of the issues as to other scripts premature until the [later will] issues were answered.

In re Will of Hester, 320 N.C. 738, 743-44, 360 S.E.2d 801, 805 (1987), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987). Thus, I do not believe that the trial court erred or abused its discretion by submitting to the jury the issues pertaining to the 1989 will first.

The majority here, however, addresses the issue of the 1967 will first, concludes that it was revoked, and that the caveators thus had no standing to challenge the 1989 will. By addressing the 1967 will first, and upholding the determination that it had been revoked, the majority implicitly holds that the trial judge abused his discretion by taking up the 1989 will first. Since I do not believe that he did, I cannot concur with this analysis. Having concluded as I have that the trial court properly addressed first the matter placed in issue by the caveat (the 1989 will), I do not believe that it is appropriate for us to decide the issues based on what could have been the outcome had the trial judge exercised his discretion differently. He did not, and I believe that we are bound to address the issues as they come to us. As long as the 1967 Will Beneficiaries continued to claim under that will, which they did throughout the first phase of the trial, they had standing to do so, and the jury's verdict is a valid determination of the issues at that phase.

If this Court chooses to adopt a new rule, specifically holding that when caveators produce only a copy of the will under which they claim, they must, as a threshold matter, rebut the presumption of revocation, the Court may certainly do so. With such a rule, I do not necessarily disagree. However, no such rule had been articulated at the time of this trial by our Courts, and none of the cases cited by the majority on this point involve will contests, except *Casstevens*, 99 N.C. App. 337, 392 S.E.2d 776 (1990), in which no caveat at all had been filed. Thus, I do not believe the trial judge abused his discretion in not divining such a rule and acting accordingly. In light of all the cases giving broad discretion in trial management, I believe he acted reasonably.

This is especially clear in light of the cases explaining the significance of a proceeding *in rem*. Our Supreme Court has stated that in a will caveat the

> "proceeding is *in rem*, in which the court pronounces its judgment as to whether the *res*, *i.e.*, the script itself, is the will of the deceased. *In re Hinton*, 180 N.C. 206, 104 S.E.2d 341 (1987)." *Brissie v. Craig*, [232 N.C. 701, 62 S.E.2d 330], *supra*. The will is the *res*.

In re Will of Charles, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965). As the Court in *Charles* pointed out, when a will is presented, it "stands as the testator's will and only will, until challenged and reversed in a [caveat] proceeding." *Id.* Here, once the caveat was filed by persons claiming an interest in the estate through a prior will, the court acquired jurisdiction over the matter of the validity of the 1989; that will became the *res* at issue.

Our Supreme Court has also explained, though not often, the difference between a proceeding *in rem*, and a typical proceeding between litigants.

> This is a proceeding *in rem* and the statute confers jurisdiction on the clerk of the court. There are no parties, strictly speaking, certainly none who can withdraw or take a nonsuit, and thus put the matter where it was at the start, as in actions between individuals. A nonsuit in the latter case affects no one but the litigants; in the former, creditors, legatees and distributees are interested and they are stayed until the question of testacy or intestacy is determined. The court having *jurisdiction*, public policy and our statutes require that this preliminary question [of testacy] should be determined as soon as practicable, and require the court to do it, regardless of objecting persons.

In re Will of Westfeldt, 188 N.C. 702, 705, 125 S.E. 531, 533 (1924) (citations and quotation marks omitted). None of the cases cited as authority involved a will caveat, and I do not believe the analysis of standing of the parties applies here. No authority has been cited and none found holding that in a North Carolina will caveat proceeding, the standing of individuals claiming under a copy of a will must be determined first. In fact, the presumption that the earlier will has been revoked tends to support the logic of first determining the validity of the later will, since it makes it more likely that the later will is the last will. Thus, I believe that once the caveat to the 1989 will was filed by persons claiming an interest in the estate through a prior will, the court acquired jurisdiction over the *res* and the court was required to proceed as it did, to resolve the issue of devisavit vel non.

The authorities cited, which address the role of standing of the parties in conferring jurisdiction on the court, are not applicable to this case, in my opinion. Instead, I believe that when a person fits within the definition of an interested party under G.S. § 32-31 by claiming under a prior will, and that person timely files a caveat, the

court acquires jurisdiction of the *res*. To hold that whenever a caveator claims under a prior will, which is later determined to have been revoked, the court thereby loses jurisdiction over the issue of a later will to which the caveat was addressed, would render meaningless all of these cases in which that has happened. It would also produce the illogical result that beneficiaries under such a later will would inherit under an instrument which the jury has found was made by a testator at a time when he lacked the mental capacity to do so.

The case here is not distinguishable in any meaningful way from *Hester*, in which the caveators challenged a later will on grounds of lack of mental capacity and alleged their interest from a prior will. As noted by the majority, this Court stated:

> [P]ropounders contend that [a] beneficiary under a prior will does have standing to caveat a will but such a beneficiary must, in the same proceeding, prove the interest alleged. We disagree. . . . If the facts be as caveators allege, they are interested in the estate. Because the proceeding is *in rem*, the proceeding must go on until the issue *devisavit vel non* is appropriately answered.

In re Will of Hester, 84 N.C. App. 585, 594, 353 S.E.2d 643, 650, (internal citations and quotation marks omitted), *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987). The majority distinguishes this case because here the caveators produced a copy, rather than the original, of the 1967 will, thereby giving rise to a presumption that the will had been revoked. I do not believe that this presumption alters the jurisdiction of the court over the *res*, once the caveat has been filed by persons who claim an interest. It may change their burden of proof on that issue, but it does not change the fundamental nature of the proceeding. Thus, I believe *Hester* is controlling on this point.

And finally, I disagree that since the heirs at law neither filed a caveat nor aligned themselves with the caveators or propounders to the 1989 will, they have no legal recourse. On 23 January 2001, less than a week before the matter was scheduled for trial, notice was sent to the heirs at law, informing them that a caveat had been filed to the 1989 will and that the caveators intended to probate the 1967 will. The notice did not indicate that the matter was set for trial, nor did it indicate when the heirs should respond, if they chose to do so. The will caveat trial began 29 January 2001, and the judgment was signed 22 February 2001. On 26 February 2001, the lawyers for the

heirs entered their notices of appearance, and a few days later, gave "Notice of Joinder per Rule 5." Then they filed briefs as Appellees in this Court.

Although the heirs acted promptly upon being notified, the judgment on the caveat had already been entered. Thus, it would have been impossible for them to intervene and align themselves at that point. As in *Hester*, these heirs were not bound by the judgment and could have filed a caveat; in fact, I believe they still can, within three years from the notice. However, since the Courts have held repeatedly that all issues should be determined in one proceeding, they acted properly in appearing as they did. By the time that they did so, there was no need to align themselves with either set of beneficiaries, since both of the wills had been rejected by the jury. In my opinion they acted appropriately in appearing and joining when they did as non-aligned appellees. However, whether they had done so or not, they would inherit by operation of law if the judgment is upheld.

In conclusion, I would hold (1) that when the caveat was filed the court acquired jurisdiction of the *res*; (2) that the trial court acted within its discretion in managing the trial by first addressing the 1989 will; and (3) that the judgment entered upon the jury's verdicts was proper in all respects.

MICHAEL JOHNSON, EMPLOYEE-PLAINTIFF v. HERBIE'S PLACE, EMPLOYER, UNINSURED, DEFENDANT, NORTH CAROLINA INDUSTRIAL COMMISSION, AGENCY OF THE STATE OF NORTH CAROLINA, PLAINTIFF v. HERBIE'S PLACE, L.L.C., AND BILL KENNEDY, INDIVIDUALLY, DEFENDANTS

No. COA02-298

(Filed 15 April 2003)

1. Workers' Compensation— proposed findings—province of Commission—credibility determinations—explanations not required

The Industrial Commission did not err in a workers' compensation case by not making defendant's proposed findings regarding the integrity of plaintiff's wife and plaintiff's alleged drug abuse. The Commission made specific findings regarding the crucial facts upon which plaintiff's right to compensation depends and does not have to explain its credibility determinations.

2. Workers' Compensation— alleged perjury—no criminal action—credibility of evidence for Commission

The Industrial Commission correctly refused to deny a workers' compensation award based on plaintiff's alleged perjury where there were no criminal charges. Defendants' allegations of perjury rest upon the credibility of testimony and evidence, of which the Commission is the sole judge.

3. Workers' Compensation— findings—credibility and weight of evidence

The Industrial Commission did not err in a workers' compensation action by making a finding which defendants contended conflicted with the evidence. It is the Commission's duty to judge the credibility of the witnesses and to determine the weight to be given testimony.

4. Workers' Compensation— back injury—cause—findings—conclusive on appeal

There was sufficient evidence that the back injury suffered by a workers' compensation plaintiff was due to a fall at work rather than the result of a long and gradual deterioration of his back. The Commission's findings of fact are conclusive on appeal, even if there is evidence to support a contrary finding.

5. Workers' Compensation— failure to obtain insurance—penalty mandatory

The Industrial Commission did not err by imposing a fine for failure to obtain workers' compensation insurance. Under N.C.G.S. § 97-94(b), the imposition of a penalty is mandatory if the employer refuses or neglects to obtain workers' compensation insurance, and the phrase "failed to" obtain insurance in the Commission's findings carries the same meaning as "neglected to" carry insurance.

Appeal by defendant from opinion and award entered 16 November 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 October 2002.

Hodgman and Oxner, by Todd P. Oxner, for plaintiff-appellee Michael Johnson.

Attorney General Roy Cooper, by Assistant Attorney General Tina Lloyd Hlabse and Assistant Attorney General Adrian Phillips, for the State.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for defendant-appellant.

LEVINSON, Judge.

This appeal arises from two consolidated actions: (1) a workers' compensation claim filed by plaintiff Michael Johnson, and (2) a petition for assessment of administrative penalty filed by the Industrial Commission against defendants (Herbie's Place, L.L.C., and Bill Kennedy, individually), plaintiff's employer. Defendants appeal both the award of disability benefits to plaintiff and the assessment of a civil penalty. For the reasons that follow, we affirm.

The procedural history of this case is as follows: On 24 January 2000, plaintiff filed an Industrial Commission Form 18, "Notice of Accident to Employer." Plaintiff alleged that he suffered a back injury as a result of a workplace fall occurring on 1 January 2000. Defendants denied his claim for medical expenses and disability, and plaintiff sought a hearing before the Commission. On 1 March 2000, the Industrial Commission filed a Petition for Assessment of Administrative Penalty for defendants' failure to have Workers' Compensation insurance or self-insurance. The Industrial Commission also moved to consolidate the actions.

Both cases were heard before a deputy commissioner of the Industrial Commission on 9 May 2000. On 23 August 2000, the deputy commissioner awarded plaintiff temporary total disability and medical expenses. The Opinion and Award also assessed a civil penalty against defendant Herbie's Place of $37,200, and against individual defendant Kennedy in "an amount equal to 100% of the medical and disability compensation due to [plaintiff]." The order provided for a reduction in the civil penalties if defendants paid plaintiff "all compensation due under the North Carolina Workers' Compensation Act." Defendants appealed to the Full Commission, which issued its Opinion and Award on 16 November 2001. The Industrial Commission affirmed the deputy commissioner's awards in both cases. The opinion was unanimous as to the administrative penalty. Commissioner Scott dissented from the award of temporary total disability. Defendants appealed to this Court on 11 December 2001.

Standard of Review

"The Workers' Compensation Act should be liberally construed to achieve its purpose of providing compensation to employees injured

by accident arising out of and in the course of their employment[.]" *Lynch v. Construction Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *cert. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). "The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). The Industrial Commission's findings of fact "are conclusive on appeal when supported by competent evidence . . . even [if] there is evidence to support a contrary finding[,]" *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and "may be set aside on appeal [only] when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

"Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission[.]" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). Where "defendants' interpretation of the evidence is not the only reasonable interpretation[, it] is for the Commission to determine the credibility of the witnesses, the weight to be given the evidence, and the inferences to be drawn from it. As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002) (citation omitted). Therefore, "appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams*, 349 N.C. at 681, 509 S.E.2d at 413). However, the Industrial Commission's conclusions of law are reviewable *de novo*. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996).

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[1] Defendants argue first that the Industrial Commission "committed reversible error by failing to make [certain] specific findings of fact supported by competent and unrebutted evidence[.]" Defendants contend that their proposed findings were "necessary to decide in order for the appellate court to determine whether there was any adequate basis for the Commission's ultimate findings of fact."

Defendants correctly state that the Industrial Commission "must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend." *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981) (citing *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979)). Thus, "the Commission must find those facts which are necessary to support its conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000).

In the instant case, the Industrial Commission awarded plaintiff temporary total disability and medical expenses. Under N.C.G.S. § 97-2(9) (2001), " 'disability' means 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." A compensable injury in the meaning of the workers' compensation statute is an "injury by accident arising out of and in the course of the employment[.]" N.C.G.S. § 97-2(6) (2001). With respect to back injuries, G.S. § 97-2(6) also provides that

> where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, 'injury by accident' shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

In the factual context of the present case, the Industrial Commission's findings of fact should be sufficient to establish: (1) that plaintiff fell, suffering a "specific traumatic incident," in the course of his employment; (2) that he injured his back as a result of the fall; and (3) that, as a result of the injury to his back, plaintiff was unable "to earn the wages which [he] was receiving at the time of injury in the same or any other employment." Against this backdrop, we evaluate the Order of the Industrial Commission, which included the following pertinent findings of fact:

> 1. . . . [D]efendant employed plaintiff as a cook. . . .
>
> 2. Plaintiff worked . . . for defendant on 31 December 1999 and 1 January 2000. At approximately 5:30 a.m., plaintiff slipped in the kitchen and fell on his back. Two of his co-workers . . . saw him on the floor immediately after he fell. . . .
>
> . . . .
>
> 4. A co-employee, Larry Jones, was working at defendant restaurant on the night of 31 December 1999. . . . [He] saw plaintiff slip

on a small amount of butter or margarine and fall, hitting his "tail and right elbow" on the tile floor of the kitchen. Mr. Jones took plaintiff from defendant's business to the emergency room at . . . [the] Hospital[.]"

5. Plaintiff was admitted at 6:05 a.m. on 1 January 2000. Plaintiff reported that he had slipped and fallen while working, injuring his low back. Plaintiff stated that this incident had occurred at work just prior to coming to the hospital. He complained of severe pain. A[n] examination by . . . [a] physician revealed swelling and marks on the skin. The physician excused plaintiff from work pending evaluation at [Moses Cone] Occupational Health.

6. On 6 January 2000, plaintiff was seen at Moses Cone Occupational Health by [Dr.] Ciacchella, M.D., . . . [who] ordered an MRI to be completed the next day[,] . . . [and] excused plaintiff from work for another day.

7. The . . . MRI revealed a broad based left sided disc protrusion at L5-S1 potentially encroaching on the left S1 nerve root. . . . Dr. Ciacchella . . . excused plaintiff from work until . . . 10 January 2000.

8. Plaintiff returned to Dr. Ciacchella on 10 January 2000. Dr. Ciacchella assessed plaintiff as having a herniated nucleus pulposus at L5-S1 with fairly significant symptomotalogy. Dr. Ciacchella referred plaintiff to a neurosurgeon and excused him from work until insurance authorized the referral.

. . . .

14. As a result of the incident on 1 January 2000, plaintiff was rendered incapable of earning wages from defendant or any other employer beginning from 1 January 2000 and continuing through the date of the hearing. . . .

15. The incident on 1 January 2000 was not caused by plaintiff's intoxication.

. . . .

These findings of fact are supported by competent record evidence, and establish in a straightforward manner that plaintiff fell on 1 January 2000 while performing his job; that the fall was witnessed by Larry Jones; and that as a result of his injury, Dr. Ciacchella deter-

mined that he was unable to work until he could obtain neurosurgery. The testimony offered by Jones and Dr. Ciacchella, the two witnesses cited by the Commission in its Opinion, was unimpeached; there is no evidence that Jones was pressured by either side, and no evidence that Dr. Ciacchella was associated with substance abuse or other misbehavior. Further, the authenticity of the Moses Cone Occupational Health records was not challenged. The Commission's findings also support its conclusions of law that (1) "plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant," and (2) "plaintiff is entitled to payment of temporary total disability compensation" and "is entitled to payment of all medical expenses incurred or to be incurred as a result of his low back injury[.]" We conclude, therefore, that the Industrial Commission made "specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 144, 571 S.E.2d 692, 695 (2002) (quoting *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977)).

Defendants, however, assert that the Industrial Commission was required to make certain additional findings, which they contend were "material findings of fact" that were "supported by competent and unrebutted evidence." The thrust of defendants' proposed findings is that plaintiff had a history of substance abuse, including abuse of prescribed medications such as OxyContin; and that plaintiff's wife pressured other employees of Herbie's Place to make false statements at the Industrial Commission hearing. Specifically, defendant argues that the Industrial Commission should have found that (1) in order to obtain prescriptions for OxyContin and other controlled substances, plaintiff consulted a Dr. Clark on multiple occasions in 1999 and 2000; (2) that Dr. Clark was subsequently charged with distribution of controlled substances, and was treated for substance abuse; (3) that in order to obtain controlled substances, plaintiff had in 2000, consulted a Dr. Harris, and had gone to Morehead Memorial Hospital; (4) that defendant may have lied to Drs. Clark or Harris, or to physicians at Morehead Memorial, to obtain prescriptions for controlled substances; and (5) that plaintiff's wife had attempted to influence the testimony of certain co-employees, other than Mr. Jones, who might be witnesses before the Industrial Commission.

We conclude that defendants' proposed findings of fact are not necessary to our review of the Commission's determination of plaintiff's entitlement to disability compensation. Defendants' suggested

findings, if true, would generally establish that plaintiff was a drug abuser, and that his wife is not a person of integrity. This evidence may have been pertinent to the Commission's determination of the weight and credibility to assign specific testimony or evidence. However:

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

Deese, 352 N.C. at 116-17, 530 S.E.2d at 553. Moreover, the evidence proffered by defendants in support of their proposed findings was all before the Industrial Commission.

> Defendants merely want this Court to weigh the opinions and testimony of the witnesses in a manner which benefits defendants. On an appeal from the Industrial Commission, this Court is unable to weigh evidence. . . . [T]he Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal.

Johnson v. Southern Tire Sales & Serv., 152 N.C. App. 323, 327, 567 S.E.2d 773, 776, *disc. review denied*, 356 N.C. 437, 572 S.E.2d 784 (2002). This assignment of error is overruled.

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[2] Defendants next argue that the Industrial Commission erred by "failing to deny an award of compensation to plaintiff in light of the numerous established instances of perjury, deceit, and subornation of perjury by plaintiff." We disagree.

Intrinsic fraud on the court refers to fraud relating to the "proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits." *Johnson v. Stevenson*, 269 N.C. 200, 152 S.E.2d 214 (1967). Defendants correctly assert that perjury is an intrinsic fraud on the court. *Horne v. Edwards*, 215 N.C. 622, 625, 3 S.E.2d 1, 3 (1939) (discussing "[i]ntrinsic fraud, as for example, perjury, or the use of false or manufactured evidence");

McCoy v. Justice, 199 N.C. 602, 605, 155 S.E. 452, 454 (1930) ("perjury and false swearing" considered an "intrinsic fraud"). However:

> In North Carolina perjury is held to be intrinsic fraud and ordinarily is not ground for equitable relief against a judgment resulting from it. . . . [A] party against whom a judgment has been rendered may be granted relief on the grounds of fraud provided the fraud practiced upon him prevented him from presenting all of his case to the court, but . . . *judgment will not be set aside on the grounds of perjured testimony* or for any other matter that was presented and considered in the judgment under attack.

Thrasher v. Thrasher, 4 N.C. App. 534, 545, 167 S.E.2d 549, 556-57 (1969) (citing *Cody v. Hovey*, 216 N.C. 391, 5 S.E.2d 165, and *Horne v. Edwards*, 215 N.C. 622, 3 S.E.2d 1) (emphasis added). Thus, the general rule is that "a judgment cannot be vacated because of perjured testimony unless the party charged with perjury has been indicted and convicted or he has passed beyond the jurisdiction of courts and is not amenable to criminal process." *Gillikin v. Springle*, 254 N.C. 240, 244, 118 S.E.2d 611, 614 (1961) (citing *Horne*, 215 N.C. 622, 3 S.E.2d 1, and *McCoy*, 199 N.C. 602, 155 S.E. 452). The rationale is that "[i]f perjury were accepted as a ground for relief, litigation might be endless; the same issues would have to be tried repeatedly[,] . . . and so the rule is, that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony[.]" *Mottu v. Davis*, 153 N.C. 160, 162-63, 69 S.E. 63, 64 (1910).

In the instant case, there have been no criminal charges of perjury arising out of this case. Defendants' allegation of "numerous established instances" of perjury rests, therefore, upon their assessment of the credibility of the evidence and testimony. However, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) (citations omitted). We conclude that "[a]lthough the Commission had the discretion to find that [witness's] responses were less than candid, or wholly untruthful, we cannot say, on the record before us, that [the witnesses] committed perjury." *Knight v. Cannon Mills Co.*, 82 N.C. App. 453, 465, 347 S.E.2d 832, 840, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986). This assignment of error is overruled.

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[3] Defendants argue next that the Industrial Commission erred by making a finding of fact not supported by any competent evidence. We disagree.

Defendants contend that the Industrial Commission's finding regarding "prescriptions being filled other than from Dr. Harris" is unsupported by competent evidence. Their contention is based upon the existence of testimony from Dr. Clark, which defendants argue is in conflict with the Industrial Commission's findings of fact. Defendants have elsewhere argued that Dr. Clark is a substance abuser who has lost all hospital privileges, and who is currently being prosecuted in federal court for distribution of controlled substances. Such evidence was before the Industrial Commission in its determination of whether to make findings of fact based upon the testimony—and thus the credibility—of Dr. Clark. We reiterate that the Commission's findings " 'are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)), and that "[i]t is the Commission's duty to judge the credibility of the witnesses and to determine the weight given to each testimony." *Gordon v. City of Durham*, 153 N.C. App. 782, 786, 571 S.E.2d 48, 51 (2002) (citing *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998)).

Secondly, the challenged findings of fact concern whether or not plaintiff had tried to get controlled substances from Dr. Clark. Evidence of plaintiff's purported substance abuse was also before the Industrial Commission in its determination of plaintiff's credibility. Having resolved issues of credibility to its satisfaction, the Industrial Commission made findings of fact that support its determination regarding plaintiff's legal entitlement to workers' compensation. This assignment of error is overruled.

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[4] Defendants argue next that the Industrial Commission's finding "that an injury occurred which disabled plaintiff, must be set aside for lack of competent evidence to support it." We disagree.

Defendants argue that "[t]he unrebutted evidence established that plaintiff's back problems developed over a period of time[,]" and thus that there is no competent evidence that the injury occurring on 1 January 2000 was disabling. This argument is based upon evidence tending to show that plaintiff went to several medical care providers during 1999 and 2000 claiming to suffer from painful conditions, including back pain, that could only be treated with controlled substances. Defendants also direct our attention to evidence tending to show that, on one or more of plaintiff's "drug-seeking"

visits to medical providers, plaintiff listed an employer on the waiting room form.

As defendants argue, one plausible interpretation of the evidence is that plaintiff's condition was due to a long and gradual development of a back condition, rather than from the fall on 1 January 2000, and that the fall did not prevent plaintiff from, *e.g.*, bowling, working, or moving a chair, activities which defendants contend are documented by witness testimony. However, another plausible interpretation, depending on one's determination of the relative strength and credibility of testimony, is that plaintiff suffered a *bona fide* injury to his back on 1 January 2000, which was separate and apart from his alleged substance abuse or his false statements to certain medical providers.

" '[T]he findings of fact made by the Commission are conclusive on appeal, . . . if supported by competent evidence . . . *even though there is evidence which would support a finding to the contrary.*' " *Hunter v. Perquimans County Bd. of Educ.*, 139 N.C. App. 352, 355, 533 S.E.2d 562, 564, (quoting *Hansel*, 304 N.C. at 49, 283 S.E.2d at 104), *cert. denied*, 352 N.C. 674, 545 S.E.2d 424 (2000). *Rivera v. Trapp*, 135 N.C. App. 296, 304, 519 S.E.2d 777, 782 (1999) ("if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal"). This assignment of error is overruled.

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[5] Finally, defendants argue that the Industrial Commission erred by imposing a fine for failure to obtain workers' compensation insurance. Defendants contend first that the Industrial Commission "erred as a matter of law when it determined that the civil penalty provisions of N.C.G.S. § 97-94(b) are mandatory[.]" We do not agree.

N.C.G.S. § 97-94(b) (2001), which governs imposition of a civil penalty against an employer such as Herbie's Place, provides in pertinent part:

> Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation *shall be punished* by a penalty of one dollar ($1.00) for each employee, but not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) for each day of such refusal or neglect, and until the same ceases. . . . The penalty herein provided may be assessed by the Industrial Commission administratively, with the right to a hearing if requested within 30 days after

> notice of the assessment of the penalty and the right of review and appeal as in other cases. . . .

(emphasis added). The language "shall be punished" indicates that the imposition of a penalty against the employer is mandatory if the employer "refuses or neglects" to obtain workers' compensation insurance. *See Pollock v. Waspco Corp.*, 148 N.C. App. 381, 388, 559 S.E.2d 567, 572 (2002) ("G.S. § 97-18(g) [is] mandatory" where statute states penalty "shall be added" in certain situations); *Living Centers-Southeast, Inc. v. N.C. Dep't of Health & Human Servs.*, 138 N.C. App. 572, 580, 532 S.E.2d 192, 197 (2000) ("[o]rdinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory") (quoting *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978)).

Defendants argue that because the statute also provides that "[t]he penalty herein provided may be assessed by the Industrial Commission administratively," that the imposition of a penalty is optional. However, we agree with the Industrial Commission that this language "does not give the Commission discretion as to whether or not the penalty should be assessed . . . [but] allows the Industrial Commission some discretion in deciding whether or not to assess the penalty administratively without a hearing." Defendants also contend that, were this Court to decide that the Industrial Commission's imposition of a civil penalty is discretionary, the presence of "considerable mitigating evidence" would make it inappropriate to impose a civil penalty upon the present defendant. However, as we conclude that imposition of civil penalties is required under the statute, we necessarily reject defendants' argument that such penalties may only be assessed in the absence of "mitigating evidence."

Defendants also argue that, before a civil penalty could be imposed against either defendant, the Industrial Commission was required to make certain findings establishing the existence of "neglect" which defendants contend requires proof of "something more than mere failure to carry out a duty." We disagree.

Under N.C.G.S. § 97-86 (2001), an appeal from an opinion and award of the Industrial Commission is taken "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions[, and the] procedure for the appeal shall be as provided by the rules of appellate procedure." Further, compliance with the North Carolina Rules of Appellate Procedure is mandatory. *Marsico v. Adams*, 47 N.C. App. 196, 266

S.E.2d 696 (1980). N.C.R. App. P. 10(a) states that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal." *See Singleton v. Haywood Elec. Membership Corp.*, 151 N.C. App. 197, 204, 565 S.E.2d 234, 239 (2002) (where defendant "failed to set out [relevant] argument as an assignment of error in the record on appeal" this Court holds that "defendant has failed to properly preserve this question for appellate review"). Further, N.C.R. App. P. 10(b) requires that "to preserve a question for appellate review . . . [i]t is . . . necessary for the complaining party to obtain a ruling upon the party's request, objection or motion."

In the instant case, defendants failed to assign error to any of the Commission's findings of fact regarding defendants' failure to secure workers' compensation insurance. Thus, these findings are conclusively established on appeal. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) ("each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding") (citing *Taylor v. N.C. Dept. of Transportation*, 86 N.C. App. 299, 357 S.E.2d 439 (1987). Therefore, our review "is limited to the question of whether the [Industrial Commission's] findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *Okwara*, 136 N.C. App. at 591-92, 525 S.E.2d at 484.

In the instant case, the Industrial Commission made the following pertinent findings of fact:

> 1. . . . Herbie's Place was a limited liability company operating a restaurant business. . . .
>
> 2. Defendant Bill Kennedy was a corporate officer with the authority and ability to bring the defendant-employer into compliance with [N.C.G.S. §] 97-93.
>
> 3. . . . defendant-employer regularly employed three or more persons.
>
> . . . .
>
> 5. . . . defendant-employer failed to maintain a policy of workers' compensation insurance . . . and Bill Kennedy failed to exercise his authority and ability to bring defendant- employer into compliance with [N.C.G.S. §] 97-93.
>
> . . . .

The imposition of a penalty against Herbie's Place is governed by G.S. § 97-94(b), which addresses imposition of a civil penalty against an employer and provides in part that "[a]ny employer required to secure the payment of compensation under this Article who refuses or *neglects to secure such compensation* shall be punished by a penalty[.]" (emphasis added). Assessment of the penalty against individual defendant Kennedy is governed by N.C.G.S. § 97-94(d) (2001), which provides in relevant part as follows:

> . . . *Any person who, with the ability and authority* to bring an employer in compliance with G.S. 97-93, *neglects to bring the employer in compliance*, shall be guilty of a Class 1 misdemeanor. Any person who violates this subsection *may be assessed a civil penalty* by the Commission in an amount up to one hundred percent (100%) of the amount of any compensation due the employer's employees injured during the time the employer failed to comply with G.S. 97-93.

(emphasis added). Thus, a civil penalty *must* be imposed upon an employer who neglects to secure workers' compensation, and *may* be imposed upon an individual who neglects to bring the employer into compliance. As discussed above, the Commission's findings that defendant-employer was subject to the provisions of the workers' compensation statute yet failed to obtain insurance, and that Kennedy was a corporate official who had the ability and authority to enforce compliance yet failed to do so, are conclusively established. However, defendants argue that the Industrial Commission's findings that "defendant-employer failed to maintain a policy of workers' compensation insurance" and that defendant "Kennedy failed to exercise his authority and ability to bring defendant-employer into compliance" do not support the Industrial Commission's conclusion of law that defendants were in violation of N.C.G.S. § 97-93 (2001), because of the Commission's use of the phrase "failed to" rather than "neglected to" comply with the statute. We do not agree.

Defendants propose that in our analysis of G.S. § 97-94(b) and (d), we apply to the word "neglect" the definition given to the word when it is used as a noun, as in "the neglect of a duty," and further assert that "neglect" must mean "something more than mere failure to carry out a duty." However, in G.S. § 97-94(b) and (d), the word "neglect" is found in the phrase "*neglects to secure such compensation*," and, thus, may properly be defined as follows: "([where] foll[owed] by verbal noun, or *to* + infin[itive]): *Fail, overlook, or for-*

get the need to." Oxford Encyclopedic English Dictionary 970 (Judy Pearsall& Bill Trumble, eds., 2nd ed. 1995) (emphasis added). We conclude that in the context of N.C.G.S. § 97-94, the phrases "neglects to" secure workers' compensation, or "neglects to" bring the employer into compliance, carry essentially the same meaning as "fails to secure" workers' compensation or "fails to bring the employer into compliance." This conclusion is supported by prior appellate opinions addressing G.S. § 97-94, in which the phrase "*neglects to*" obtain workers' compensation coverage is used interchangeably and synonymously with "*fails to*" obtain coverage. *See, e.g., Harrison v. Tobacco Transp., Inc.*, 139 N.C. App. 561, 570, 533 S.E.2d 871, 877, *disc. review denied*, 353 N.C. 263, 546 S.E.2d 96 (2000) (where Industrial Commission finds that "defendant-employer had *failed to secure* workers' compensation insurance" this Court affirms imposition of fine, holding that "the Commission correctly determined that [employer] *had failed to procure necessary insurance* for its North Carolina operations, and thus, that [employer] is in violation of G.S. § 97-94") (emphasis added); *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 883, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000) ("where the employer *fails to secure* the payment of compensation . . . such employer shall be liable during continuance of *such refusal or neglect*") (emphasis added). Moreover, regardless of which definition of 'neglect' is applied, the existence of neglect is established in the present case, in which defendants concede that they "[were] very tied up and preoccupied" and simply "forgot about it." We conclude that the Industrial Commission did not err by imposing a penalty on defendants for their failure to obtain workers' compensation insurance as required by G.S. § 97-94. This assignment of error is overruled.

For the reasons discussed above, the opinion and award of the Industrial Commission is

Affirmed.

Judges McGEE and HUDSON concur.

STATE OF NORTH CAROLINA v. SAMUEL EMANUEL MAHATHA, DEFENDANT

No. COA02-322

(Filed 15 April 2003)

1. Confessions and Incriminating Statements— voluntariness—waiver of Miranda rights—mental capacity

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motion to suppress post-arrest inculpatory statements he made to police even though defendant contends they were made involuntarily and obtained in violation of Miranda, because: (1) four officers who interviewed defendant testified that a Miranda waiver was obtained and the interview was conducted under noncoercive conditions; (2) evidence was presented that defendant understood his Miranda rights and that he was not intoxicated or otherwise impaired when he made his Miranda waiver and statements; (3) the trial court's findings and the evidence permitted a conclusion that defendant had sufficient mental capacity to waive his Miranda rights and voluntarily make inculpatory statements; (4) the totality of circumstances surrounding defendant's post-arrest statements support the trial court's conclusion that the statements were made pursuant to defendant's knowing, intelligent, and voluntary waiver of his Miranda rights including that interrogations of longer duration than the one at hand have been held to be not so lengthy as to render them coercive, defendant made no complaints of being hungry and was provided with drinks and bathroom breaks, the police did not make any threats of physical violence against defendant or promises to him in exchange for his Miranda waiver and statement, and defendant had some familiarity with the criminal justice system; (5) evidence of an officer's deception or trickery leading defendant to mistakenly believe that his fingerprints had been recovered from the victim officer's holster was insufficient standing alone to render defendant's inculpatory statements inadmissible; and (6) the actions of the police in not allowing an attorney to see defendant even though he was appointed by the public defender to represent defendant did not invalidate defendant's Miranda waiver or statements when defendant never requested an attorney.

2. Criminal Law— competency to stand trial—ability to assist defense in rational or reasonable manner

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's pretrial motion under N.C.G.S. § 15A-1001 that he be declared incompetent to stand trial even though defendant contends he was unable to assist in his defense in a rational or reasonable manner, because: (1) two expert witnesses testified that based on their interviews with defendant and reviews of his test results and school and medical records, they believed that defendant did not suffer from any active mental illness and that he was competent to stand trial; (2) defendant's recitation to a doctor of the key facts of the case against him also supports the conclusion that defendant was able to assist in his defense in a rational and reasonable manner; and (3) contrary to defendant's assertion, the evidence supports the trial court's finding that another doctor did not give an opinion as to defendant's competency to proceed, and therefore, the trial court properly considered his testimony at the competency hearing.

Appeal by defendant from judgment entered 15 February 2001 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2003.

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

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

ELMORE, Judge.

On 12 October 1998, defendant Samuel Mahatha was indicted for the murder of Captain Anthony Stancil of the Mecklenburg County Sheriff's Department, and for robbery with a dangerous weapon. Defendant was tried at the 16 January 2001 Criminal Session of Mecklenburg County Superior Court. On 9 February 2001, defendant was found guilty of first-degree murder and robbery with a dangerous weapon. On 15 February 2001, the trial court sentenced defendant to life imprisonment without parole for the murder of Captain Stancil and a consecutive term of imprisonment for a minimum of 103 and a maximum of 133 months for the robbery with a dangerous weapon conviction.

On appeal, defendant contends that the trial court erred in denying his motion to suppress post-arrest inculpatory statements he made to police, which statements defendant contends were made involuntarily and obtained in violation of *Miranda*. Defendant also contends that the trial court erred in finding him competent to stand trial. For the reasons stated herein, we conclude that defendant's trial was free of prejudicial error, and we therefore uphold his convictions and sentence.

The State's evidence tended to show that shortly after midnight on 29 September 1998, defendant and Celeste Davis traveled to the Harris Teeter supermarket on W.T. Harris Boulevard in Charlotte, where Captain Stancil was moonlighting as a security officer. After being in the store for a short time, Davis noticed that defendant had what appeared to be "a package of meat of some kind" concealed in his shirt. Davis then lost sight of defendant and paid for her purchase. As Davis was exiting the store, she ran into Kimberly Nicholson, who told Davis that someone had been shot outside and to call 911. Davis looked outside in the direction where Nicholson was pointing and saw defendant running away from the store, with "something shining in his hand."

Nicholson testified at trial that she had just arrived at the Harris Teeter when she noticed two men in front of the store engaged in a "confrontation" involving a package held by one of the men. As Nicholson approached the store's entrance, she heard a loud shot. She looked back and saw one of the men, later identified as Captain Stancil, on the ground, and the other man standing over him with a gun in his hand. A package of crab legs was on the hood of a nearby car. The man bent over Captain Stancil and then ran through the parking lot away from the store. After approaching Captain Stancil and finding that he did not have a pulse, Nicholson ran into the store, where she encountered Davis. Captain Stancil, who had been shot in the head through the left eye, died at the scene. His service weapon was missing.

After the police arrived, Davis stated that she drove defendant to the store and she thought defendant had killed Captain Stancil. An intensive search for defendant ensued and continued throughout the night. Defendant was arrested at his grandmother's Charlotte home at 10:15 a.m. on 29 September 1998. Defendant had in his possession a brown wallet containing $63.00 in currency and a single Federal .40-caliber bullet, the ammunition type employed by Captain Stancil's service weapon.

A hearing to determine whether defendant was competent to stand trial was held on 1 December 2000. Defendant stipulated that the only issue for determination was whether defendant was able to assist his attorneys in a rational and reasonable manner in providing his defense. The evidence presented at this hearing tended to show that while in elementary school, defendant was placed in a program for educable mentally handicapped children; defendant was later moved into a program for children with behavioral and emotional handicaps, where he remained until dropping out of high school. Defendant's school records reveal performance consistently significantly below grade level for reading comprehension. Defendant's medical records reveal that he contracted bacterial meningitis when he was just over one year old.

At the competency hearing, defendant presented expert testimony from George Baroff, Ph.D ("Dr. Baroff"). Dr. Baroff, who holds a doctorate in clinical psychology and has extensive experience administering intelligence tests to mentally retarded individuals, was admitted as an expert in the area of psychology with an emphasis in the field of mental retardation. Dr. Baroff testified that his testing indicated defendant was seriously mentally retarded with a full-scale IQ of 46, although previous tests had scored defendant's IQ somewhat higher. Dr. Baroff also testified that bacterial meningitis "is associated with significant cognitive impairment" in children. Dr. Baroff testified that he believed defendant lacked the capacity to assist his counsel in a rational and reasonable way in the presentation of his defense. On cross-examination, Dr. Baroff testified that defendant indicated the key facts of this case were the bullet, the witness against him, and the fact that he was at the Harris Teeter on the night Captain Stancil was shot.

Roy Mathew, M.D. ("Dr. Mathew"), a professor of psychiatry and associate professor of radiology at Duke University, also testified for defendant at the competency hearing. Dr. Mathew was admitted as an expert in the field of psychiatry with a specialization in alcohol and substance abuse. Dr. Mathew testified that he was primarily attempting to determine the effect of defendant's alcohol and drug abuse on his mental status, and that due to defendant's failure to cooperate, he was unable to make such a determination. The trial court found that Dr. Mathew did not give an opinion as to whether or not defendant was competent to stand trial.

Nicole Wolfe, M.D. ("Dr. Wolfe"), a forensic psychiatrist at Dorothea Dix Hospital in Raleigh, testified for the State at the com-

petency hearing. Dr. Wolfe was admitted as an expert in forensic psychiatry. Dr. Wolfe testified that she did not believe that defendant was suffering from any active mental illness, nor did she believe defendant was mentally retarded. Dr. Wolfe also testified that she did not believe defendant suffered from any mental disabilities as a result of contracting bacterial meningitis in early childhood.

Mr. Bart Abplanalp ("Abplanalp"), a Postdoctoral Fellow in clinical psychology at Dorothea Dix Hospital, also testified for the State at the competency hearing. Abplanalp conducted psychological testing and performed competency evaluations at Dix and was admitted as an expert in clinical psychology. Abplanalp testified that he administered psychological testing to defendant, including the WASI test, which is a standard test designed to measure intelligence. Abplanalp testified that defendant's results on the WASI test indicated he had a full-scale IQ of 54. Abplanalp testified that defendant's behavior during the WASI test differed notably from defendant's behavior while talking informally with him prior to the test, and that in Abplanalp's opinion, defendant intentionally performed poorly on the test. Abplanalp testified that he believed defendant's school records failed to show any mental retardation. Abplanalp testified that in his opinion, defendant was competent to stand trial. The trial court denied defendant's motion and found defendant competent to proceed.

On 20 December 2000 a hearing was held on defendant's motion to suppress his post-arrest statements. At the suppression hearing, Charlotte-Mecklenburg Police Officer Carmen Mendoza testified that she and Officer Mark Faulkenberry transported defendant to the Law Enforcement Center ("LEC") after his arrest. Officer Mendoza testified that at no point did either she or Officer Faulkenberry initiate any conversation with defendant, but that once defendant was inside the vehicle, defendant "repeatedly asked me about his wallet." During the twenty-two minute ride to the LEC, defendant spoke almost continuously, often in a rhyming or rapping manner and sometimes unintelligibly. Officer Mendoza testified that she never gave a *Miranda* warning to defendant on the way to the LEC because she did not ask him any questions; nor did defendant ever ask for a lawyer or say that he wanted to exercise his right to remain silent. Officer Mendoza testified that defendant exhibited no signs of drug or alcohol impairment.

Evidence presented at the suppression hearing tended to show that upon arrival at the LEC, defendant was taken to a second-floor interview room. Charlotte-Mecklenburg Police Investigator Mark E.

Corwin asked defendant if he wanted anything to eat or drink; defendant declined food but asked for a soft drink, which Officer Corwin immediately procured. At 12:54 p.m., Officer Corwin re-entered the interview room with his colleague, Officer Harold R. Jackson, to find defendant prone on the floor. Both officers testified that defendant did not appear to be asleep, and that defendant showed no signs of intoxication. Defendant got up and sat in a chair when asked to do so by Officer Corwin. Before the officers could begin advising defendant of his *Miranda* rights, and without being asked anything by them, defendant stated that he "[had] not killed anyone . . . I was in the store around 9:00 p.m. Celeste drove me there." At the suppression hearing, Officer Corwin testified that he let defendant finish making this statement and then advised defendant of his *Miranda* rights by going over a standard, printed "waiver of rights" form with defendant. Officer Corwin testified that each of defendant's *Miranda* rights were printed individually on the form; that he read each right aloud to defendant; and that defendant verbally acknowledged that he understood each of his *Miranda* rights. Defendant's initials appear in the space provided on the form beside each of the enumerated *Miranda* rights. Officer Corwin testified that he then had defendant read aloud the following paragraph from the "waiver of rights" form:

> I understand my rights as explained by Officer M.E. Corwin/ H.R. Jackson. I now state that I do wish to answer questions at this time and that I do not wish to have a lawyer here during questioning.

Officers Corwin and Jackson testified that they had no concerns about defendant's level of intelligence and that they believed defendant understood the *Miranda* warnings. Defendant signed the "waiver of rights" form at 1:02 p.m.

For approximately the next two hours, Officers Corwin and Jackson questioned defendant about the murder of Captain Stancil. Officers Corwin and Jackson each testified that at no time did defendant ask for a lawyer or indicate that he wished to terminate the interview. Defendant never complained of being hungry or tired. Neither officer made any promises to defendant. Officer Corwin testified that defendant was never denied a drink or bathroom break, and that defendant took at least one bathroom break during their interview. Defendant never confessed to Officers Corwin and Jackson that he shot Captain Stancil, but he did repeat his earlier statement that he had been at the Harris Teeter with Celeste Davis

the previous night sometime before Captain Stancil was killed. Officer Jackson testified that defendant asked them a series of questions, including whether Davis had mentioned his name; what evidence they had against him; and how much time he could get. Officers Corwin and Jackson ended their interview of defendant at 2:50 p.m. and exited the interview room.

At 3:03 p.m., Sergeant Tom Athey and Officer Tony Rice, who had been observing via video monitor the interview conducted by Officers Corwin and Jackson, began their own interview of defendant. At the suppression hearing, Sergeant Athey and Officer Rice each testified that they had observed Officer Corwin advise defendant of his *Miranda* rights, and that they had no concerns about defendant's intelligence level or ability to understand his rights. Each officer testified that defendant showed no signs of intoxication, and that at no point did defendant ask for an attorney. During their interview, defendant never complained of being tired or hungry. The officers testified that they neither threatened defendant nor made any promises to him during the interview. At the outset of the interview, defendant stated that he knew the policeman had been shot and asked "Where did he get shot, in his eye?" Defendant continued to assert that he had been at the Harris Teeter with Celeste Davis the previous night several hours before Captain Stancil was killed, and that he did not shoot Captain Stancil.

Later in the interview, in response to a series of "true/false" questions asked by Officer Rice, defendant acknowledged that Captain Stancil had confronted him as defendant attempted to leave the store with a package of crab legs concealed under his shirt. Defendant then stated that a gun which defendant had hidden in his sock fell out and discharged, striking Captain Stancil in the head. After Officer Rice questioned the plausibility of defendant's account, defendant stated that the gun was actually hidden in his waistband, and he pulled it out and shot Captain Stancil. Defendant also stated that after shooting Captain Stancil he took the deputy's service weapon and fled. When Officer Rice asked defendant whether he had grabbed Captain Stancil's holster while removing the weapon, defendant stated "So my fingerprints are on the holster," to which Officer Rice replied "Yes," although defendant's fingerprints were never recovered from the holster. Defendant then requested a cup of water.

After a short break, Officer Rice returned with a cup of water and a tape recorder and asked defendant to give a recorded statement. Defendant agreed, and the officers began audio-taping the interview

at 4:27 p.m. This recording was introduced as an exhibit and played at the suppression hearing. When Officer Rice asked defendant to "tell me in your own words what happened out there at the Harris Teeter," the following exchange took place:

> DEFENDANT: No. I don't want to tell what happen [sic] in my own words. It should be right here on the paper [indicating the notes Officer Rice had taken during earlier portions of the interview].
>
> INVESTIGATOR RICE: Do you just want me to read this, is that okay?
>
> DEFENDANT: That will work.

For the next thirteen minutes, Officer Rice proceeded to ask defendant a series of "yes/no" questions based on the notes he had taken earlier in the interview. In his collective responses to these "yes/no" questions, defendant acknowledged the accuracy of his account of pulling a gun from his waistband and shooting Captain Stancil. Defendant also acknowledged ejecting a bullet from Captain Stancil's service weapon and placing it in his wallet. Defendant also stated that he did not mean to shoot Captain Stancil and that after being confronted by the deputy, he was "trying to get away and the gun just went off. I'm seeing if the jury buys that." Sergeant Athey and Officer Rice concluded their interview at 4:40 p.m.

Harold Bender, defendant's trial counsel, testified by affidavit that on 29 September 1998 he agreed to represent defendant in the instant matter pursuant to a request from the public defender. Defendant was unaware of Bender's appointment while he was being questioned. Bender testified that he arrived at the LEC at 1:18 p.m. on 29 September 1998 and asked to see defendant, but was told that he could not. At that time Officers Corwin and Jackson were approximately twenty-four minutes into their interview of defendant. Over the next four hours, while defendant was being interviewed by Officers Corwin and Jackson, and then by Sergeant Athey and Officer Rice, Bender's repeated requests to see defendant were denied.

At the suppression hearing, Officer Corwin testified that he knew Bender was at the LEC and wished to see defendant, and that he never told this to defendant. Sergeant Athey testified that upon learning of Bender's presence, he directed the officer on duty at the LEC's front desk not to allow Bender onto the second floor. Sergeant Athey also testified that he did not tell defendant about Bender. Sergeant Athey testified that shortly after he and Officer Rice concluded their interview, they encountered Bender in the LEC's lobby, at which time

Sergeant Athey told Bender that defendant "had not asked for Mr. Bender or any other attorney" and that defendant was being taken to the Mecklenburg County Jail. The trial court denied defendant's motion to suppress his post-arrest statements.

I.

[1] Defendant first assigns error to the trial court's denial of defendant's pre-trial motion to suppress inculpatory statements he made to the police following his arrest. Defendant contends that these statements should be suppressed because they were not made voluntarily, nor were they made pursuant to a voluntary, knowing, and intelligent waiver of defendant's constitutional right against compulsory self-incrimination. U.S. Const. amend. V; N.C. Const. art. I, § 23; *Miranda v. Arizona*, 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 706-07 (1966). We disagree.

In reviewing a trial court's ruling on a motion to suppress, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). However, the trial court's conclusions of law are fully reviewable by this Court. *State v. Perdue*, 320 N.C. 51, 59, 357 S.E.2d 345, 350 (1987).

At the conclusion of the suppression hearing, the trial court made findings of fact and conclusions of law, in pertinent part, as follows:

> That the Defendant was arrested at his grandmother's home on the morning of September the 29th, 1998, at approximately 10:15 A.M.; [t]hat Officer Carmen Mendoza . . . testified . . . she accompanied [defendant] to the Law Enforcement Center and took notes of what he said on the way there; . . . [t]hat on the way to the Law Enforcement Center, the Defendant asked about his wallet, saying that it had money in it, which according to other testimony . . . proved to be correct; [t]hat [defendant] cursed and talked constantly[;] . . . Officer Mendoza never at any time asked the Defendant questions, and while with her the Defendant never requested a lawyer . . . ; Officer Mendoza observed no indication that the Defendant was impaired or smelled alcohol on his person . . . ; [u]pon arrival at the Law Enforcement Center, Sergeant Athey, Officer Jackson, Officer Corwin . . . and Officer Rice . . . participated in the interview of the Defendant, which began around [12:54 P.M.] on September the 29th, 1998, and continued for several hours thereafter; [t]hat . . . on September the

29th, 1998 . . . Harold Bender agreed to accept an appointment to represent the Defendant as his attorney in this case . . . ; Harold Bender went to the Law Enforcement Center and arrived there at 1:18 P.M. and asked to see the Defendant[;] [a]lthough Mr. Bender made repeated request to see the Defendant from 1:18 P.M. until 5:19 P.M., when Sergeant Athey informed Mr. Bender that the Defendant had not asked for a lawyer . . . Mr. Bender was not allowed to see the Defendant during this time . . . ; [t]hat Officer Jackson and Officer Corwin . . . began the interview with the Defendant at [12:54 P.M.], and continued until around 2:50 P.M., that day; [d]uring this time Officer Corwin advised the Defendant of his *Miranda* rights . . . both of the officers, Corwin and Jackson, stated in their opinion that the Defendant understood his *Miranda* rights as they were explained to him by Officer Corwin[;] [b]oth stated that he, the Defendant, did not appear impaired in any way . . . ; [p]rior to signing the *Miranda* rights waiver form, the Defendant was asked to read the last portion of the form, which states in essence that he understood the form but did not desire a lawyer at that time and desired to answer the officers['] questions; [u]pon Officers Corwin and Jackson leaving the interview room, Sergeant Athey and Officer Rice proceeded with the conclusion of the interview; [t]hat both Sergeant Athey and Officer Rice stated that the Defendant did not ask to have an attorney present . . . and they both stated that they did not notice anything wrong with the Defendant or that he appeared to be intoxicated or in any other way impaired; [t]hat . . . during the time Sergeant Athey and Officer Rice were with the Defendant, the Defendant made no complaints of being hungry, . . . and [defendant] admitted to shooting Deputy Stancil, initially stating that the gun had been hidden in his sock and it fell out of his sock and [defendant] subsequently made a statement; [t]hat some yes and no [questions] were asked of the Defendant and he replied with yes or no answers . . . ; [t]hat two teachers that had previously taught the Defendant . . . testified for the Defendant in this matter, and both stated that . . . at the time they saw [defendant], he was noted to be a behaviorally emotionally handicapped person and the[y] both stated that they did not believe that he could understand [his] *Miranda* rights, but both stated that they did not know whether he understood the *Miranda* rights that were given to him or not; [t]hat [Dr.] George Baroff also testified for the Defendant as an expert in the field of psychology with a speciality [sic] in mental retardation and a speciality [sic] in evaluating

> the issues of a waiver of the Miranda rights; . . . [t]hat [Dr.] Baroff testified that when he tested the Defendant . . . on the 19th of December [Dr. Baroff]. . . found that [defendant] had a reading comprehension IQ of 62; [t]hat it was [Dr. Baroff's] opinion that the Defendant did not understand his rights because of the mode of presentation of the rights as he understood it and based on his interview with [defendant] and from what he understood about the case; [however, Dr.] Baroff did testify that he did not know whether the Defendant understood the rights form or not; [t]hat there was evidence presented that the Defendant had been involved in other criminal activity in 1996 and that at that time a waiver of rights form was read to him in basically the same manner that Officer Corwin read the rights to him, and in 1996 this rights form was explained to [defendant] by Officer Walter, and it was Officer Walter's testimony that the Defendant understood the waiver of rights at that time . . . . Based on the foregoing findings of fact and based on the totality of the circumstances, the [c]ourt makes the following conclusions of law: That the Defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights before making any statements to the officers herein; [t]hat based thereon, the [c]ourt hereby denies the Defendant's motion to suppress his confession in this case.

Defendant contends that the trial court's findings do not support its conclusions that his post-arrest statements were made voluntarily and pursuant to a knowing, voluntary, and intelligent waiver of his *Miranda* rights. Specifically, defendant contends that his subnormal intelligence and mental condition combined with the coercive nature of the police interview to preclude a conclusion that both his *Miranda* waiver and his inculpatory post-arrest statements were made voluntarily.

First, we note that the trial court's pertinent findings are supported by competent evidence, and are thus binding on this Court. *Perdue*, 320 N.C. at 59, 357 S.E.2d at 350. At the suppression hearing, all four of the officers who interviewed defendant testified that the *Miranda* waiver was obtained, and the interview was conducted, under non-coercive conditions. Evidence was also presented that defendant understood his *Miranda* rights and that he was not intoxicated or otherwise impaired when he made his *Miranda* waiver and statements. We are bound by the trial court's findings even where the evidence is conflicting. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826.

Next, we turn to the question of whether the trial court's findings support its conclusion that defendant's post-arrest statements were made voluntarily and pursuant to a knowing, intelligent, and voluntary waiver of his *Miranda* rights. Because defendant's purported waiver of his *Miranda* rights and the inculpatory statements arose within the same set of circumstances, we discuss the voluntariness of the inculpatory statements as a single issue. *State v. McKoy*, 323 N.C. 1, 22, 372 S.E.2d 12, 23, *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). A trial court's conclusion that a defendant's statement was given voluntarily is fully reviewable on appeal. *State v. Kemmerlin*, 356 N.C. 446, 457, 573 S.E.2d 870, 880 (2002). Upon review, this Court considers the totality of the circumstances surrounding the defendant's statement. *Id.* at 458, 573 S.E.2d at 880. The many factors to be considered include the length of the interrogation, the defendant's age and mental condition, whether the defendant had been deprived of food or sleep, whether the defendant was in custody, whether the defendant was deceived, whether the defendant was held incommunicado, whether threats of violence were made against the defendant, whether promises were made to obtain the confession, whether the defendant's *Miranda* rights were violated, and the defendant's familiarity with the criminal justice system. *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). "The presence or absence of one or more of these factors is not determinative." *State v. Barlow*, 330 N.C. 133, 141, 409 S.E.2d 906, 911 (1991).

In the instant case, the totality of the circumstances surrounding defendant's post-arrest statements support the trial court's conclusion that the statements were made pursuant to defendant's knowing, intelligent, and voluntary waiver of his *Miranda* rights. The trial court found that "Officer Corwin advised defendant of his *Miranda* rights" and that Officers Corwin and Jackson "stated in their opinion that the Defendant understood his *Miranda* rights as they were explained to him by Officer Corwin." The trial court also found that defendant read aloud the portion of the *Miranda* waiver form "which states in essence that [defendant] understood the form but did not desire a lawyer at that time and desired to answer the officers[']' questions" and that defendant then signed the form. The trial court also found that Officers Mendoza, Jackson, Corwin, Rice, and Sergeant Athey each observed that defendant did not appear intoxicated or otherwise impaired while he was in their custody, and that each officer stated that defendant never requested an attorney.

The trial court also made findings that two of defendant's former schoolteachers "noted [defendant] to be a behaviorally emotionally handicapped person" and that Dr. Baroff determined that defendant "had a reading comprehension IQ of 62." However, our courts

> []have consistently held that a defendant's subnormal mental capacity is a factor to be considered when determining whether a knowing and intelligent waiver of rights has been made. Such lack of intelligence does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made.

State v. Fincher, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (citations omitted). The trial court found that while neither the schoolteachers nor Dr. Baroff believed that defendant was capable of understanding his *Miranda* rights, they did not know conclusively whether he was able to understand them or not. Further, the record contains evidence that defendant functions at a higher mental level than that ascribed to him by Dr. Baroff. At the suppression hearing, each officer who participated in the interview testified that defendant spoke and behaved rationally and coherently while being questioned. There was testimony that during the interview, defendant asked the officers questions concerning the evidence against him, which is further evidence of defendant's capacity for rational thought. The trial court's findings and the evidence of record thus permitted a conclusion that defendant had sufficient mental capacity to waive his *Miranda* rights and voluntarily make inculpatory statements.

The trial court made findings that Officers Jackson and Corwin interviewed defendant on 29 September 1998 from approximately 12:54 p.m. until approximately 2:50 p.m., and that Sergeant Athey and Officer Rice thereafter questioned defendant until approximately 4:40 p.m. Our Supreme Court has held that interrogations of longer duration than the one at hand are not so lengthy as to render them coercive. *State v. Greene*, 332 N.C. 565, 580, 422 S.E.2d 730, 739 (1992); *State v. Morgan*, 299 N.C. 191, 199-200, 261 S.E.2d 827, 832, *cert. denied*, 446 U.S. 986, 64 L. Ed. 2d 844 (1980). Further, the trial court found that defendant "made no complaints of being hungry" to Sergeant Athey or Officer Rice, and the record reveals that defendant was provided with a soft drink, a cup of water, and bathroom breaks upon request during his interview. The trial court did not find that the police made either any threats of physical violence against defendant or promises to him in exchange for his *Miranda* waiver and statement, and the record contains no evidence of such circumstances.

The trial court also found that defendant had some familiarity with the criminal justice system arising from an episode in 1996 where he was questioned by police after "a waiver of rights form was read to him in basically the same manner that Officer Corwin read the rights to him." A defendant's prior experience with the criminal justice system, even where the experience consists of a single prior arrest, is "an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly." *Fincher*, 309 N.C. at 20, 305 S.E.2d at 697.

While there is evidence that Officer Rice led defendant to mistakenly believe that his fingerprints had been recovered from Captain Stancil's holster, "[d]eception or trickery is merely one of the circumstances that the court may consider in looking at the totality of the circumstances surrounding the confession." *State v. Jackson*, 308 N.C. 549, 582, 304 S.E.2d 134, 152 (1983). Standing alone, such actions are insufficient to render defendant's inculpatory statements inadmissible. *Id.*

Finally, we note the trial court's finding that "at no time from the time he . . . was taken to the Law Enforcement Center on September 29, 1998, until the time he left the Law Enforcement Center to go to the Intake Center, did the Defendant ever, at any time, request a lawyer . . . to be present while he was talking to the officers in this matter." Our courts have held that:

> the law in North Carolina is that the right to counsel belongs to the defendant, and he retains it even after counsel is appointed. Thus, the attorney may advise a defendant, but he cannot control defendant's own exercise of his constitutional rights. If defendant's waiver of his right to counsel is otherwise voluntary, knowing, and intelligent, his lawyer's wishes to the contrary are irrelevant.

State v. Reese, 319 N.C. 110, 135, 353 S.E.2d 352, 366 (1987) (citations omitted) (*overruled on other grounds by State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998)). We are bound by the trial court's finding that defendant never requested an attorney, since that finding is supported by competent evidence. *Perdue*, 320 N.C. at 59, 357 S.E.2d at 350. Despite the trial court's findings that (1) Harold Bender was appointed to represent defendant on the day defendant was arrested; (2) Bender arrived at the LEC shortly after defendant's interview began and repeatedly requested that he be allowed to see defendant,

to no avail; and (3) Sergeant Athey knew of Bender's presence at the LEC and ordered that Bender not be allowed onto the second floor, we must therefore conclude that the actions of the police in not allowing Bender to see defendant at the LEC did not invalidate defendant's *Miranda* waiver or statements. *Moran v. Burbine*, 475 U.S. 412, 422, 89 L. Ed. 2d 410, 421 (1986) (rejecting the argument that police refusal to inform defendant of his attorney's attempts to reach him undermines validity of defendant's otherwise proper waiver); *State v. Hyatt*, 355 N.C. 642, 658, 566 S.E.2d 61, 72 (2002), *cert. denied*, —— U.S. ——, 154 L. Ed. 2d 823 (2003) ("an otherwise intelligent, knowing, and voluntary waiver of Fifth Amendment rights is unaffected by a suspect's lack of knowledge about his or her attorney's wishes or efforts").

For the foregoing reasons, we conclude that the totality of the circumstances supported the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his post-arrest statements were made voluntarily. We find no error in the denial of defendant's motion to suppress the statements, and this assignment of error is overruled.

II.

[2] Next, defendant assigns error to the trial court's denial of his pretrial motion that he be declared incompetent to stand trial. Specifically, defendant contends that by finding Dr. Mathew did not render an opinion as to defendant's competency, the trial court did not properly consider Dr. Mathew's testimony at the competency hearing. We find this assignment of error to be without merit.

Our legislature has expressly provided that a defendant may not be tried, convicted, sentenced or punished for a crime when

> by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2001). At the competency hearing, defendant's counsel conceded that defendant was able to understand the nature and object of the proceedings against him and to comprehend his situation in reference to the proceedings. Therefore, defendant's motion was based solely on his contention that he was unable to assist in his defense in a rational or reasonable manner.

A defendant who moves under N.C. Gen. Stat. § 15A-1001 for a determination that he is incapable of proceeding bears the burden of persuasion. *State v. Baker*, 312 N.C. 34, 43, 320 S.E.2d 670, 677 (1984). "The court's findings of fact as to defendant's mental capacity are conclusive on appeal if supported by the evidence." *Id.*

In the instant case, defendant and the State each offered two expert witnesses at the competency hearing. The trial court made the following pertinent findings of fact and conclusions of law:

> That the [c]ourt heard testimony from Dr. George Baroff, who . . . was admitted as an expert in the field of mental retardation . . . ; [t]hat it was the opinion of Dr. Baroff, that the Defendant would be extraordinarily at a disadvantage about what evidence the Defendant would be able to help his attorneys present in a trial of this matter based on the psychological testing that he had done[;] . . . [t]hat on cross-examination by the State, Dr. Baroff . . . said that the defendant indicated to him that the key facts of this case were the bullet, the witness against him, and that he was out there at the time, which so indicates to the [c]ourt he is fully aware of what he's facing[;] . . . [t]hat the [c]ourt further heard testimony from . . . Dr. Roy Mathew, who is an expert in the field of psychiatry . . . [a]nd that Dr. Mathew was primarily attempting to determine the effect of the Defendant's alcohol and drug abuse on his mental status, and that due to the failure to cooperate, he was frustrated in that regard, and . . . the [c]ourt doesn't find he gave an opinion as to what the competency of the Defendant to proceed in this matter was[;] [t]hat the [c]ourt further heard testimony from Dr. Nicole Wolfe, who testified that she spent time interviewing the Defendant . . . [and] [t]hat she found no evidence of . . . active mental illness[;] . . . [t]hat it was her opinion that [defendant] was competent to stand trial, that he was able to assist his attorneys if he chose to do so, . . . it was her opinion that [defendant] was not mentally retarded[;] . . . [t]hat Dr. Wolfe stated that the history of bacterial meningitis was about as minor . . . as one could have, and that there was no evidence of any mental disabilities as a result of that[;] . . . [t]hat there was further [testimony] from Dr. [sic] Bart Abplanalp . . . [w]ho was a clinical psychologist, and who also had administered psychological testing of the Defendant . . . that [Abplanalp's] belief was that the Defendant was malingering . . . that there was a noted difference in [defendant's] behavior in informal[ly] talking to him, and also in the formal test[;] [t]hat he believed [defendant] was per-

> forming poorly on purpose[;] [t]hat [defendant's] school records failed to show any mental retardation[;] . . . [t]hat it was his opinion, that the Defendant definitely understood the legal system. That based on the foregoing findings of fact, the [c]ourt concludes as a matter of law that the Defendant . . . is able to assist in his defense in a rational and reasonable manner, and that he's competent to stand trial.

We find that the trial court's findings of fact are amply supported by the evidence received at the competency hearing, and are therefore binding on this Court. *Baker*, 312 N.C. at 43, 320 S.E.2d at 677 (1984). Both Dr. Wolfe and Mr. Abplanalp testified that, based on their interviews with defendant and reviews of his test results and school and medical records, they believed that defendant did not suffer from any active mental illness and that he was competent to stand trial. Defendant's recitation to Dr. Baroff of the "key facts of the case" against him also supports the conclusion that defendant was able to assist in his defense in a rational and reasonable manner.

With respect to Dr. Mathew's testimony, the trial court's finding that he did not give an opinion as to defendant's competency to proceed was supported by the evidence, and this finding is therefore conclusive on appeal. *Id.* When asked whether he had an opinion as to whether defendant could assist in his own defense in a rational and reasonable manner, Dr. Mathew replied that he "tried to explain to [defendant] what my role was . . . he didn't seem to be able to comprehend it at all . . . we didn't get very far." When asked whether defendant could make a reasonable and rational decision regarding acceptance of a potential juror, Dr. Mathew replied "[t]hat's a difficult question for me to answer, because that's more for a neuropsychologist to answer . . . my own opinion would be that he would have a hard time doing that." Finally, when asked whether defendant could reasonably and rationally decide what evidence to present, or what witnesses to call, Dr. Mathew replied "that's outside of my limits of expertise. I would expect him to have difficulties." We find that this evidence supports the trial court's finding that Dr. Mathew did not give an opinion as to defendant's competency to proceed, and therefore the trial court did properly consider his testimony at the competency hearing. This assignment of error is overruled.

We hold, for the reasons stated herein, that defendant received a trial free of any error.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. PHILLIP JAMES EVERY

No. COA02-150

(Filed 15 April 2003)

1. **Indecent Liberties— telephone conversations—sexually explicit—evidence sufficient—common sense of society**

Defendant's telephone conversations with the minor victim constituted an indecent liberty with a child, and the trial court correctly denied defendant's motion to dismiss, where defendant repeatedly engaged in extremely graphic and explicit sexual conversations while he groaned, breathed heavily, told the victim that he was masturbating, and invited her to do the same. Moreover, defendant exploited a position of trust as the victim's karate instructor to overcome her hesitation.

2. **Indecent Liberties— telephone conversations—sexually explicit—constructive presence**

A defendant using a telephone to have sexually explicit conversations with a minor girl was in her constructive presence for purposes of an indecent liberties prosecution; defendants may be deemed present constructively where the use of electronic technology enables them to effectively carry out conduct that would constitute taking an indecent liberty if done in the victim's actual presence to substantially the same degree that could have been achieved in the victim's actual presence.

3. **Indecent Liberties— telephone conversations—sexually explicit—gratification of desire**

There was sufficient evidence that an indecent liberties defendant accused of having sexually explicit telephone conversations with a minor acted to arouse or gratify a sexual desire.

4. **Evidence— other misconduct—indecent liberties**

The trial court did not abuse its discretion in an indecent liberties prosecution by admitting evidence of other misconduct

where the court concluded after voir dire that the State had met its burden on the similar plan exception, issued appropriate limiting instructions, and sustained eight objections from defendant during the testimony.

5. Trial— instructions—substantial accord with request

The trial court did not err during an indecent liberties prosecution by not giving defendant's requested special instructions as to certain issues where the instruction as a whole presented the law fairly and accurately and in substantial accord with the requested instructions.

6. Indecent Liberties— instructions—presence—definition

There was no prejudice in a prosecution for taking indecent liberties with a minor from the trial court's failure to specifically define "with" and "presence" because those words are commonly understood.

7. Indecent Liberties— instructions—presence—modern electronic technology

The inclusion of the phrase "modern electronic technology" in the definition of constructive presence in the court's charge to the jury in an indecent liberties prosecution did not prejudice defendant because the definition was in accord with the holding of the one North Carolina case on point.

8. Indecent Liberties— telephone conversations—constructive presence—instructions—victim calling defendant

An instruction that defendant constructively placed himself in the victim's presence during sexually explicit telephone conversations was not improper in an indecent liberties prosecution even though the victim called the defendant. He had requested or instructed that she do so.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 7 August 2001 by Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 21 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Sue Y. Little, for the State.

Grace, Holton, Tisdale & Clifton, by Donald K. Tisdale, Sr. and Christopher R. Clifton, for defendant-appellant.

EAGLES, Chief Judge.

Defendant, Phillip James Every, appeals from judgment entered in Forsyth County Superior Court upon a jury verdict finding him guilty of taking indecent liberties with a child.

The State's evidence tended to establish that the victim ("E.B.") began taking karate lessons at Karate International in Winston-Salem, North Carolina, when she was twelve-years-old. Defendant, who was in his "forties" at the time, was the "main instructor" at the studio. E.B. continued taking lessons from defendant until she was fourteen-years-old, at which point E.B. began taking lessons at a more convenient studio. Although the record indicates that nothing inappropriate occurred during this time, E.B. did develop somewhat of a "crush" on defendant while he was her instructor. After E.B. transferred, defendant was no longer her instructor.

E.B. contacted defendant by phone during the summer of 1995, shortly after transferring to the new studio. During their conversation, defendant asked E.B. if she "would let him kiss [her]." When E.B. responded that she "didn't know," defendant said: "Say yes. It doesn't ever have to happen, but I just want to hear you say it." Defendant then asked E.B. if she "would ever let him touch [her] breasts." E.B. again expressed equivocation and defendant responded that "it doesn't have to happen, but I just want to hear you say yes." The conversation lasted approximately twenty to thirty minutes and ended with E.B. agreeing to call defendant back the following Wednesday.

During the evening of the following Wednesday, E.B. called defendant just as she had been instructed. Defendant said "he missed [E.B.]" because she "was a very good student, one of his favorites." Defendant asked E.B. if she had "thought about what [they] had talked about that Friday before." When E.B. responded affirmatively, the conversation turned "sexual in nature." Using very explicit language, defendant inquired into E.B.'s willingness to participate in various sexual acts with him. Defendant asked E.B. if she would let him "kiss [her] breasts." Defendant also asked E.B. if she would "stroke" his genitals. Defendant was "breathing heavily" throughout the conversation, which lasted approximately fifteen to twenty minutes. Near the end of the conversation, defendant instructed E.B. to call him back the following Wednesday.

E.B. called defendant again the following Wednesday. This time, the conversation was "more explicit." Defendant told E.B. he "wanted

to f—k" her and "lick" her genitals. When E.B. hesitated, defendant said "just let me hear you say it." Again, defendant sounded like he was "breathless" while speaking to E.B.

E.B. soon began calling defendant approximately once a week, usually on Wednesday. Each conversation was sexual in nature and became more graphic and sexually explicit as each week passed. During the course of these conversations defendant told E.B. that he wanted to "get together with [her] at some point to . . . f—k [her]" and have her "suck his c—k," making explicit reference to E.B.'s virginity when he discussed his desire to have sexual intercourse with her. Defendant also invited E.B. to "play with [her]self while [she] was talking to him because he was doing the same thing." E.B. testified that defendant was "breathless" and making "groaning noises" when he made this statement and that defendant's heavy breathing continued until he reached "orgasm." At that point the conversation ended.

Sometime during the fall of 1995, in the midst of these explicit phone conversations, both defendant and E.B. attended a karate camp near Hanging Rock. On one particular evening, E.B. was sitting with defendant and several other students around a campfire when defendant began rubbing his foot against E.B.'s foot. After "several minutes" of rubbing his foot against hers, defendant stood and walked off into the woods. However, E.B. remained by the fire. Defendant later asked E.B. "why [she] didn't follow him into the woods." E.B. continued calling defendant until shortly after her sixteenth birthday, when she stopped because the conversations "grossed [her] out."

The State also presented evidence of defendant's other crimes, wrongs or acts, pursuant to N.C.R. Evid. 404(b). "N.G.," another teenaged girl, testified that she began taking karate lessons from defendant when she was nine-years-old and continued until she was fourteen-years-old. N.G. said she stopped taking lessons in May of 1999, after defendant touched her inappropriately. According to N.G., the incident was preceded by defendant telling her that she "was a very good student, his favorite" and that she "had become a very beautiful young lady." Later, defendant approached N.G. in an isolated part of the karate studio and "asked [N.G.] if [she] would kiss him." N.G., standing with her arms crossed, said "no." Defendant then approached N.G., uncrossed her arms and "asked if he could squeeze" her breast. N.G. again responded negatively. Defendant then asked N.G. to remove her top, but ceased his advances when N.G.'s mother

entered the room. N.G. reported the incident to her mother and to police and never returned to defendant's class. The following Saturday, defendant approached N.G. at a karate tournament, put his arm around her and told her "you can be my girlfriend and we'll just keep it a secret from everybody else." N.G.'s testimony was corroborated by the testimony of her mother and the police officer who investigated her complaint.

Defendant presented no evidence and moved for dismissal at the close of the evidence. The trial court denied defendant's motion to dismiss. Defendant was convicted of taking indecent liberties with a child and sentenced to imprisonment for a term of 16 to 20 months, which was suspended in lieu of supervised probation for a period of 48 months. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss because the State failed to present sufficient evidence that he took indecent liberties with a child. We disagree.

We first note that a motion to dismiss in a criminal case is properly denied where the State presents substantial evidence of each essential element of the charged offense and defendant's identity as the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002). When reviewing the denial of a motion to dismiss, appellate courts " 'must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.' " *Id.* (citations omitted).

Section 14-202.1 of the North Carolina General Statutes provides:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1 (1995).

In order to withstand a motion to dismiss charges brought under G.S. 14-202.1(a)(1), the State must present substantial evidence of each of the following elements:

> (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987).

Here, the first, second and fourth elements were established by uncontradicted direct evidence. With respect to the third element, defendant asserts two arguments: (1) that "[m]ere words" cannot constitute an indecent liberty under G.S. 14-202.1; and (2) evidence that defendant spoke to the victim over the phone is insufficient to establish that defendant was in either the actual or constructive "presence" of the child. Defendant further asserts the State failed to produce sufficient evidence of the fifth element. We address defendant's arguments below.

Defendant first contends that the utterance of "mere words," no matter how reprehensible, does not constitute the taking of an indecent liberty with a child. We disagree.

" 'Indecent liberties' are defined as 'such liberties as the common sense of society would regard as indecent and improper.' " *State v. McClees*, 108 N.C. App. 648, 653, 424 S.E.2d 687, 690 (1993) (quoting Black's Law Dictionary (6th ed.)), *disc. review denied*, 333 N.C. 465, 427 S.E.2d 626 (1993).

> The evil the legislature sought to prevent in this context was the defendant's performance of *any* immoral, improper, or indecent act in the presence of a child 'for the purpose of arousing or gratifying sexual desire.' Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990) (emphasis added). Therefore, neither a completed sexual act nor an offensive touching of the victim are required to violate the statute. *State v. Hicks*, 79 N.C. App. 599, 603, 339 S.E.2d 806, 809 (1986). In fact, no physical touching of the victim at all is required in order to show the taking of an indecent liberty. *State v. Nesbitt*, 133 N.C. App. 420, 423, 515 S.E.2d 503, 506 (1999).

Activity that has been held to violate the statute includes: photographing an unclothed child in a sexually suggestive position, *see State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983); masturbating in front of a child, *see State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981); defendant exposing himself and placing his hand on his penis while in close proximity to a child, *see State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986); defendant masturbating behind a glass door in his home, within the view of children at a bus stop, *see State v. Nesbitt*, 133 N.C. App. 420, 515 S.E.2d 503 (1999); and defendant secretly videotaping a child who was undressing. *See State v. McClees*, 108 N.C. App. 648, 424 S.E.2d 687 (1993).

The breadth of conduct that has been held violative of the statute indicates a recognition by our courts of "the significantly greater risk of psychological damage to an impressionable child from overt sexual acts," as well as "the enhanced power and control that adults, even strangers, may exercise over children who are outside the protection of home or school." *Hicks*, 79 N.C. App. at 603, 339 S.E.2d at 809. Not only do these decisions "demonstrate that a variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor," *State v. Etheridge*, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987), they also demonstrate the scope of the statute's protection: to "encompass more types of deviant behavior" and provide children with "broader protection" than that available under statutes proscribing other sexual acts. *Id.*

Here, defendant repeatedly engaged the victim in extremely graphic and explicit conversations that were sexual in nature. Defendant told the victim he was masturbating during these conversations and invited the victim to do the same. Defendant's conversations were punctuated with heavy breathing and "groaning," leaving little doubt in the mind of the victim as to what was transpiring on the other end of the line. Moreover, defendant exploited and abused a position of trust he had occupied with the victim, karate instructor, in order to overcome the victim's hesitancy about participating in sexu-

ally explicit conversations with him and to persuade her to continue contacting him by phone. Because a rational juror could find that the common sense of society would regard this conduct as indecent or improper, we hold this conduct constitutes an indecent liberty for purposes of N.C.G.S. 14-202.1.

[2] Defendant next contends that phone conversations alone are insufficient to establish that he was either actually or constructively in the presence of the victim. We disagree.

It is not necessary that an actual touching of the victim by defendant occur in order for the defendant to be "with" a child for purposes of taking indecent liberties under § 14-202.1(a)(1). *Nesbitt*, 133 N.C. App. at 423, 515 S.E.2d at 506. All that is required is that "at the time of the immoral, improper, or indecent liberty," the defendant must be in either the "actual or constructive 'presence' of the child." *Id.*

Our decisions provide that spatial distance between the defendant and victim at the time of the offense is not the determinative factor when evaluating whether the defendant was in the actual presence of the child. *State v. Strickland*, 77 N.C. App. 454, 456, 335 S.E.2d 74, 75 (1985). In *Strickland*, the defendant exposed himself and masturbated in front of two young boys from approximately 62 feet away. This Court rejected a requirement "that a defendant must be within a certain distance of or in close proximity to the child" to be "with" them for purposes of taking an indecent liberty. *Id.* The *Strickland* court held that because defendant was close enough to see and be seen by the children; and the children could hear defendant's invitation to imitate his activity, the defendant was "with" the children within the meaning of G.S. 14-202.1. *Id.*

In *State v. McClees*, 108 N.C. App. 648, 424 S.E.2d 687 (1993), this Court also provided that "the forces of modern electronic technology" can enable a person to "constructively place himself in the 'presence' of another." *Id.* at 654, 424 S.E.2d at 690.

In *McClees*, the defendant headmaster of a private school, asked a fifteen-year-old female student to try on basketball uniforms in order to help him decide which uniform to buy for use at the school. Defendant instructed the student to change clothes in his office while he waited outside. Without the student's knowledge, defendant had secretly placed a video camera on the shelf in his office and recorded the student while she changed clothes. Defendant argued that the

State failed to show that he took an indecent liberty "with" a child because he was not in her actual presence. This Court said:

> Certainly defendant's behavior was such as the common sense of society would regard as indecent and improper. Although the defendant was not actually located in the room with his victim, he strategically placed a camera such that she was unaware of its presence, thereby secretly filming the child as she changed clothes several times at his direction. As a result, he essentially had the same capability of viewing her in a state of undress as he would have had, were he physically present in the room. Through the forces of modern electronic technology, namely the video camcorder, one can constructively place himself in the 'presence' of another. Thus we find that defendant was 'constructively present' and thereby took immoral, improper or indecent liberties 'with' the minor victim.

Id. at 654, 424 S.E.2d at 690.

Here, there can be little doubt that at the time defendant spoke to the victim over the phone, he was not in her actual presence. However, by using the telephone, defendant had virtually the same capability to hear and be heard by the victim as he would have had if he were in the same room with the victim. Because this same conduct would constitute the taking of indecent liberties if defendant were in the victim's actual presence, we conclude the use of this technology, albeit arguably less than modern, renders defendant constructively present under these circumstances.

We conclude that where, as here, the use of electronic technology enables the defendant to effectively carry out conduct: (1) that would constitute the taking of an indecent liberty if done in the victim's actual presence; (2) to substantially the same degree that could have been achieved in the victim's actual presence, he may be deemed constructively present by the law for purposes of proving the taking of indecent liberties with a child. Accordingly, we hold that defendant's use of the telephone placed him in the victim's constructive presence at the time he took the indecent liberties.

[3] Defendant's final contention is that the State failed to sufficiently establish that his actions were done for the purpose of arousing or gratifying a sexual desire. We disagree.

"A defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference."

State v. Campbell, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981). Indeed, whether "the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987). Based on the evidence presented at trial, we conclude a rational juror could properly infer that defendant's conduct was for the purpose of arousing or gratifying a sexual desire.

Having concluded the State presented substantial evidence of each element of the charged offense, we hold the trial court properly denied defendant's motion to dismiss.

II.

[4] Defendant next argues that the trial court erred by admitting evidence of other misconduct pursuant to N.C.R. Evid. 404(b). Defendant contends the trial court abused its discretion by failing to exclude the evidence related to the 1999 incident involving N.G., pursuant to N.C.R. Evid. 403.

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) (1995).

North Carolina's appellate courts have been "markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b) . . . ." *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987). The test for determining the admissibility of such evidence is whether the incidents are "sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 299 (1996). The exclusion of evidence under Rule 403 is a matter "within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Bidgood*, 144 N.C.

App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001).

Here, the State proffered the evidence for the purposes of establishing *modus operandi*, common plan or scheme and the absence of mistake. The evidence tended to show that defendant followed a similar pattern of communications in order to persuade or coerce adolescent female karate students into engaging in inappropriate sexual conduct with him. In each case, defendant praised his victims' classroom performance and told them they were his "favorite" student. Defendant broached the subject of inappropriate physical contact by first suggesting that he and the victims kiss. Defendant further suggested that the victims permit him to fondle their breasts. Finally, not only did defendant express a desire to engage in a surreptitious sexual relationship with both victims, he also approached both victims during off-site karate events for the apparent purpose of facilitating sexual encounters.

Following *voir dire* of the witnesses and arguments from both counsel, the trial court concluded that the State had only "met its burden with respect to the similar plan exception," based on the "similarity to the manner of approach." The trial court issued appropriate limiting instructions both before any corroborating testimony was received and again in its charge to the jury. Finally, defendant interposed a total of eight Rule 403 objections during the testimony in question, all of which were sustained by the trial court. On this record, we cannot say as a matter of law that the trial court's decision could not have been the result of a reasoned decision. Accordingly, we conclude the trial court did not abuse its discretion.

Defendant further states that evidence of subsequent conduct "cannot constitute . . . evidence of a 'plan' " with respect to the charged offense. However, defendant fails to support this assertion with either citation to legal authority or legal argument. Accordingly, this contention is deemed abandoned. *State v. Stitt*, 147 N.C. App. 77, 84, 553 S.E.2d 703, 708 (2001); N.C.R. App. P. 28(b)(5).

III.

[5] Defendant next argues the trial court erred by denying his request for special jury instructions and by giving an erroneous supplemental instruction. We disagree and find no prejudicial error.

At the charge conference, defendant submitted two written requests for special instructions. Defendant's first proposed instruction states in pertinent part:

> The defendant is charged with a violation of G.S. 14-202.1, i.e., Taking Indecent Liberties With Children.
>
> The word "with" in the connection in which it is employed in the statute indicates "in the company of: as companion of," Webster's Third new [sic] International Dictionary (Unabridged 1968), or "denoting a relation of proximity, contiguity or association." Black's, *supra*. Thus, "indecent liberties *with*" a minor implies an inherent liberty committed in the *presence of the minor*. However, Black's Law Dictionary defines "presence" as: [t]he existence of a person in a particular place at a given time particularly with reference to some act done there and then. Besides actual presence, the law recognizes *constructive presence*, which latter may be predicated of a person who, though not on the very spot, was near enough to be accounted *654 present by the law, or who was actively cooperating with another who was actually present. State v. McElees, [sic] 108 N.C. App. 648 (1993).

(Emphasis omitted). Defendant's second proposed instruction states in pertinent part:

> The defendant is charged with a violation of G.S. 14-202.1, i.e., Taking Indecent Liberties With Children.
>
> Although "with" as used in section 14-202.1(a)(1) has not been defined by our legislature, our courts have set its parameters. It is well settled that a physical touching of a child by the defendant is not required in order to show an indecent liberty with the child in violation of section 14-202(a)(1) (citations omitted) (lewd or lascivious act must be "upon or with the body or any part or member of the body of any child"). It is necessary, however, that the defendant, at the time of the immoral, improper, or indecent liberty, be either in the actual or constructive "presence" of the child. State v. Nesbitt, 133 N.C. App. 420, 423 (1999); State v. Hartness, 326 N.C. 561, 567 (1990).

(Emphasis omitted.)

The trial court denied defendant's request and instructed the jury in accordance with N.C.P.I. 226.85. The trial court instructed:

> The Defendant has been accused of taking an indecent liberty with a child. I charge that for you to find the Defendant guilty of taking an indecent liberty with a child the State must prove three things beyond a reasonable doubt:
>
> First, that the Defendant wilfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper or indecent act by the defendant upon the child.
>
> Second, the State must prove beyond a reasonable doubt that the child had not reached her sixteenth birthday at the time in question.
>
> And third, the State must prove beyond a reasonable doubt that the Defendant was at least five years older than the child and had reached his sixteenth birthday at that time.

After retiring to deliberate, the jury asked the trial court to "define act upon the child." In response, the trial court gave the following supplemental instruction:

> You have requested additional instructions with respect to the language of the instructions previously given concerning the meaning of the term "indecent liberty[.]"[]
>
> I previously instructed you that an indecent liberty is an immoral, improper or indecent act by the Defendant upon the alleged victim. An actual touching of the victim by the Defendant is not required. However, the State is required to prove to you beyond a reasonable doubt that the act was committed within the actual or constructive presence of the victim. Constructive presence means that the Defendant has constructively placed himself in the presence of the victim by means including modern electronic technology.

Defendant first contends the trial court was required to give his proposed instructions because they were correct statements of the law and supported by the evidence.

It is well settled that "if a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance." *State v. Lynch*, 46 N.C. App. 608, 608, 265 S.E.2d 491, 492, *rev'd on other grounds*, 301 N.C. 479, 272

S.E.2d 349 (1980). However, "[t]he trial court is not required to give requested instructions verbatim, even when they correctly state the law." *State v. Williams*, 333 N.C. 719, 731, 430 S.E.2d 888, 894 (1993). Furthermore, the trial court's charge to the jury must be construed contextually. *State v. Reese*, 31 N.C. App. 575, 577, 230 S.E.2d 213, 215 (1976). "[S]egregated portions will not be held prejudicial error where the charge as a whole is free from objection." *Id.* "When the trial court gives substantially the same instructions as those requested . . . purged of irrelevant and confusing features, the court does not err in refusing to give defendant's instructions exactly as proposed." *Williams*, 333 N.C. at 731, 430 S.E.2d at 894.

Here, defendant sought special instruction with respect to the following issues: (1) that no physical touching is required to violate G.S. § 14-202.1; (2) that a defendant must be in either the actual or constructive presence of the child to violate G.S. § 14-202.1; and (3) definitions of the words "with," "presence" and "constructive presence." Although the supplemental instructions did not track the language of defendant's proposed instructions verbatim, we conclude they adequately reflected the substance of defendant's requests with respect to the first two issues. Although, the court failed to specifically define the words "with" and "presence," it did define "constructive presence." Therefore, we conclude the charge as a whole, presented the law fairly and accurately and in substantial accord with defendant's requested instructions.

[6] Moreover, even if the trial court's failure to specifically define "with" and "presence" was error, defendant suffered no prejudice. For an error in the trial court's instructions to be prejudicial error, defendant must show " 'that the jury was misled or misinformed by the charge as given, or that a different result would have been reached had the requested instruction been given.' " *State v. Wilds*, 88 N.C. App. 69, 74, 362 S.E.2d 605, 608-09 (1987), *disc. review denied*, 322 N.C. 329, 368 S.E.2d 873 (1988). A defendant fails to demonstrate prejudice where the instructions requested are for words that "are so generally used and their meaning so commonly understood as to require no further definition." *Id.* at 74, 362 S.E.2d at 609 (citation omitted).

Here, the trial court's instructions notified the jury that in addition to actual presence, a person could also be constructively present. The trial court then instructed the jury on the definition of constructive presence. In light of the instructions given, the only words left undefined by the trial court were "with" and "[actual] presence."

Since these are generally used words whose meaning is commonly understood, no further definition was needed. Therefore, defendant suffered no prejudice from the trial court's failure to give the requested instructions.

[7] Defendant's final contention is that he was prejudiced by the trial court's definition of "constructive presence." Defendant first asserts there was no precedential basis for inclusion of the phrase "modern electronic technology" in the definition. We disagree.

It is the general rule that where a trial court, in charging a jury, undertakes the definition of a term that the law provides no set formula for defining, "the definition given should be in substantial accord with definitions approved by [our Supreme] Court." *State v. Hammonds*, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954). *Accord, State v. McClain*, 282 N.C. 396, 193 S.E.2d 113 (1972). Our research has yielded no North Carolina Supreme Court decision either addressing or defining "constructive presence" for purposes of taking indecent liberties with a child. On the other hand, this Court has, on one previous occasion, elaborated on the parameters of what may establish "constructive presence" in this context. In *State v. McClees*, 108 N.C. App. 648, 424 S.E.2d 687 (1993), this Court held that "[t]hrough the forces of *modern electronic technology*, namely the video camcorder, one can constructively place himself in the 'presence' of another." *Id.* at 654, 424 S.E.2d at 690 (emphasis added). Because our Supreme Court has yet to pass upon this issue, *McClees* was the only North Carolina decision on point. Accordingly, the trial court properly relied on *McClees* in framing its definition. Since the definition given by the trial court was in substantial accord with the holding of *McClees*, this argument is without merit.

[8] Defendant next asserts that it was improper to state in the instruction "that the defendant has constructively placed himself in the presence of the victim," because the "evidence reveal[ed] that the victim called the defendant, not vice versa." We disagree.

"[W]hen a charge, as a whole, presents the law accurately, fairly, and clearly to the jury, reversible error does not occur." *State v. Nesbitt*, 133 N.C. App. 420, 426, 515 S.E.2d 503, 507 (1999). After reviewing the entire jury charge, in context, we conclude the trial court presented the law to the jury fairly and accurately. Furthermore, there is ample evidence in the record indicating that after the first call, defendant, victim's former karate instructor, either requested or instructed the victim to call him the next week on

Wednesday, which she dutifully did for a number of weeks. Therefore, we find this argument without merit.

Accordingly, we hold defendant received a fair trial, free from prejudicial error.

No error.

Judge McCULLOUGH concurs.

Judge ELMORE dissents.

ELMORE, Judge dissenting.

Because I do not agree with the majority's holding that defendant placed himself in the constructive presence of the victim by participating in telephone conversations of a sexual nature with her, I respectfully dissent.

In order to withstand a motion to dismiss charges brought under N.C. Gen. Stat. § 14-202.1(a)(1), the State must present substantial evidence that, *inter alia*, the defendant "willfully took or attempted to take an indecent liberty *with* the victim." *Rhodes*, 321 N.C. at 104, 361 S.E.2d at 580 (emphasis added). As the majority correctly notes, it is not necessary for physical contact to occur in order for the defendant to be "with" a child for purposes of taking indecent liberties under the statute. *Nesbitt*, 133 N.C. App. at 423, 515 S.E.2d 506. Rather, at the time of the indecent liberty, the defendant must be in either the "actual or constructive 'presence' of the child." *Id.*

Since there are no North Carolina Supreme Court decisions defining "constructive presence" for the purpose of taking indecent liberties with a child, the majority correctly identifies *State v. McClees*, 108 N.C. App. 648, 424 S.E.2d 687 (1993), this Court's lone previous attempt to define "constructive presence" in an "indecent liberties" context, as our touchstone in determining whether defendant's conduct placed him in the constructive presence of the victim in the case at bar. However, unlike the majority, I find that the facts of the instant case are clearly distinguishable from *McClees* and compel a different outcome.

The *McClees* Court reasoned that by hiding a video camera in his office "such that [the victim] was unaware of its presence" and filming her changing clothes *at his invitation* but outside of

his presence, the defendant "essentially had the same capability of *viewing her in a state of undress* as he would have had, were he physically present in the room." *McClees*, 108 N.C. App. at 654, 424 S.E.2d at 690 (emphasis added). The *McClees* Court stressed that the victim was not aware of the camera's presence, and certainly was unaware that she was being *filmed* by defendant. The defendant's use of video recording equipment in *McClees* supported an inference that he planned to view the tape repeatedly as a means of arousing or gratifying sexual desire. This is in stark contrast with the case at bar, where the *victim*, over a period of several weeks, initiated each of the telephone calls at issue and willingly engaged in sexually explicit conversation with defendant, knowing all the while of the presence and identity of the party on the other end of the line. Further, there was no evidence that defendant recorded any of these telephone conversations. The conduct at issue in *McClees* involved secretly videotaping the unaware victim in a state of undress and was accomplished solely on the defendant's initiative and through an elaborate ruse. By contrast, defendant's conduct in the instant case consisted of answering the victim's telephone calls and engaging her in sexually explicit conversation, with no recording and no deception on his part.

The majority cites the *McClees* Court's holding that "[t]hrough the forces of modern electronic technology, namely the video camcorder, one can constructively place himself in the 'presence' of another[,]" *Id.*, to support its own holding that defendant's telephone conversations with the victim "renders defendant constructively present under these circumstances." For the reasons stated above, I believe that "these circumstances" are readily distinguishable from those considered by the *McClees* Court. Further, I would limit the "forces of modern technology" sufficient to confer constructive presence to the single "modern technology" considered by the *McClees* Court, "namely[,] the video camcorder."

Because I do not believe the State has presented sufficient evidence that defendant was in the victim's constructive presence while engaging in these admittedly reprehensible telephone conversations with her, I would remand to the trial court for entry of an order granting defendant's motion to dismiss the charges against him.

STATE OF NORTH CAROLINA v. MICHAEL SCOTT LYNN

No. COA02-382

(Filed 15 April 2003)

1. **Discovery— medical records—State's witness—request that State investigate**

An attempted murder defendant's right to due process was not violated by the denial of his motion to require the State to investigate to learn the identities of any mental health professionals from whom an accomplice (and State's witness) had sought treatment. The motion did not suggest that the witness's ability to observe and to testify to events was impaired by a mental defect or by any medication used to treat a mental illness; defendant did not allege that information about the witness's mental health was in the possession of the State; and the denial of the motion did not prevent defendant from exploring the issue at trial.

2. **Discovery— sealed medical records—in camera review—no exculpatory evidence**

The trial court correctly ruled that the sealed medical records of a witness did not contain exculpatory evidence, even though the court said that certain medical terms were hard to understand. The court did not say that the records were incomprehensible, as defendant contended, and defendant did not preserve that issue for appeal. Moreover, the Court of Appeals conducted an independent review of the records.

3. **Evidence— hearsay—statements to nontestifying officer—related by another officer**

Inconsistent statements from an attempted murder victim were properly excluded where they were made to an officer who did not testify and elicited at trial during the cross-examination of an SBI agent. Inconsistent statements must be proven by direct evidence. Moreover, defendant did not move at trial to admit the officer's notes under the public records and reports exception to the hearsay rule, and there was no reasonable possibility of a different result if the statement had been admitted.

Appeal by defendant from judgment entered 27 January 1999 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 30 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Kurtz and Blum, P.L.L.C., by Seth A. Blum, for the defendant.

LEVINSON, Judge.

Defendant, Michael Scott Lynn, appeals his convictions of conspiracy to commit first degree murder, attempted first degree murder, and assault with a deadly weapon with intent to kill. For the reasons that follow, we affirm.

The evidence tended to show, in relevant part, the following: In the fall of 1997, defendant was hired as a cook at the Garner, North Carolina, Waffle House restaurant. Sylvia Groves (Sylvia) was a supervisor at the restaurant. She was married to the victim in this case, David Groves (Groves). Sylvia introduced Groves to the defendant on at least one occasion, when Groves ate at the restaurant. After defendant was hired at the Waffle House, he and Sylvia became friends, and later began a romantic and sexual relationship. After about six months, Sylvia and defendant began to discuss "shooting Dave [Groves] to get [him] out of the way[.]" Sylvia testified that these conversations began "as a little joke" but then the two "planned to shoot him so he would not be there because [she] could not . . . leave [Groves]."

On 7 May 1998, defendant called in sick at work. Sylvia went to defendant's home and picked him up. At trial, defendant's mother testified that defendant returned home in about an hour. However, Sylvia testified that she and the defendant drove to her house, where defendant waited outside. Sylvia further testified that when they arrived at her house, she went in, retrieved a gun from the bedroom that she and Groves shared, and took it outside to defendant. The defendant waited until she signaled that Groves was asleep. Then he snuck into the house and shot Groves twice while he lay in bed. Groves awoke, shouted that defendant had shot him, and called 911. Sylvia testified that she gave false statements to the police on the night of the shooting, denying that she knew the assailant, whom she described as wearing red checked pants. Nonetheless, Sylvia was arrested that evening, and later pled guilty to conspiracy to commit murder, attempted first degree murder, and assault with a deadly weapon with the intent to kill inflicting serious injury.

Groves testified that on the night of 7 May 1998, while he was in bed, the defendant came into his bedroom and shot him several

times. He saw the defendant clearly because "the light hit him right across the face," and Groves saw "the profile that was so distinctive[.]" Groves recognized the defendant immediately, because he had met the defendant several times before the shooting. He ran out of the bedroom, shouting to Sylvia that "her cook" had shot him. When an ambulance arrived, Groves was taken to the hospital, where he was treated and released. On cross-examination, Groves was questioned about the description of the defendant he had given law enforcement officers the night of the shooting, and denied telling officers that his assailant had worn "checkered pants."

Greg and Brenda Kehle, the Groves' next door neighbors, testified that Sylvia called them after the shooting. Greg Kehle immediately went to the Groves' trailer to help. Before the ambulance arrived, Groves told Kehle that the defendant, whom Kehle and Groves had met several times, was the person who shot him. Other evidence indicated that the defendant's fingerprints were found on Groves' truck the day after the shooting.

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[1] Defendant has presented three arguments on appeal, two of which concern Sylvia's medical records. The defendant argues first that the trial court committed reversible error when it denied his pretrial motion to require that the State learn the names of any mental health professionals who had treated Sylvia, so that defendant could subpoena their records for an *in camera* inspection by the trial court. The transcript of pretrial proceedings indicates that the defendant had filed a written motion, requesting that the court order the State to conduct an inquiry to determine who, if anyone, had previously treated Sylvia for emotional or psychological problems. However, the motion is not a part of the record. This omission violates N.C.R. App. P. 9(3)(i), which requires that the record on appeal include "copies of all . . . papers filed . . . which are necessary for an understanding of all errors assigned[.]" Our review of this issue is, therefore, based upon the statements of counsel and of the trial court as they appear in the transcript of pretrial proceedings.

In the pretrial hearing, defendant asked that the trial court order the State to determine the identities of any mental health professionals "who [were] treating her for whatever her psychological problems were[.]" He alleges that the court's denial of this motion denied his due process right to material exculpatory evidence. We disagree.

As a general rule, a criminal defendant is entitled to potentially exculpatory evidence:

> 'Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt, or to punishment, irrespective of the good faith or bad faith of the prosecution.'. . . The duty to disclose encompasses impeachment evidence as well as exculpatory evidence. Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'

State v. Holadia, 149 N.C. App. 248, 256-57, 561 S.E.2d 514, 520-21 (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963), and *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 490 (1985)), *disc. review denied*, 355 N.C. 497, 562 S.E.2d 432 (2002). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *State v. Thompson*, 139 N.C. App. 299, 306, 533 S.E.2d 834, 840 (2000) (quoting *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494). Therefore, in determining whether the defendant's lack of access to particular evidence violated his right to due process, "the focus should be on the effect of the nondisclosure on the outcome of the trial, not on the impact of the undisclosed evidence on the defendant's ability to prepare for trial." *State v. Hunt*, 339 N.C. 622, 657, 457 S.E.2d 276, 296 (1994).

" 'Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule.' " *State v. Soyars*, 332 N.C. 47, 63, 418 S.E.2d 480, 490 (1992) (quoting *Bagley*, 473 U.S. at 676, 87 L. Ed. 2d at 490). *See also State v. McGill*, 141 N.C. App. 98, 102-03, 539 S.E.2d 351, 355-56 (2000) (" '[f]avorable' evidence includes . . . 'any evidence adversely affecting the credibility of the government's witnesses' ") (new trial required where defendant denied access to files "tend[ing] to show that [previous] false accusations were made against [defendant]") (quoting *United States v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996)).

Moreover, such impeachment evidence may include evidence that a witness suffers from a serious psychiatric or mental illness. The rationale behind allowing impeachment by evidence of prior treatment for psychiatric problems is that although "instances of . . . mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to 'cast doubt upon the

capacity of a witness to observe, recollect, and recount[.]' " *State v. Williams*, 330 N.C. 711, 719, 412 S.E.2d 359, 364 (1992) (quoting 3 Federal Evidence § 305, at 236). *See State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983) ("agree[ing] with defendant's contention that he was entitled to discredit the prosecuting witness' testimony by attempting to show by cross-examination that she suffered from a mental impairment which affected her powers of observation, memory or narration") (citing 1 H. Brandis on North Carolina Evidence, *Witnesses*, § 44 (2d. Rev. 1982)). *See also, e.g., United States v. Golyansky*, 291 F.3d 1245, 1248 (10th Cir. 2002) ("potential *Brady/Giglio* information" held to include information regarding a "witness' serious mental health issues" triggering prosecutor's "affirmative duty to disclose the information"); *East v. Johnson*, 123 F.3d 235, 238 (5th Cir. 1997) (new trial ordered where state failed to disclose that witness "experienced bizarre sexual hallucinations and believed that unidentified individuals were attempting to kill her[,] . . . was incapable of distinguishing between reality and the fantasies caused by her hallucinations[, . . . and] was mentally incompetent to stand trial on a pending burglary charge").

However, failure to disclose evidence relating to a witness's mental health is not reversible error where there is no likelihood that the outcome of the trial was affected. *See United States v. Cole*, 293 F.3d 153, 157 (4th Cir. 2002), *cert. denied*, —— U.S. ——, 154 L. Ed. 2d 296 (2002) (no *Brady* violation in prosecutor's belated disclosure of impeachment evidence of mental problems where "disclosed materials did not indicate that [witness's] disorders had any bearing on his ability to recall events and tell the truth"); *United States v. Burns*, 668 F.2d 855, 860 (5th Cir. 1982) (where psychologist "testified that [witness] was fully in touch with reality, [and] that his personality problems did not affect his ability to tell the truth" the State was under no duty to conduct further investigation into witness's mental health).

In *State v. Chavis*, 141 N.C. App. 553, 556, 540 S.E.2d 404, 408 (2000), the defendant sought discovery of the "psychiatric history of [the prosecuting witness] . . . to impeach the witness's ability to perceive, retain, or narrate." The trial court ruled that the prosecutor had "no duty to go out and find impeaching information with regard[] to its witnesses[,]" and this Court affirmed:

> A defendant is constitutionally entitled to all exculpatory evidence, including impeachment evidence, in the possession of the State. The State, however, is under a duty to disclose only those

> matters in its possession and 'is not required to conduct an independent investigation' to locate evidence favorable to a defendant. In this case, Defendant presented no evidence the State actually had [the witness'] medical and psychiatric history in its possession or that such history would have been favorable to Defendant. Accordingly, the State was under no obligation to obtain and disclose this information to Defendant.

Chavis, 141 N.C. App. at 561, 540 S.E.2d at 411 (quoting *State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994), and citing *Soyars*, 332 N.C. at 63, 418 S.E.2d at 490). Similarly, in *Smith*, 337 N.C. at 663, 447 S.E.2d at 379, the defendant moved for "disclosure of impeaching information as to whether [the] witness suffered from any mental defect or history of substance abuse which might affect her ability to recollect or recount the events occurring on the evening of [the offense]." The defendant contended that "his specific requests for discovery triggered the State's duty to determine if any such impeachment evidence existed and, if so, to disclose the information to the defense." The North Carolina Supreme Court held that:

> the information requested exceeds the scope of *Brady* and the requirements of N.C.G.S. § 15A-903. The State is not required to conduct an independent investigation to determine possible deficiencies suggested by defendant in [the] State's evidence. . . . [D]efendant's motion was nothing more than a fishing expedition for impeachment evidence and the trial court properly disallowed the motion.

Smith, 337 N.C. at 663-64, 447 S.E.2d at 379.

In the instant case, defendant's motion does not suggest that Sylvia's ability to observe and testify to events was impaired by virtue of a mental defect, or by any medication used to treat a mental illness. Nor did defendant allege that information about Sylvia's mental health was in the possession of the State, or of persons acting on the State's behalf. At the pretrial hearing, the defendant alleged only that other witnesses would testify Sylvia acted "oddly" before the attempt on her husbands' life, and that Sylvia wrote letters to defendant indicating that she had consulted a psychiatrist and had taken some unidentified prescription medication.

Moreover, the denial of defendant's motion did not prevent him from exploring the issue at trial. Sylvia testified that although she was not under a doctor's care at the time of the shooting, a year earlier she had consulted a psychiatrist who prescribed an antidepressant.

She took the medication briefly, before deciding that it did not help her. She also took anti-anxiety medication and sleeping pills on an occasional basis. Sylvia testified that after her arrest, she saw a psychiatrist while in jail, because she was "dazed" and "cried all the time" after the "shock" of the incident and her incarceration. The psychiatrist prescribed antidepressants, but Sylvia again experienced unpleasant side effects, and stopped taking them. Defendant cross-examined Sylvia about her treatment for emotional problems, the medications that had been prescribed, and letters to defendant in which she described her reactions to the drugs. Groves also testified that Sylvia had received psychological counseling about a year before the shooting, and had taken medication for "nerves." Further, Phil Braswell, a private investigator hired by defendant, testified that when he interviewed Sylvia in jail, she had told him that prior to her arrest she was taking three different medications. We conclude that defendant was sufficiently able to develop this issue at trial. *See Newman*, 308 N.C. at 254, 302 S.E.2d at 187 (holding trial court did not err by limiting cross-examination where defendant able to "conduct a lengthy and in-depth cross-examination into the past mental condition of the prosecuting witness" and "the jury had ample opportunity to observe the prosecuting witness' demeanor and hear her responses to the questions posed so as to form an opinion as to whether her powers of observation, memory and narration were then so impaired that she was not a credible witness").

We conclude that the trial court did not err by denying defendant's pretrial motion to require the State to investigate in order to learn the identities of any mental health professionals with whom Sylvia had previously sought treatment. We hold that the denial of his motion did not violate defendant's right to due process. This assignment of error is overruled.

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[2] Although the trial court denied defendant's pretrial motion for Sylvia's psychiatric treatment records, at some point certain records were forwarded from the jail to the trial court. Defendant's second argument is that the trial court erred by not providing him with these records. He asserts that the trial court "should have allowed the defendant access to Sylvia Groves' medical records because the trial court's *in camera* review was tantamount to no review at all." We disagree.

The defendant's right to exculpatory evidence often must be balanced against the privacy rights of witnesses. *State v. Johnson*, 145

N.C. App. 51, 55, 549 S.E.2d 574, 577 (2001) ("government entity has a statutorily protected right to maintain confidential records containing sensitive information such as child abuse"). In such situations, "a defendant's due process rights are adequately protected by an *in camera* review of the files of the government agency, after which the trial court must order the disclosure of any information discovered which is material to the defendant's guilt or innocence." *Id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 94 L. Ed. 2d 40, 57 (1987)).

In the case *sub judice*, the trial court received a sealed copy of certain records forwarded from the jail where Sylvia was confined pending trial. The trial court examined these records *in camera* and ruled as follows:

> [U]pon inspection of these records I find nothing in the records that reveals any exculpatory information that would be of any benefit to the defendant. . . . Let the record further reflect that based on what I've read I've found nothing to be exculpatory, but I will also admit that there are some words in here that I could not make out what the word was. It was written in medical terms, medical language, medical abbreviations, and I could not determine or could not make out what the word was. Essentially I just couldn't read it.

Defendant argues on appeal that "[b]ecause the court admitted that the records . . . were incomprehensible, the court failed to review the records[.]" We disagree.

We first note that defendant failed to preserve this issue for appellate review. N.C.R. App. P. 10(b)(1) ("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 . . . [and must] obtain a ruling upon the party's request, objection or motion"). After announcing its ruling, quoted above, the trial court immediately asked if there was "anything further" from either party. Defense counsel offered no response. The trial court's ruling appears to state clearly that certain individual medical terms were hard to decipher, and *not* that the records overall were hard to understand. It was defendant's responsibility to object, or to seek clarification.

In addition, this Court has undertaken an independent review of the medical records, and concludes that the trial court correctly ruled

that they did not contain exculpatory evidence. This assignment of error is overruled.

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[3] Finally, defendant argues that the trial court committed reversible error by excluding certain cross-examination testimony of Agent Johnson, regarding statements purportedly made by Groves to Officer Perry shortly after the shooting. We conclude that the trial court did not err by excluding this cross-examination testimony.

At trial, Groves testified that he had several opportunities to view his assailant, whom he immediately recognized, and that he had provided a description of the shooter shortly after the shooting. However, Groves denied telling a law enforcement officer that "the man that shot me was wearing checkered pants." Subsequently, the State called Agent Johnson of the City County Bureau of Identification for Wake County, who testified concerning his collection of crime scene evidence on the night of the shooting. On cross-examination, Johnson denied speaking with Groves, who had already been taken to the hospital when Johnson arrived at the crime scene. He expressly denied having any first-hand knowledge of statements Groves may have made to other law enforcement officers. Johnson testified on cross-examination that when he prepared a report of the incident, he included statements allegedly made by Groves to Officer Perry, another non-testifying law enforcement officer, in which Groves described to Perry what his assailant was wearing. The defendant sought to cross-examine Johnson regarding this description of the shooter's clothing, and the trial court sustained the prosecutor's objection to this cross-examination. Defendant then made an offer of proof, which established that, if allowed to testify, Johnson would have stated that Perry informed him that Groves had said the shooter wore "some type of red colored checked pants." Defendant argues that this cross-examination testimony was admissible as a 'prior inconsistent statement' of Groves, and that its exclusion was reversible error.

"Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment[.]" *State v. Bish*op, 346 N.C. 365, 387, 488 S.E.2d 769, 780 (1997) (quoting *State v. Lane*, 301 N.C. 382, 386, 271 S.E.2d 273, 276 (1980)).

"When a prior inconsistent statement by a witness relates to material facts in the witness' testimony, the prior statement may be proved by extrinsic evidence." *State v. Jones*, 347 N.C. 193, 205, 491 S.E.2d 641, 648 (1997) (citing 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 161 (4th ed. 1993) (hereinafter 1 *Broun on Evidence*)). Such extrinsic evidence may include testimony from another witness to whom the inconsistent statement was made. *State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996) (allowing cross-examination of officer regarding witness's prior inconsistent statement to officer). However, in the case *sub judice*, defendant did not seek to impeach Groves with testimony from Officer Perry, to whom Groves allegedly made the statement. Rather, he tried to introduce cross-examination testimony of Johnson, repeating what Perry told him that Groves had said. This is similar to the situation presented in *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994). In *Ward*, a witness for the State denied making certain statements regarding the number of gunshots he heard. The defendant attempted to impeach the witness by cross-examining the medical examiner about what a sheriff's deputy had told the medical examiner that the witness said to the deputy about the number of shots fired. The North Carolina Supreme Court ruled that the trial court properly excluded such cross-examination:

> [T]he making of the [inconsistent] statements *must be proved by direct evidence and not by hearsay*; and a witness may not be impeached by the inconsistent statements of someone else. . . . 'Proof of a prior statement by a witness who heard it at second hand would clearly be inadmissible.' . . . Because the statement defendant alleges the witness made to the deputy relates to material facts in the testimony, namely, the number of gunshots heard on the night of the killing, it may be proved by others—the deputy, for example, or a bystander who overheard the witness make the statement to the deputy. However, *defendant sought to prove the prior inconsistent statement by a witness who heard second hand from the deputy* [what the] neighbor told the deputy . . . *such second hand proof is clearly inadmissible*, and the trial court did not err in excluding it.

Ward at 98, 449 S.E.2d at 727-28 (citing 1 *Broun on Evidence* § 159, at 523-28 and § 161, at 531) (emphasis added). We conclude that, as in *Ward*, the trial court did not err by excluding this evidence.

Defendant also argues that the cross-examination testimony was admissible because it was based upon notes in Officer Johnson's

report, which he contends was admissible under N.C.G.S. § 8C-1, Rule 803(8) (2001), the hearsay exception for public records and reports ("matters observed pursuant to duty imposed by law as to which matters there was a duty to report"). However, defendant did not seek to admit the testimony under this theory at trial, and never sought to admit the officer's report into evidence. Defendant did not preserve this argument for appellate review. N.C.R. App. P. 10(b)(1).

Finally, even assuming, *arguendo*, that the statement was admissible, defendant cannot show prejudice by its exclusion. Sylvia and Groves both testified unequivocally that defendant shot Groves. Kehle corroborated Groves' having identified defendant immediately after the shooting. Sylvia testified that she was the one who offered the description of defendant's 'checkered pants.' Defendant's fingerprints were found on a truck in Groves' driveway. Under N.C.G.S. § 15A-1443 (2001), the defendant is prejudiced by non-constitutional errors only if "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." Moreover, the "burden of showing such prejudice under this subsection is upon the defendant." We conclude that there is no reasonable possibility that the outcome of the trial would have been different if Agent Johnson had testified that Officer Perry told him that Groves had described the defendant as wearing checkered pants. This assignment of error is overruled.

For the reasons discussed above, we conclude that the defendant received a fair trial, free from prejudicial error. His conviction is, therefore,

Affirmed.

Judges McGEE and HUDSON concur.

RONALD C. COX, EMPLOYEE, PLAINTIFF v. CITY OF WINSTON-SALEM, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA02-370

(Filed 15 April 2003)

1. Workers' Compensation— temporary total disability—apportionment

The Industrial Commission did not err in a workers' compensation case by awarding temporary total disability benefits to plaintiff employee and by failing to apportion plaintiff's award of compensation as a result of his injury at work on 31 August 1998, because there was competent evidence before the Commission to support its finding that plaintiff's work-related injury accelerated plaintiff's pre-existing bone tumor.

2. Workers' Compensation— average weekly wage—calculation

The Industrial Commission's calculation of plaintiff employee's average weekly wage under N.C.G.S. § 97-2(5) in a workers' compensation case is remanded in order for the Commission to make findings showing its specific calculations in reaching plaintiff's average weekly wage.

3. Workers' Compensation— long-term disability retirement benefits—entitlement to credit

The Industrial Commission's decision in a workers' compensation case to grant defendant a credit for the long-term disability retirement benefits paid and to be paid to plaintiff employee until plaintiff reaches age sixty-five is remanded to the Commission for a hearing on whether defendant is entitled to a credit under N.C.G.S. § 97-42 and the amount, if any, based on findings as to whether the long-term disability benefits are funded solely by defendant's contributions or are made up of a combination of contributions from both plaintiff and defendant.

4. Workers' Compensation— attorney fees—entitlement to credit

The Industrial Commission's decision in a workers' compensation case to deny plaintiff employee's motion for an award of attorney fees under N.C.G.S. § 97-88, based on the fact that defendant was successful upon appeal with regard to entitlement

to a credit, is remanded because the case is already remanded on the issue of whether defendant is entitled to a credit.

5. Workers' Compensation— interest on award—date of original hearing

The Industrial Commission erred in a workers' compensation case by failing to allow plaintiff employee's motion for interest on the award to plaintiff from the date of the original hearing under N.C.G.S. § 97-86.2 and the case is remanded for the Commission to award plaintiff interest on his award from 25 May 2000.

Appeal by plaintiff and defendant from an opinion and award entered 10 September 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2003.

Robert A. Lauver for plaintiff-appellant.

Wilson & Iseman, L.L.P., by S. Ranchor Harris, III, for defendant-appellant.

HUNTER, Judge.

The City of Winston-Salem ("defendant") appeals from the Industrial Commission's ("the Commission") opinion and award granting Ronald C. Cox ("plaintiff") temporary total disability benefits. Defendant challenges the Commission's award of benefits and claims the Commission erred in calculating plaintiff's average weekly wage. Plaintiff also appeals, challenging the Commission's decision to grant defendant a credit for the long-term disability retirement benefits paid and to be paid to plaintiff until plaintiff reaches age sixty-five. Plaintiff additionally assigns error to the Commission's denial of his motion for an award of attorney's fees and his motion for interest on the compensation award from the date of the original hearing. For the reasons set forth herein, we affirm in part and remand in part.

This claim arises from injuries plaintiff sustained when he fell into an open manhole on the night of 31 August 1998, while performing his job duties as a wastewater pump mechanic for defendant. The day after the fall, plaintiff was diagnosed with multiple contusions and restricted to no repetitive use of his right arm and shoulder. However, plaintiff immediately returned to work. By 9 September 1998, plaintiff's right shoulder and clavicle pain had become worse and plaintiff was referred to Dr. Howard Jones ("Dr. Jones"). X-rays revealed a probable dislocation of the right clavicle and plaintiff was

restricted from using his right arm. On 13 October 1998, Dr. Jones found that plaintiff continued to have an obvious mass over the sternoclavicular joint.

On 29 December 1998, Dr. Jones reevaluated plaintiff and referred him to Dr. Jerome Jennings ("Dr. Jennings"), an orthopedic surgeon, who diagnosed plaintiff as having a symptomatic subluxation of the sternoclavicular joint. Dr. Jennings then referred plaintiff to Dr. John Hayes ("Dr. Hayes"), who removed plaintiff from work on 2 February 1999. Plaintiff had surgery on 8 February 1999, during which Dr. Hayes found a solid cartilaginous tumor, referred to as an intraosseous chondrosarcoma, within the medial end of the clavicle and a fracture of the cortex of the right clavicle. On 25 February 1999, plaintiff underwent another surgery performed by Dr. Joel Morgan ("Dr. Morgan") and Dr. George Hoerr ("Dr. Hoerr") to remove all margins of tissue that may have been affected by the tumor.

Plaintiff remained out of work from 3 February 1999 to 25 April 1999. On 26 April 1999, Dr. Hoerr released plaintiff and allowed him to return to work with a restriction of no pulling of valves. Subsequently, on 30 April 1999, plaintiff aggravated the site of his right shoulder/clavicle injury while lifting a trash can at work. On 3 May 1999, due to this aggravation of the injury, plaintiff returned to Dr. Hayes and was restricted to no overhead lifting, maximum lifting of twenty-five pounds infrequently, and lifting ten pounds occasionally. Plaintiff was unable to perform the duties he was assigned even with these restrictions and was sent to Prime Care on 10 May 1999. Plaintiff was further restricted to no sweeping, no lifting, no pushing or pulling, and no squatting or climbing. Defendant was unable to provide plaintiff with a job within these additional restrictions. On 13 May 1999, Dr. Hayes wrote plaintiff out of work indefinitely. Plaintiff has not worked nor looked for work since 9 May 1999.

On 12 May 1999, plaintiff filed a Form 33 Request for Hearing. The case was heard before a deputy commissioner on 25 May 2000. At the outset of the hearing, the parties stipulated that plaintiff suffered an injury by accident in the course and scope of his employment, but defendant disputed the injuries sustained as a result of that accident. The deputy commissioner filed an opinion and award on 20 October 2000 from which defendant and plaintiff both appealed to the Full Commission. The Commission affirmed in part and modified in part the deputy commissioner's opinion and award by concluding the following in its 10 September 2001 opinion and award:

1. Plaintiff sustained an admittedly compensable injury by accident arising out of and in the course and scope of his employment with defendant-employer on August 31, 1998. Additionally, this injury augmented and accelerated the disease process of the pre-existing intraosseous chondrosarcoma that was within plaintiff's right clavicle allowing the tumor to become more aggressive and to spread into adjacent tissues. N.C. Gen. Stat. § 97-2(6).

2. As a result of his injury and its consequences, plaintiff is entitled to temporary total disability benefits at a weekly rate of $393.75 from February 2, 1999 until April 26, 1999 and again beginning May 10, 1999 and continuing until he returns to work at the same or greater wages or until further order of the Commission, subject to a reasonable attorney's fee and defendant's credit. N.C. Gen. Stat. § 97-29.

3. Plaintiff is entitled to the payment of all medical expenses incurred, or to be incurred, as a result of his injury by accident so long as the treatment tends to effect a cure, give relief or lessen the period of plaintiff's disability, subject to the limitations of N.C. Gen. Stat. § 97-25.1. N.C. Gen. Stat. § 97-25.

4. Plaintiff's average weekly wage at the time of his injury by accident was $590.59 per week, yielding a compensation rate of $393.75. N.C. Gen. Stat. § 97-2(5).

5. Defendant is not entitled to a credit for the short-term disability plan to which only plaintiff contributed. However, defendant is entitled to a credit for the benefits paid and to be paid in the future pursuant to the employer funded long-term disability plan from which plaintiff began receiving benefits in October 1999 and will continue to receive benefits until his sixty-fifth birthday in the amount of $166.29 per week. N.C. Gen. Stat. § 97-42.

6. Plaintiff is not entitled to attorney's fees as defendant did not engage in stubborn or unfounded litigiousness and as defendant was successful upon appeal with regard to entitlement to a credit. N.C. Gen. Stat. § 97-88.1; § 97-88.

On 5 October 2001, plaintiff filed a motion for reconsideration, which the Commission denied on 20 December 2001. Plaintiff and defendant both appeal to this Court from the Commission's opinion and award.

DEFENDANT'S APPEAL

I.

[1] Defendant initially contends the Commission erred in concluding that plaintiff is entitled to temporary total disability compensation as a result of the cancerous tumor located in his right sternoclavicular joint because defendant asserts this tumor was not accelerated or aggravated by his fall on 31 August 1998. We disagree.

At the outset, appellate review of a decision of the Industrial Commission is limited to two issues: "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). However, the Commission's conclusions of law are subject to *de novo* review. *Holley v. Acts, Inc.*, 152 N.C. App. 369, 371, 567 S.E.2d 457, 459 (2002). In addition, the "Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982). 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 v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Our Supreme Court has stated that "[w]hen a pre-existing, *non-disabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent." *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981). Further, "[i]n such a case[] where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed." *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 196, 352 S.E.2d 690, 694 (1987).

In the case *sub judice*, Dr. Hayes opined that the trauma to plaintiff's right clavicle from his fall on 31 August 1998, damaged the cor-

tex of the bone that had previously confined the tumor and allowed the tumor to grow out of the confines of the bone into the surrounding soft tissues. Dr. Hayes testified that the trauma from the fall accelerated the onset of plaintiff's disability which began 3 February 1999. Dr. Tucker testified that if the tumor was found to have extended beyond the cortex of the clavicle at the site of the fracture, then the fall could have allowed the tumor to extend into the mediastinum, which is the thorax located centrally beneath the sternum. The Commission acknowledged that another expert, Dr. Chrysson, gave conflicting opinions concerning the causal relationship between plaintiff's fall and plaintiff's condition as related to the tumor. However, the Commission gave greater weight to Dr. Hayes' opinion. As noted earlier, the "Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Hilliard,* 305 N.C. at 595, 290 S.E.2d at 683-84. Thus, after reviewing the record, we conclude that the Commission's findings, which are supported by competent evidence, in turn support the Commission's conclusion that plaintiff's injury sustained from his fall on 31 August 1998, "augmented and accelerated the disease process of the pre-existing intraosseous chondrosarcoma that was within plaintiff's right clavicle allowing the tumor to become more aggressive and to spread into adjacent tissues."

There is also ample evidence and findings to support the Commission's conclusion that plaintiff is entitled to temporary total disability benefits from 2 February 1999 until 26 April 1999 and again beginning 10 May 1999 and continuing until plaintiff returns to work at the same or greater wages or until further order of the Commission. Plaintiff bore the burden of showing that he had suffered a "disability" (loss of wage-earning capacity) pursuant to N.C. Gen. Stat. § 97-29 (2001). *See* N.C. Gen. Stat. § 97-2(9) (2001). We conclude plaintiff satisfied this burden. Plaintiff was written out of work by his doctors from 2 February 1999 to 26 April 1999. On 30 April 1999, plaintiff aggravated the site of his right shoulder/clavicle injury while lifting a trash can. Thereafter, plaintiff returned to Dr. Hayes on 3 May 1999 and was restricted to light duty. Plaintiff was unable to perform his duties even with these restrictions and was further restricted to no sweeping, no lifting, no pushing or pulling, and no squatting or climbing. Defendant was unable to provide plaintiff a job within these additional restrictions. On 13 May 1999, Dr. Hayes wrote plaintiff out of work indefinitely. In addition, evidence was presented that plaintiff was fifty-five years old and all of his past work experience had been in manual labor. Dr. Hayes noted that plaintiff was

unable to even perform janitorial work. There was also evidence that plaintiff's education was limited to special education classes due to a significant learning disability and plaintiff is a non-reader. Thus, it would be futile for plaintiff to seek other non-manual employment because of his prior experience, lack of education, and learning disability and according to the medical evidence, plaintiff is physically unable to perform manual labor. *See Trivette v. Mid-South Management, Inc.*, 154 N.C. App. 140, 571 S.E.2d 692 (2002). Therefore, the Commission was proper in concluding that plaintiff became totally disabled as a result of his injury at work on 31 August 1998 and in awarding temporary total disability benefits.

Defendant argues, in the alternative, that the Commission should have apportioned plaintiff's award of compensation. "However, apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity." *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 119, 415 S.E.2d 583, 586 (1992). We previously concluded that there was competent evidence before the Commission to support its finding that plaintiff's work-related injury accelerated plaintiff's pre-existing bone tumor. Therefore, the Commission properly declined to apportion the award.

II.

[2] Defendant next claims the Commission erred in finding that plaintiff's average weekly wage at the time of his injury by accident was $590.59 per week. Defendant contends plaintiff's average weekly wage was $544.14, which was supported by the Form 22.

Pursuant to N.C. Gen. Stat. § 97-2(5),

> "[a]verage weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. . . .

N.C. Gen. Stat. § 97-2(5). Plaintiff argues that in calculating plaintiff's average weekly wage, the Commission properly included a longevity

bonus in the amount of $600.29 and the overtime adjustment for longevity in the amount of $57.64 paid to plaintiff on 1 December 1997, which was not included in the Form 22 calculation. Plaintiff further argues that the Commission properly divided plaintiff's total gross earnings by 50.71 weeks (52 weeks less 1.29 weeks) because plaintiff did not work from 22 August 1998 through 30 August 1998, as shown on the face of the Form 22.

Plaintiff asserts that the Commission correctly calculated plaintiff's average weekly wage as follows: total gross earnings of $29,953.02 ($28,295.09, figure obtained from Form 22, + longevity bonus of $657.93) divided by 50.71 weeks (52 weeks less 1.29 weeks). However, this calculation does not result in the Commission's finding of an average weekly wage of $590.59 since ($28,295.09 + $657.93) does not equal $29,953.02. We are unable to ascertain from the record how the Commission determined plaintiff's average weekly wage since the Commission's finding does not conform to the Form 22. Therefore, we remand this case for the Commission to make findings showing its specific calculations in reaching plaintiff's average weekly wage.

PLAINTIFF'S APPEAL

I.

[3] Plaintiff contends the Commission erred in finding that "defendant-employer has paid, without contribution from the plaintiff, for the long-term disability benefits that plaintiff will receive until his sixty-fifth birthday." Plaintiff further argues the Commission erred in concluding, based upon this finding, that

> defendant is entitled to a credit for the benefits paid and to be paid in the future pursuant to the employer funded long-term disability plan from which plaintiff began receiving benefits in October 1999 and will continue to receive benefits until his sixty-fifth birthday in the amount of $166.29 per week.

Plaintiff asserts that disability retirement allowance is the sum of employee contributions and employer contributions. Accordingly, plaintiff claims that defendant is not entitled to a credit for such disability payments pursuant to N.C. Gen. Stat. § 97-42 (2001).

"The decision of whether to grant a credit is within the sound discretion of the Commission." *Shockley v. Cairn Studios Ltd.*, 149 N.C.

App. 961, 966, 563 S.E.2d 207, 211 (2002). Therefore, this Court will not disturb the Commission's grant or denial of a credit to the employer on appeal in the absence of an abuse of discretion. *Id.* N.C. Gen. Stat. § 97-42 "is the only statutory authority for allowing an employer in North Carolina any credit against workers' compensation payments due an injured employee." *Effingham v. Kroger Co.*, 149 N.C. App. 105, 119, 561 S.E.2d 287, 296 (2002). This statute provides the following, in pertinent part:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. . . . Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week.

N.C. Gen. Stat. § 97-42.

In the instant case, plaintiff was paid disability retirement benefits from the State of North Carolina Local Governmental Employees' Retirement System. Clark Case ("Mr. Case"), who is financial systems and employee accounting manager for defendant, explained at the hearing that plaintiff's disability retirement benefits are fully funded by defendant until plaintiff reaches age sixty-five. According to Mr. Case, plaintiff's contributions do not go toward his disability retirement benefits but instead go to the retirement benefits that he will begin to receive upon reaching the age of sixty-five. Plaintiff offered no evidence contradicting Mr. Case's testimony at the hearing. However, after the Commission filed its opinion and award, plaintiff filed a motion for reconsideration and submitted an affidavit from J. Marshall Barnes, III ("Mr. Barnes"), who is Deputy Director of the Retirement Systems Division in the Department of State Treasurer for the State of North Carolina. Mr. Barnes' affidavit directly conflicts with Mr. Case's testimony. Mr. Barnes stated that "[t]he disability benefits paid to [plaintiff] by the Local Governmental Employees' Retirement System represent a combination of employee contributions which were deducted from his wages, employer contributions and interest/investment earnings on total contributions as defined by

N.C.G.S. § 128-27(c), entitled Disability Retirement Benefits." In light of the directly conflicting statements from Mr. Case and Mr. Barnes, we remand this case to the Commission for a hearing on the credit issue. The Commission shall make findings as to whether the long-term disability benefits received and to be received by plaintiff until he reaches age sixty-five are funded solely by defendant's contributions or are made up of a combination of contributions from both plaintiff and defendant. After making this determination, the Commission must then conclude whether defendant is entitled to any credit for these long-term disability benefits pursuant to Section § 97-42 and if so, to how much credit defendant is entitled.

II.

[4] Plaintiff next argues the Commission erred in applying the standard under N.C. Gen. Stat. § 97-88.1 (2001), when considering plaintiff's motion for an award of an attorney's fee pursuant to N.C. Gen. Stat. § 97-88 (2001).

We initially note that an attorney's fee award is within the Commission's discretion and therefore, the Commission's award or denial of an award must be upheld absent an abuse of that discretion. *Taylor v. J. P. Stevens*, 57 N.C. App. 643, 648, 292 S.E.2d 277, 280 (1982). In the instant case, plaintiff moved for an award of attorney's fees pursuant to Section 97-88.

The Commission or a reviewing court may award an injured employee attorney's fees "[u]nder section 97-88, . . . if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee." *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994). Section 97-88 "permits the Full Commission or an appellate court to award fees and costs based on an insurer's unsuccessful appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 475, 570 S.E.2d 121, 125 (2002). Section 97-88 does not require that the appeal be brought without reasonable ground for plaintiff to be entitled to attorney's fees. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 464 S.E.2d 481 (1995). "By contrast, an award of attorney's fees under N.C.G.S. § 97-88.1 requires that the litigation be brought, prosecuted, or defended without reasonable ground." *Id.* at 53-54, 464 S.E.2d at 485. The purpose of this statute "is to prevent 'stubborn, unfounded litigiousness' which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to

injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (quoting *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982)).

In the case *sub judice*, the Commission concluded that plaintiff was "not entitled to attorney's fees as defendant did not engage in stubborn or unfounded litigiousness and as defendant was successful upon appeal with regard to entitlement to a credit. N.C. Gen. Stat. §97-88.1; §97-88." We acknowledge that the Commission unnecessarily concluded that plaintiff was not entitled to attorney's fees under Section 97-88.1 by stating that "defendant did not engage in stubborn or unfounded litigiousness," since plaintiff's motion for attorney's fees was not made pursuant to Section 97-88.1. However, the Commission also concluded that plaintiff was not entitled to attorney's fees under Section 97-88 because "defendant was successful upon appeal with regard to entitlement to a credit." As stated earlier, Section 97-88 "permits the Full Commission or an appellate court to award fees and costs based on an insurer's unsuccessful appeal." *Rackley*, 153 N.C. App. at 475, 570 S.E.2d at 125. Therefore, the Commission applied the proper standard in determining whether plaintiff was entitled to attorney's fees under Section 97-88. However, because we are remanding this case for a hearing on the credit issue we must also remand the issue of whether plaintiff is entitled to an award of attorney's fees for the Commission to consider in light of their determination of the credit issue.

III.

[5] Plaintiff finally claims the Commission erred in failing to allow his motion for interest on the award to plaintiff from the date of the original hearing pursuant to N.C. Gen. Stat. § 97-86.2 (2001). Defendant does not dispute this contention. We conclude plaintiff is entitled to interest on the award to plaintiff from the date of the original hearing, 25 May 2000, pursuant to Section 97-86.2. Accordingly, we remand this case for the Commission to award plaintiff interest on his award from 25 May 2000.

In summary, as to defendant's appeal, we affirm the Commission's award of temporary total disability benefits and remand for the Commission to make findings showing its specific calculations in reaching plaintiff's average weekly wage. As to plaintiff's appeal, we remand for a hearing on whether defendant is entitled to a credit and if so, the amount of credit to which defendant is entitled. We further

remand this case for the Commission to determine whether plaintiff is entitled to attorney's fees in light of its conclusion on the credit issue. Finally, we hold that plaintiff is entitled to interest on the award to plaintiff from the date of the original hearing on 25 May 2000 and remand for the Commission to award plaintiff interest on his compensation award.

Affirmed in part and remanded in part.

Judges McGEE and CALABRIA concur.

NEW HANOVER COUNTY, ON BEHALF OF SHERRI M. MANNTHEY, PLAINTIFF V. BRAD W. KILBOURNE, DEFENDANT

No. COA01-1521

(Filed 15 April 2003)

Child Support, Custody, and Visitation— support—Oregon and North Carolina orders—arreages

A child support case was remanded for a determination of what amount, if any, was owed where an initial order was obtained in Oregon in 1989, another in North Carolina in 1992, this 2001 motion in the cause sought arrears from the Oregon order after the children had "aged out," and the trial court found the North Carolina order to be controlling. The trial court's duty was to enforce defendant's obligation to pay vested arrears accrued under the Oregon order up to the date of the North Carolina order; from that point, defendant owed any arrears that vested under both orders, but is due a credit for payments made under either order. N.C.G.S. §§ 50-13.10, 52C-2-209.

Appeal by plaintiff from order entered 13 July 2001 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 7 January 2003.

Johnson & Lambeth, by Maynard M. Brown, Anna J. Averitt, and Carter T. Lambeth, for plaintiff-appellant.

Brad Kilbourne, pro se.

GEER, Judge.

Plaintiff, Sherri M. Mannthey, appeals from an order denying her request that a 1989 Oregon child support order be found controlling over a 1992 North Carolina child support order. The trial court concluded that "[t]he North Carolina order of September 1992 is the controlling order in this matter." Because the record reveals that the only issue before the trial court was arrearages, we hold that the trial court erred in failing to give full faith and credit to the 1989 Oregon child support order in violation of the United States Constitution and, therefore, reverse.

Ms. Mannthey and Brad Kilbourne were married in January 1982. They are the parents of Jamie M. Kilbourne, born 10 September 1982. During the marriage, the family resided in Oregon. The parties divorced in February 1987. On 3 November 1989, the Oregon courts entered a child support order (the "Oregon order"), requiring defendant to pay $175.00 per month, beginning in December 1989 and continuing until the child reached age 18 (unless the child married or was emancipated) or until age 21 if the child was regularly attending school. After entry of the Oregon order, defendant moved to North Carolina.

In March 1992, pursuant to the Uniform Reciprocal Enforcement of Support Act ("URESA"), the Oregon courts sent the North Carolina courts a Uniform Support Petition requesting the establishment of a URESA order for child support and medical coverage. Oregon's URESA petition failed to request arrears, although defendant allegedly owed Oregon $5,958.00 in arrears pursuant to the Oregon order because of public assistance provided to plaintiff. On 22 September 1992, a North Carolina court entered a new child support order (the "North Carolina order") in which the court applied the North Carolina Child Support Guidelines. Mr. Kilbourne consented to the order and judgment, which required defendant to pay $54.00 per week in child support beginning October 1992. Defendant followed the North Carolina order in making child support payments until 2001.

In 2001, Oregon requested that North Carolina register the original 1989 Oregon order under the Uniform Interstate Family Support Act ("UIFSA"). On 6 April 2001, the New Hanover Child Support Agency filed a URESA/UIFSA motion in the cause in New Hanover County requesting that the court:

1. Determine the Oregon order to be the controlling order pursuant to NCGS 52C-2-207(b)(2).

2. Confirm registration of the November 7, 1989 Oregon order in the state of North Carolina.

3. Dismiss the North Carolina Order and Judgment.

On 16 April 2001 North Carolina entered a notice of registration of foreign support order, which registered the Oregon order in North Carolina. After an 11 July 2001 hearing on plaintiff's motion in the cause, the trial court denied plaintiff's requests and found the North Carolina order to be controlling.

On appeal, plaintiff argues that the application of N.C. Gen. Stat. § 52C-2-207(b) and *State ex rel. Harnes v. Lawrence*, 140 N.C. App. 707, 538 S.E.2d 223 (2000) render the Oregon order controlling and, therefore, enforceable under UIFSA. While we agree with plaintiff that the trial court's ruling was in error, because of the particular facts of this case, we do not reach the question of which order controls.

I

Because of the complexity and multiplicity of pertinent state and federal child support legislation, a summary of the law regarding review of multi-state child support orders is critical in order to define the proper analytical framework for cases such as this one.

From 1951 until 1996, URESA provided the procedural mechanism in North Carolina for establishing, modifying, and enforcing child support across state lines. Under URESA, a state was not bound to adopt a child support order entered in another state. Instead, "a state had jurisdiction to establish, vacate, or modify an obligor's support obligation even when that obligation had been created in another jurisdiction." *Welsher v. Rager*, 127 N.C. App. 521, 524, 491 S.E.2d 661, 663 (1997). As a result, child support obligors could have multiple, inconsistent obligations in different states. As this Court noted, this aspect of URESA meant that "obligors could avoid their responsibility by moving to another jurisdiction and having their support obligations modified or even vacated." *Id.*

In 1986, in an effort to improve the collection of child support, Congress amended Title IV-D of the Social Security Act ("the Bradley amendment"). 42 U.S.C. 666(a)(9) (2003); *see also* Lisa Dukelow,

Child Support in North Carolina: What is the State of the Law and How Did We Get Here?, 22 N.C. Cent. L.J. 14, 18 (1996). The Bradley amendment's intent was to "concentrate on the collection of child support rather than on the amount of child support to be awarded." *Id.* As one commentator has noted, the amendment "required states to enact laws providing that unpaid, court-ordered child support constituted a vested right when due, prohibiting the retroactive modification of vested child support arrearages, considering past-due child support as a final judgment, and extending full faith and credit with respect to the enforceability of judgments for past-due child support." John L. Saxon, *"Reconciling" Multiple Child Support Orders Under UIFSA and FFCCSOA: The Twaddell, Roberts, and Dunn Cases*, Family Law Bulletin No. 11 (Institute of Government, The University of North Carolina at Chapel Hill), June 2000, at 20 n.68 (hereinafter *"Reconciling"*); *see also* 42 U.S.C. 666(a)(9) (2003).

To comply with the Bradley amendment, North Carolina enacted N.C. Gen. Stat. § 50-13.10 in 1987, which provided:

> (a) Each past due child support payment is *vested* when it accrues and *may not thereafter be vacated, reduced, or otherwise modified* in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law . . . .
>
> (b) A past due child support payment which is vested pursuant to G.S. 50-13.10(a) *is entitled, as a judgment, to full faith and credit* in this State and any other state, with the full force, effect, and attributes of a judgment of this State, except that no arrearage shall be entered on the judgment docket of the clerk of superior court or become a lien on real estate, nor shall execution issue thereon, except as provided in G.S. 50-13.4(f)(8) and (10).

N.C. Gen. Stat. § 50-13.10(a) and (b) (2001) (emphasis added). Under § 50-13.10, past due child support is vested in the obligee, is not subject to retroactive modification, and is entitled to full faith and credit by sister states.

In a further effort to address interstate child support issues, Congress enacted the Full Faith and Credit for Child Support Orders Act ("FFCCSOA") in 1994. While the Bradley amendment addressed arrearages, FFCCSOA addressed the proliferation of inconsistent child support orders being filed across the country. *Wilson Cty. ex rel. Egbert v. Egbert*, 153 N.C. App. 283, 286, 569 S.E.2d 727, 729

(2002) ("Congress passed FFCCSOA for the purpose of establishing 'national standards' to facilitate the payment of child support, discourage interstate conflict over inconsistent orders, and to avoid jurisdictional competition."). According to one scholar, FFCCSOA was significant because prior to its enactment, "states were required to give full faith and credit to out-of-state child support orders only to the extent that child support payments under another state's order were past-due arrearages that were vested and not subject to retroactive modification under the rendering state's law." John L. Saxon, *The Federal "Full Faith and Credit for Child Support Orders Act,"* Family Law Bulletin No. 5 (Institute of Government, The University of North Carolina at Chapel Hill), Feb. 1995, at 1.

FFCCSOA, codified at 28 U.S.C. § 1738B, requires "that state courts afford 'full faith and credit' to child support orders issued in other states and refrain from modifying or issuing contrary orders except in limited circumstances." *Lawrence*, 140 N.C. App. at 710, 538 S.E.2d at 225. Under § 1738B(e), a child support order may be modified by a sister state only if the rendering state has lost continued, exclusive jurisdiction over the child support order, which in turn occurs only if (1) neither the child nor any of the parties continue to reside in the state; or (2) each of the parties has consented to the assumption of jurisdiction by another state. 28 U.S.C. § 1738B(e)(2) (2003); *Lawrence*, 140 N.C. App. at 710, 538 S.E.2d at 226. Under the Supremacy Clause of the United States Constitution, FFCCSOA is binding on all states "and supersede[s] any inconsistent provisions of state law, including any inconsistent provisions of uniform state laws such as URESA . . . ." *Kelly v. Otte*, 123 N.C. App. 585, 589, 474 S.E.2d 131, 134 (1996). Thus, to the extent URESA conflicted with FFCCSOA, FFCCSOA was binding on North Carolina prior to North Carolina's adoption of UIFSA in 1996.

UIFSA—the Uniform Interstate Family Support Act—was promulgated in 1992 by the National Conference of Commissioners on Uniform State Laws. North Carolina's adoption of UIFSA, codified in Chapter 52C of the North Carolina General Statutes and replacing URESA, did not become effective, however, until 1 January 1996. Enacted by states as a mechanism to reduce the multiple, conflicting child support orders existing in numerous states, UIFSA creates a structure designed to provide for only one controlling support order at a time: "UIFSA establishes a one order system whereby all states adopting UIFSA are required to recognize and enforce the same obligation consistently." *Welsher*, 127 N.C. App. at 525, 491 S.E.2d at 663;

see also John L. Saxon and Jacqueline M. Kane, *The Uniform Interstate Family Support Act*, Family Law Bulletin No. 8 (Institute of Government, The University of North Carolina at Chapel Hill), March 1996, at 3. Under UIFSA, "[u]pon filing, a [foreign] support order becomes registered in North Carolina and, unless successfully contested, must be recognized and enforced." *Welsher*, 127 N.C. App. at 525, 491 S.E.2d at 663. The registered order may not be vacated or modified unless (1) both parties consent or (2) the child, the obligor, and the obligee have all permanently left the issuing state and the registering state has personal jurisdiction over all of them. *Id.*

Although FFCCSOA had become effective in 1994, the statute—in contrast to UIFSA—originally did not include any provisions for reconciling multiple child support orders when both states had continuing exclusive jurisdiction. Congress, therefore, amended FFCCSOA in 1996 so that it mirrored UIFSA. After the 1996 amendment, FFCCSOA was identical to UIFSA with both acts strictly prohibiting modification of a sister state's prior, valid order. Today, UIFSA and FFCCSOA together:

> prohibit a court from entering (and, except under certain limited circumstances, prohibit a court's modification of) a child support order if a sister state's court has already entered a support order involving the same parent and child and the other court's order is, or may be determined to be, the one controlling support order with respect to the parent's duty to support that child or family.

Saxon, "*Reconciling,*" at 3.

II

Because of the prevalence of older child support orders, such as those in this case, a court reviewing multiple child support orders must consider the applicability of each of the above pieces of legislation. If the court is confronted with orders originally entered or registered in North Carolina pursuant to URESA (in other words, prior to 1 January 1996), then the court must turn to URESA to determine the validity of each order. Although superseded by UIFSA, URESA is still applicable to determine the validity of an order originally entered when URESA was in effect and before UIFSA's and FFCCSOA's one-order rules were effective. *Twaddell v. Anderson*, 136 N.C. App. 56, 62, 523 S.E.2d 710, 715 (1999), *disc. review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000) (the effect of a subsequent North Carolina URESA

order on a prior California order registered "shall be determined in accordance with URESA.").

Under URESA, a subsequent support order "does not necessarily nullify a prior order." *Id.* Thus, as indicated above, a case may involve more than one valid child support order even though the orders may be inconsistent in their terms. *Id.* at 63, 523 S.E.2d at 715. This Court has previously determined that a subsequent URESA order nullifies a prior order only if it specifically so provides. *Id. See also* N.C. Gen. Stat. § 52A-21 (1992) (repealed 1996) (a support order of this State does not nullify a support order by a court of any other state "unless otherwise specifically provided by the court").

Once the court has determined how many valid URESA orders exist, it must focus on the relief sought by the plaintiff. If the plaintiff is seeking only payment of arrearages because there is no prospective child support obligation (as when the child has "aged out"), then the court need not consider which of the valid URESA orders is controlling. Instead, the Bradley amendment and N.C. Gen. Stat. § 50-13.10 apply.

The court must first determine what arrearages have vested. Under N.C. Gen. Stat. § 50-13.10(a), child support payments due under a North Carolina child support order are vested when they accrue. With respect to valid child support orders from other states, the court must determine whether that state has enacted legislation pursuant to the Bradley amendment or whether the state has otherwise provided that the past-due child support amounts are vested. If so, the court must give full faith and credit to the other state's order and enforce the past-due support obligation. *See Twaddell*, 136 N.C. App. at 66-67, 523 S.E.2d at 718 (the full faith and credit clause of U.S. Const. art. IV, § 1 applies to require North Carolina courts to enforce arrearages arising out of a second state's child support order); *Fleming v. Fleming*, 49 N.C. App. 345, 349-50, 271 S.E.2d 587, 584 (1980) ("[a] decree for the future payment of . . . child support is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the Constitution unless by the law of the state in which the decree was rendered" the amounts are not considered vested).

We note one caveat: if properly raised, a defendant may be entitled to raise the statute of limitations as a defense. *See, e.g., Twaddell*, 136 N.C. App. at 69, 523 S.E.2d at 719 (concluding that once the amount of arrearages was reduced to judgment, that judgment

was entitled to full enforcement in North Carolina for a period of ten years after its entry); *Fitch v. Fitch*, 115 N.C. App. 722, 724, 446 S.E.2d 138, 140 (1994) (past due child support payments which became due more than ten years prior to the filing of a motion in the cause would be barred by the statute of limitations). The trial court must apply whichever statute of limitations is longer as between North Carolina and the second state. 28 U.S.C. § 1738B(h)(3) (2003); *see also Kelly*, 123 N.C. App. at 589, 474 S.E.2d at 134 ("section 1738B(g)(3) requires that the longer of the forum state's statute of limitation and the rendering state's statute of limitation be applied").

If the case involves, in full or in part, the question of prospective payment of child support, then the court must apply UIFSA and FFCCSOA to the URESA orders for the purpose of reconciling the orders and determining which one order will control the obligor's prospective obligation. North Carolina's UIFSA, found at N.C. Gen. Stat. § 52C-2-207(b)(2), provides:

> (b) If a proceeding is brought under this Chapter, and two or more child support orders have been issued by tribunals of this State or another state with regard to the same obligor and child, a tribunal of this State shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction:
>
> . . .
>
> (2) If more than one of the tribunals would have continuing, exclusive jurisdiction under this Chapter, an order issued by a tribunal in the current home state of the child controls and must be so recognized, but if an order has not been issued in the current home state of the child, the order most recently issued controls and must be so recognized.

N.C. Gen. Stat. § 52C-2-207(b)(2) (2001).

A court's determination that a particular child support order is controlling under UIFSA operates only prospectively from the date of the court's ruling to define the parent's current and future obligation to support his or her child. It cannot alter the parent's continuing obligation to pay vested child support arrearages that have already accrued. As a leading commentator has noted:

> A contrary interpretation of UIFSA and FFCCSOA—holding that the recognition of a controlling order retroactively invalidates

> "unrecognized" orders or prohibits the collection of child support arrearages that accrued under these "unrecognized" orders *before* the date another order was recognized under UIFSA and FFCCSOA—would almost certainly be inconsistent with the U.S. Constitution and state laws implementing the Bradley amendment.

Saxon, "*Reconciling*," at 9 (emphasis original).

III

In the case before us, a child support order was entered in Oregon in 1989 and a child support order was entered in North Carolina in 1992. Plaintiff argues and the trial court agreed that the primary issue in this case is a determination under UIFSA regarding which of these two valid orders controls. Based on a careful review of the record, we do not believe that it is either necessary or appropriate to reach that issue.

As explained above, the first question that this Court must address is the validity of each order. At the time they were entered, both orders were enforceable because they were both entered under URESA and filed prior to UIFSA's becoming effective in North Carolina in 1996. Further, nothing in the North Carolina order specifically expressed an intent to nullify the prior Oregon order.

The next question is the nature of the relief sought. In this case, the record reveals that when the motion in the cause was filed on 4 April 2001, the child had "aged out" and no further support was due prospectively under either order. The record indicates that the only remaining issue is whether defendant is obligated to pay arrears owed to the State of Oregon under the 1989 Oregon order. Since arrearages are the sole issue, there is no need for an analysis of which order controls.

Defendant's obligation as to arrears owed under the North Carolina order would be determined by N.C. Gen. Stat. § 50-13.10. Defendant's obligation regarding arrears under the Oregon order is determined by North Carolina looking to Oregon law to determine if the arrears are vested under Oregon law as well. *Lawrence*, 140 N.C. App. at 712, 538 S.E.2d at 227 ("As to the choice of state law governing the support order, our courts have clarified that the law of the issuing state must be applied by the adopting state."). If so, North Carolina must apply full faith and credit to enforce the Oregon statute under U.S. Const. art. IV, § 1.

We find that Oregon has passed legislation in accordance with the Bradley amendment. Chapter 109.100 of the Oregon statutes, entitled "Petition for support; effect of order; parties," provides:

> (2) The order is a final judgment as to any installment or payment of money which has accrued up to the time either party makes a motion to set aside, alter or modify the order, and the court does not have the power to set aside, alter or modify such order, or any portion thereof, which provides for any payment of money which has accrued prior to the filing of such motion.

ORS § 109.100(2) (2001). As Oregon's version of the Bradley amendment, this provision has the same effect on arrears as N.C. Gen. Stat. § 50-13.10. The arrears due under the 1989 Oregon order vested when they became due, constituted a final judgment, and must be accorded full faith and credit under North Carolina law unless barred by a properly-raised statute of limitations defense.

This case must be remanded for a determination by the trial court of what amount, if any, defendant owes in arrears. In making this calculation, the trial court must apply N.C. Gen. Stat. § 52C-2-209:

> Amounts collected and credited for a particular period pursuant to a support order issued by a tribunal of another state must be credited against the amounts accruing or accrued for the same period under a support order issued by the tribunal of this State.

When two valid child support orders exist, the obligor receives credit for his child support payments under both orders beginning at the date that both orders came into effect.[1]

Conclusion

On the facts before us, the trial court's duty was to enforce defendant's obligation to pay plaintiff's vested arrears that accrued under the Oregon order up until the date in 1992 when the North Carolina order was entered. From that point on, defendant owed any arrears that vested under both orders although he is entitled to a

1. The official commentary to this section explains how the calculation of arrears is done with multiple child support orders: "For example, full payment of $300 on an order of State C earns a 100% pro tanto discharge of the current support owed on a $200 order of State A, and a 75% credit against a $400 order of State B. Crediting payments against arrears on multiple orders is more complex, and is subject to different constructions in various States. Under the one-order system of UIFSA, an obligor ultimately will be ordered to pay only one sum-certain amount for current support (a sum certain to reduce arrears, if any)."

credit for payments made under either order. On remand, the trial court must determine the appropriate amount of arrears, if any, that defendant owes.

Vacated and Remanded.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. EVA KATHLEEN BARLOWE

No. COA02-579

(Filed 15 April 2003)

Criminal Law— continuance to obtain expert—denial—constitutional violation

The denial of a continuance violated a first-degree murder defendant's constitutional rights to confront her accusers, to effective assistance of counsel, and to due process of law where defendant sought more time in which to obtain a blood splatter expert. There was no sound reason in the record for the denial of the continuance given the penalty faced by defendant and the materiality of the issue on which defendant sought advice and testimony, and the State did not carry its burden of showing that the ruling was harmless beyond a reasonable doubt. U.S. Const. amends. V, VI, XIV; N.C. Const. art. I, §§ 19, 23.

Appeal by defendant from judgment entered 28 September 2001 by Judge James U. Downs in McDowell County Superior Court. Heard in the Court of Appeals 17 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

C. Frank Goldsmith, Jr., and Amy E. Ray, for defendant-appellant.

MARTIN, Judge.

Defendant was indicted for the first degree murder of her mother, Cynthia Barlowe. She appeals from a judgment sentencing her to life imprisonment without parole entered upon her conviction by a jury of first degree murder.

Briefly summarized only to the extent required for an understanding of the dispositive issue raised by defendant's appeal, the evidence at trial tended to show that Cynthia Barlowe was murdered in the garage of her home in Nebo, N.C., on 23 September 2000, by defendant's then-boyfriend, Jeremy Dunlap. Dunlap, who was twenty years old at the time of the murder, testified to choking Mrs. Barlowe with his arm and then striking her in the head three times with a large metal flashlight. The evidence also showed that defendant, a seventeen-year-old high school senior at the time, was present at the house at the time of the murder and participated in cleaning up the garage, transporting her mother's body to a relatively secluded location near a lake where it was set on fire, and letting her mother's car roll off a nearby embankment. The evidence is in conflict as to whether defendant joined Dunlap in planning and committing the murder.

Testimony by both Dunlap and defendant, as well as others with whom Mrs. Barlowe and defendant spoke on the day of the murder, indicates that Mrs. Barlowe had discovered defendant and Dunlap together in defendant's bed the night before. According to defendant, Mrs. Barlowe ordered Dunlap to leave and expressed anger and disappointment with defendant. Defendant had also been found by her mother and father in bed with a different young man a few months earlier. Her father had been enraged and had struck the wall near defendant with a pool cue and dragged the young man around the room by his hair before he could leave the house. Mr. Barlowe had then punished defendant by refusing to speak with or show affection to her for several days.

The morning after Mrs. Barlowe found defendant and Dunlap in defendant's bed, defendant drove Mrs. Barlowe to a party in their neighborhood. Mrs. Barlowe told defendant they would talk about the previous night's incident when she returned and she would tell defendant's father about it when he came home from work that evening and that "her father would never look at [defendant] the same again . . . ." After driving her mother to the party, defendant returned home.

According to defendant's statement to police, Dunlap called her house and told her to bring her mother home from the party or he would kill defendant. She did so, and as they were entering the house through the garage, she heard her mother scream and turned to see Dunlap choking her. She ran and hid and when she returned to the garage, Dunlap had cleaned the garage up with a hose. He then forced defendant to drive either his car or her mother's with her mother's

body to the place where Dunlap attempted to burn the body. Dunlap then took her back home and watched as she got ready for work, then followed her to her father's business and then to work. She later provided additional information, indicating, *inter alia*, that (a) Dunlap had come to the residence for her mother's car, (b) Dunlap had wanted to talk to Mrs. Barlowe about marrying defendant, and (c) defendant had known Dunlap was going to hurt her mother, but not that he would kill her. In her written statement, defendant said:

> Jeremy Dunlap did choke my mother. I didn't call anyone in fear of the thought that I would be guilty of the murder of my mother. I did not know that he was going to attack her. I thought that he had left but he was inside of my garage and he snuck up behind her. I tried to make him let her go. But when he refused I ran away and came back upstairs to him cleaning up the blood at 2:00 pm. and he then grabbed me and forced me to help him. And instead of calling anyone for help I pretended that nothing happened in fear of being found guilty for my mother's death. I am willing to testify against Jeremy Dunlap.

Defendant testified at trial that Dunlap was waiting for her outside her house when she returned from taking her mother to the party. She stated that they discussed the need to talk with Mrs. Barlowe to "straighten things out." To that end, she drove to the party and told her mother in private that Dunlap was at their house and wanted to talk to her. She stated that her mother then told friends that their dog was sick and she had to leave. They drove back to the house and were entering the house through the garage when her mother and Dunlap began arguing behind her. She continued into the house, but then heard her mother scream and turned to see Dunlap choking her mother. She then ran to her room and hid under a blanket. She returned to the garage after an indeterminate period and saw blood everywhere, her mother on the floor, and Dunlap standing over her mother with a flashlight. Dunlap then told her to help him clean up and she did. She also followed his directions in disposing of the body and car. She drove her mother's car with the body in it for a while, but then did not want to be in that car anymore and pulled over and they switched cars. Defendant also testified that Dunlap did everything regarding setting fire to her mother's body and rolling her mother's car off a cliff.

In contrast, Dunlap testified at trial that killing Mrs. Barlowe had been defendant's idea, though they worked out the plan together and he carried out the murder himself. He testified that defendant went

between the house and garage several times while he choked her mother, asking each time she came back out whether "it was done yet." He also stated that after Mrs. Barlowe was on the floor and had at least lost consciousness, he let go of her and defendant asked him, "Are you sure she's dead?" When he responded that he did not know, defendant then went into the house and came back with a heavy flashlight, handed it to him, and said, "Hit her." According to Dunlap, defendant was present in the garage when Dunlap struck Mrs. Barlowe. They then cleaned the garage together, with defendant bringing out towels and the plastic bags that were put over her mother's head and body and hosing off the garage floor herself.

The State also presented testimony by SBI Agent Mike Garrett with respect to his analysis of bloodstains in the Barlowe's garage and on clothing defendant had said she was wearing during the events surrounding her mother's murder. Specifically, Agent Garrett testified to the difference between "transfer" and "spatter" bloodstains, the latter being created when blood is impacted and sprays out from the point of impact. He testified that multiple small stains on the knee and back of the pants which defendant was wearing at the time of the murder tested positive for blood and appeared to be spatter stains. He further testified that they were not consistent with stains that would be created by drops of blood that fell or dripped from above.

Although the record on appeal contains twenty-two assignments of error, only three of them have been addressed in defendant's appellate brief. Those assignments of error not addressed in a party's brief are deemed abandoned and will not be reviewed by this Court. N.C.R. App. P. 28(a) (2002). The dispositive issue is whether the trial court erred in denying defendant's motions to continue the trial in order to enable defendant to obtain an expert witness on bloodstain pattern interpretation. For the reasons which follow, we conclude the denial of the motions violated defendant's constitutional rights and entitle her to a new trial.

Defendant argues the denial of her motions to continue prevented her from being able to evaluate Agent Garrett's report, prepare to cross-examine him, or present contradictory evidence with respect to the interpretation of the bloodstains at issue in this case.

> [A] motion for continuance is ordinarily addressed to the sound discretion of the trial court. . . . However, if the motion to

> continue is based on a constitutional right, the trial court's ruling thereon presents a question of law that is fully reviewable on appeal.

State v. T.D.R., 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (citations omitted). "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Moses*, 272 N.C. 509, 512, 158 S.E.2d 617, 619 (1968). If the error amounts to a violation of defendant's constitutional rights, it is prejudicial unless the State shows the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2002); *State v. Gardner*, 322 N.C. 591, 369 S.E.2d 593 (1988); *State v. Cody*, 135 N.C. App. 722, 522 S.E.2d 777 (1999).

> The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions. As noted by the United States Supreme Court . . . "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."
>
> *State v. Fair*, 354 N.C. 131, 149, 557 S.E.2d 500, 515 (2001) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 308 (1973)), *cert. denied*, — U.S. —, 153 L. Ed. 2d 162 (2002); U.S. Const., Amend. V, XIV. In addition, "the right to face one's accusers and witnesses with other testimony is guaranteed by the sixth amendment to the federal constitution, applicable to the states through the fourteenth amendment, and by Article I, sections 19 and 23 of the North Carolina Constitution." *State v. Davis*, 61 N.C. App. 522, 525, 300 S.E.2d 861, 863 (1983). Improper denial of a motion to continue in order to prepare a defense may also constitute violation of a defendant's Sixth Amendment right to effective assistance of counsel. *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000).

An inquiry into alleged constitutional error by a trial court in denying a motion to continue requires scrutiny of the record and consideration of the circumstances of the individual case. *Avery v. Alabama*, 308 U.S. 444, 84 L. Ed. 377 (1940). The North Carolina Supreme Court has summarized the analysis applied by federal

courts in reviewing refusals to grant a continuance where a constitutional right is implicated:

> Courts have discussed numerous factors which are weighed to determine whether the failure to grant a continuance rises to constitutional dimensions. Of particular importance are the reasons for the requested continuance presented to the trial judge at the time the request is denied.
>
> A continuance in a criminal trial essentially involves a question of procedural due process. Implicitly, the courts balance the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency.
>
> When the individual interest at stake is the defendant's life or liberty, the individual interest is especially compelling. An interest such as . . . defendant's life is factored heavily into the analysis.
>
> On the other side of the scale, the government has an interest in procuring testimony within a reasonable time.

State v. Roper, 328 N.C. 337, 349, 402 S.E.2d 600, 607, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991) (citations omitted).

North Carolina courts have followed suit in analyzing similar alleged violations under our state constitution. *Id.* at 352, 402 S.E.2d at 608. Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance. *See State v. Branch*, 306 N.C. 101, 291 S.E.2d 653 (1982); *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981); *State v. Smathers*, 287 N.C. 226, 231-32, 214 S.E.2d 112, 115 (1975); *State v. Martin*, 64 N.C. App. 180, 182-83, 306 S.E.2d 851, 852-53 (1983).

In the present case, the alleged offense occurred on 23 September 2000 and evidence log records, as well as Agent Garrett's testimony, indicate the police took custody of the clothing worn by defendant at the time of the murder on 24 September 2000. Defendant

made a request for voluntary discovery on 31 January 2001 that included a request for "any results of . . . tests . . . made in connection with the case . . . together with any physical evidence . . . available to the State." *See* N.C. Gen. Stat. § 15A-903(e) (2002). On 23 April 2001, the State provided defendant with three pages of physical evidence log sheets dated 24 September 2000. One of the attached log sheets contained the entry: "green pants w/ blood stains [from] Eva's bedroom." On 16 May 2001, defendant made a Motion to Compel Discovery and Motion to Produce Exculpatory Evidence, requesting again, *inter alia*, a disclosure of any test results in accordance with G.S. § 15A-903(e). This motion was heard on 24 May 2001, but no disclosure or request was made specifically regarding the green pants. Another Notice of Intent was provided to defendant on 6 September 2001 that dealt with hearsay statements by the victim and defendant.

On 13 September, defendant served a Motion to Continue asserting that the State had, on 10 September, delivered to defense counsel a report containing Agent Garrett's findings from his bloodstain pattern analysis of the green pants and that "since receiving the report . . . [defense counsel had] made diligent efforts to identify potential experts in this field . . . ." Defense counsel explained that the one expert with whom contact had been made would not be able to do the analysis and prepare counsel for cross-examination or be available to give testimony by 19 September, the day trial was scheduled to start. The motion also stated "the potential experts that have been identified by defense counsel are located outside of North Carolina, and there is currently no commercial air traffic in the United States [due to the events of 11 September 2001] by which evidence and documents may be delivered to and from the expert that defendant selects." After hearing the motion on 13 September, the trial court declined to grant a continuance.

On 17 September, defendant submitted a Renewed Motion to Continue, supported with affidavits by defense counsel and three potential expert witnesses. The affidavit by defendant's counsel indicated that he had, on 13 September, presented to the trial court copies of two reports which he had received from the State. One report, prepared on 27 April 2001 and provided to the district attorney, detailed inspection of the crime scene and seizure of items, including the pants, indicating the search and collection of evidence that had taken place on 24 September and 5 October 2000. According to the affidavit and the State's response to the motion to continue,

defendant was provided with this report on 27 or 28 August 2001. The report itself mentions the discovery of small stains on the garage floor "characteristic of impact spatter" and the collection of "[g]reen pants with visible stain." The other report, which defense counsel claims was disclosed on 10 September, was Agent Garrett's bloodstain analysis, indicating the discovery of about 36 stains that "appeared to be blood spatter" on the front right knee and rear of the pants. This report indicated that the analysis had been performed on 20 August 2001 and typed on 21 August, with copies sent to the District Attorney. In his affidavit, counsel went on to detail his efforts to locate an expert witness in the days following 10 September:

> In summary, counsel has consulted with a number of experienced members of the criminal defense bar around the state, and all of those attorneys have identified only three expert witnesses in this subject matter: Marilyn T. Miller, Barton P. Epstein, and Stuart H. James. . . . Two of the witnesses state that they are familiar with the identity of other experts in their field, and that there are none currently in North Carolina outside of law enforcement employees. None of these witnesses is reasonably available to become prepared to testify on behalf of the defendant on such short notice.

Defense counsel also indicated that his law partner had contacted two potential expert witnesses in North Carolina, but neither was qualified to conduct bloodstain pattern analysis. In both the motions and the affidavit, defense counsel urged the importance of an expert witness on this issue in light of the mandatory life sentence without parole for which defendant was at risk. All three of the experts mentioned by counsel submitted affidavits regarding their availability, the earliest of which would have been mid-October 2001 and the latest, November 2001. The resumes each expert attached evidenced extensive experience, publications, and study on the subject.

In the State's Response to the Motion to Continue, the State alleged that defense counsel had in fact been provided with a copy of Agent Garrett's bloodstain pattern analysis on 27 August, although it had been marked as a "draft" then. The contents of the "draft" attached to the State's Response and the finalized report received by defense counsel on 10 September were otherwise identical. Defense counsel's law partner also submitted an affidavit indicating that she had re-contacted the three experts on 17 September to determine whether they could have been available for trial on 19 September had they been contacted on 27 August and all three indicated it would

not have made a difference due to prior commitments. After a hearing in which (1) defense counsel argued specifically that the ability of the defense to rebut the State's blood spatter evidence was critical because it contradicted certain of defendant's statements and (2) the State asserted that if a denial of the motion included a bar against presentation of the State's blood spatter evidence the State would rather not try the case at that time, the trial court denied the motion, stating:

> The Court in its discretion denies the Renewed Motion to Continue and—but I might further add that the so-called reasoning that the Court used in chambers . . . was not that which was asserted in the motion. It was discretionary then, it's discretionary now based on the totality of the circumstances.

Considering all of the factors which our courts have said are relevant to a determination of whether the denial of a motion to continue implicates constitutional guarantees, we are compelled to hold the denial of defendant's motion to continue in this case was error and violated her constitutional rights to confront her accusers, to effective assistance of counsel, and to due process of law. U.S. Const., Amend. V, VI, XIV; N.C. Const. Art. I, §§ 19, 23. It is clear that the blood spatter evidence was critical to the State's case against defendant because it was the only physical evidence potentially placing her at the scene at the time of the murder. Aside from any conclusions the jury might draw from that aspect alone, evidence of the presence of "impact spatter" also is contradictory of defendant's testimony that she was not in the garage during the murder and corroborative of Dunlap's testimony that she was present and, in fact, handed him the flashlight. In a case largely dependent on the credibility of the two, the potential harm to the defense due to the lack of opportunity to refute this evidence by informed cross-examination of Agent Garrett, rebuttal of his testimony by someone qualified to express an opinion, or to provide other explanations for the presence of blood spatter on the pants, is palpable.

Moreover, it does not appear that defendant unreasonably delayed discovery efforts, and even assuming the State is correct in its assertion that defense counsel was provided a draft of Agent Garrett's analysis report on 27 August, defendant has shown that none of the experts contacted by her counsel would have been available for trial even if they had been contacted immediately upon defendant's receipt of the report. If, as claimed by defense counsel, the report was not received until 10 September, the delay between its

receipt and the 13 September motion to continue is not unreasonable, considering the distractions imposed upon nearly all of our citizens and the difficulties likely to have been encountered in contacting and communicating with potential expert witnesses due to the tragic events in New York City and Washington, D.C. on 11 September 2001. Lastly, unlike many cases in which the defendant did not indicate to the trial court the names of witnesses or the substance of testimony they hoped to obtain by virtue of a continuance, *e.g.*, *State v. McCullers*, 341 N.C. 19, 460 S.E.2d 163 (1995), defense counsel in the present case provided such information both orally and in writing. Given the materiality of the issue on which defendant sought expert advice and testimony and the potential penalty faced by defendant if convicted, we can find no sound reason within the record for the denial of her motion for a continuance, and the State has not carried its burden of showing the court's ruling was harmless beyond a reasonable doubt. Because defendant's constitutional rights were violated by the trial court's ruling on this issue, we hold that defendant is entitled to a new trial.

Due to the decision to grant defendant a new trial, we decline to address defendant's second and third arguments.

New trial.

Chief Judge EAGLES and Judge GEER concur.

IN THE MATTER OF THE WILL OF CHARLES RICHARD JOHNSTON, DECEASED

No. COA02-452

(Filed 15 April 2003)

Appeal and Error— appealability—interlocutory order—denial of motion to compel—denial of discovery matters

Caveators' appeal from an order of the trial court denying their motion to compel testimony and granting a motion filed by a propounder to quash the subpoena of an attorney during discovery in a will caveat proceeding is dismissed as an appeal from an interlocutory order, because: (1) although the trial court attempted to certify the appeal under N.C.G.S. § 1A-1, Rule 54(b),

an order denying a motion to compel is not a final judgment and therefore certification was inappropriate; and (2) caveators failed to show that the information sought during discovery was so crucial to the outcome of the case that it would deprive them of a substantial right and thus justify an immediate appeal.

Judge TYSON dissenting.

Appeal by caveators from order entered 17 January 2002 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 22 January 2003.

Shipman & Hodges, L.L.P., by Gary K. Shipman and William G. Wright, for caveator appellants.

Hogue Hill Jones Nash & Lynch, LLP, by David A. Nash, for propounder appellee.

TIMMONS-GOODSON, Judge.

Charles Richard Johnston, Jr., Jennifer J. Mangan, and Lorie J. McCabe (collectively, "caveators") appeal from an order of the trial court denying their motion to compel testimony and granting a motion filed by Constance Sophia Johnston ("propounder") to quash the subpoena of attorney George Rountree, III, ("Rountree") during discovery in a will caveat proceeding. For the reasons stated herein, we dismiss the appeal.

The pertinent factual and procedural history of the instant appeal is as follows: Charles Richard Johnston ("decedent") died on 16 November 2000. On 7 December 2000, propounder, the second wife of decedent, submitted to probate a purported last will and testament of decedent dated 17 November 1993 ("1993 will"). The 1993 will bequeathed all tangible personal property to propounder.

On 20 June 2001, caveators, the natural children of decedent by his first wife, filed a caveat to the 1993 will, asserting that decedent lacked the mental capacity to execute the 1993 will, or alternatively, that propounder procured the 1993 will through undue influence. During discovery of the matter, caveators attempted to depose Rountree, decedent's personal and professional attorney from the 1970s until his discharge in 1992. During the course of the deposition, caveators sought information concerning Rountree's discharge as counsel, as well as information about prior wills prepared by Rountree and executed by decedent. Rountree, however, declined to

answer these questions unless ordered by the court, on the grounds that such information was protected under the work product doctrine and by attorney-client privilege.

On 6 December 2001, caveators filed a motion to compel Rountree to answer questions regarding: (1) the discharge of Rountree as legal counsel; (2) observations by Rountree of decedent's health during the time Rountree represented him; (3) conversations regarding decedent's relationship with propounder; (4) conversations concerning decedent's testamentary intent and his desire for a successor as chief executive officer of his company; and (5) wills and powers of attorney drafted by Rountree for decedent prior to the execution of the 1993 will. On 4 January 2002, propounder filed a motion to quash caveators' subpoena of Rountree.

Both motions came before the trial court on 7 January 2002, at which time the trial court heard arguments by counsel, reviewed the file and memoranda of law, and conducted an *in camera* interview of Rountree. The trial court thereafter entered an order denying the motion to compel and quashing the subpoena of Rountree. From this order, caveators appeal.

Caveators contend that the trial court erred in denying the motion to compel the testimony of Rountree and in quashing the subpoena. We conclude that caveators' appeal is interlocutory and does not affect a substantial right. We therefore dismiss the appeal.

Interlocutory orders and judgments are those "made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999); *accord Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Generally, there is no right of immediate appeal from interlocutory orders and judgments. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381.

Immediate appeal of interlocutory orders and judgments is available, however, in two instances. First, immediate review is available when 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. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001); *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999). The trial court may not, however, by certification, render its decree immedi-

ately appealable if it is not a final judgment. *See Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579; *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (stating that, merely because "the trial court declared [its decree] to be a final, declaratory judgment does not make it so"). In the instant case, although the trial court attempted to certify the appeal pursuant to Rule 54(b), an order denying a motion to compel is clearly not a "final judgment" and certification was therefore inappropriate. *See Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 23, 541 S.E.2d 782, 786, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001); *Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 726-27, 518 S.E.2d 786, 788 (1999); *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 248, 507 S.E.2d 56, 61 (1998).

A second available avenue for immediate appeal from an interlocutory order or judgment exists where such order affects a "substantial right." *See* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (2001); *Bowden v. Latta*, 337 N.C. 794, 796, 448 S.E.2d 503, 505 (1994). An interlocutory order affects a substantial right if the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life and Casualty Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991). The determination of whether an interlocutory order affects a substantial right requires application of a two-part test. *See Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579. First, the order must affect a right that is "substantial." *See Norris v. Sattler*, 139 N.C. App. 409, 411, 533 S.E.2d 483, 485 (2000). Second, deprivation of the substantial right must potentially work injury if not corrected before an appeal from final judgment. *See Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579; *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

An order regarding discovery matters is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment. *Sharpe*, 351 N.C. at 163, 522 S.E.2d at 579; *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598, 600 (1999), *affirmed per curiam*, 351 N.C. 349, 524 S.E.2d 804 (2000); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554, 353 S.E.2d 425, 426 (1987). Moreover, it is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. *Belcher v. Averette*, 152 N.C. App. 452, 455, 568 S.E.2d 630, 633 (2002); *Evans*, 142 N.C. App. at 27, 541 S.E.2d at 788.

An order denying discovery may be immediately appealable if the "desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case." *Dworsky v. Insurance Co.*, 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980). "[A] mere statement that an examination is material and necessary is not sufficient to support a production order." *Stanback v. Stanback*, 287 N.C. 448, 461, 215 S.E.2d 30, 39 (1975).

In the case *sub judice*, caveators argue that the information they seek from Rountree is highly relevant to critical issues surrounding decedent's mental state and the exertion of any undue influence upon decedent by propounder in the execution of the 1993 will. The evidence tends to show, however, that Rountree was discharged as decedent's counsel in 1992 and thereafter had no contact with decedent. Decedent did not draft the will at issue in the immediate proceeding until 1993, and did not die until 2000. Caveators have failed to demonstrate that Rountree possesses "highly material" information concerning decedent's health or his relationship with his wife at the time of the drafting of the 1993 will.

Further, there is no evidence in the record reflecting the substance of the trial court's *in camera* interview with Rountree. Caveators did not request that the trial court make findings concerning its interview, nor was the trial court required to do so. *See Evans*, 142 N.C. App. at 27, 541 S.E.2d at 788. Caveators did not seek to have the substance of the *in camera* interview placed under seal for consideration by this Court. Where no findings appear in the record, "we may presume that the trial court . . . recognized the absence of relevancy and materiality of the information [sought to be discovered]." *Rowe v. Rowe*, 74 N.C. App. 54, 60, 327 S.E.2d 624, 627, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 489 (1985). Absent evidence in the record, we cannot determine whether or not any information possessed by Rountree was highly material to caveators' case or otherwise immune from discovery. *See N.C. Farm Bureau Mutual Ins. Co. v. Wingler*, 110 N.C. App. 397, 401, 429 S.E.2d 759, 762, *disc. review denied*, 334 N.C. 434, 433 S.E.2d 177 (1993). "We must therefore conclude that [caveators] have not shown that the information sought is so crucial to the outcome of this case that it would deprive them of a substantial right and thus justify an immediate appeal." *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524.

Because caveators have not carried their burden of showing that the information they sought was highly material, we conclude that the instant appeal is interlocutory and does not affect a substantial right. *See Stevenson v. Joyner*, 148 N.C. App. 261, 264, 558 S.E.2d 215, 218 (2002) (dismissing as interlocutory an appeal from an order compelling discovery of documents where appellants failed to carry their burden of showing that the material was protected by attorney-client privilege and the work product doctrine); *Romig*, 132 N.C. App. at 686, 513 S.E.2d at 601-02 (dismissing as interlocutory an appeal from an order compelling discovery, although the information ordered to be disclosed was confidential); *N.C. Farm Bureau Mutual Ins. Co.*, 110 N.C. App. at 401-02, 429 S.E.2d at 762 (dismissing as interlocutory an appeal from the denial of a motion to compel); *Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985) (concluding that no substantial right was affected by an order denying a motion to compel discovery, even where waste and encumbrance of the plaintiff's property might ensue absent immediate appeal), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986). The instant appeal is therefore

Dismissed.

Judge LEVINSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I respectfully dissent from the majority opinion which dismisses this appeal as interlocutory. I find that the order affects a substantial right, was certified as immediately appealable, and is not interlocutory.

I. Interlocutory

The majority's opinion finds that the trial court did not state its reason for denying the motion to compel and states "Where no findings appear in the record, 'we may presume that the trial court . . . recognized the absence of relevancy and materiality of the information [sought to be discovered].' " Neither party argues that the motion to compel should be denied because of "relevancy" or "materiality." The basis of both arguments before the trial court was the applicability of the attorney-client privilege even when highly relevant and material information is sought through discovery. I would find that

the trial court followed the arguments of counsel and decided the case based on the attorney-client privilege. This Court should not "presume that the trial court . . . recognized the absence of relevancy and materiality."

"[W]hen, . . ., a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under sections 1-277(a) and 7A-27(d)(1)." *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999). In *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782 (2001), this Court applied the reasoning of *Sharpe* to the assertion of the attorney-client privilege. 142 N.C. App. at 24, 541 S.E.2d at 786. I would apply that reasoning here.

Here, the trial court certified the case for immediate appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). While not binding on our Court, a certification by the trial court is "accorded great deference." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998).

I would hold that when the attorney-client privilege is asserted, the assertion is not otherwise frivolous or insubstantial, and the trial court has certified the issue, the challenged order affects a substantial right and is immediately appealable. I address the merits of the appeal.

II. Issues

Caveators contend that the trial court erred in denying the motion to compel the testimony of Rountree and quashing the subpoena and argue that the testimony (1) falls within the testamentary exception to the attorney-client privilege and (2) does not concern confidential communications.

III. Testamentary Exception

"[I]t is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Evans*, 142 N.C. App. at 27, 541 S.E.2d at 788. A trial court abuses its discretion when it bases its decision on an error of law.

At oral argument, caveators limited the scope of discovery to questions of Mr. Rountree regarding conversations at or near the time

of the termination of the legal relationship between Mr. Rountree and the decedent. These questions are highly "relevant" and "material" to the issue of propounder's alleged undue influence over the decedent. The evidence shows that propounder took decedent to a new attorney who drafted the will at issue. That new will contains provisions markedly more favorable to propounder and inconsistent with multiple prior wills drawn by Mr. Rountree, decedent's long-time personal and business attorney. Caveators stated they no longer sought conversations surrounding the creation of the prior wills. The prior wills prepared by Mr. Rountree were provided to caveators, speak for themselves, and are admissible at trial. *In re Will of Hall*, 252 N.C. 70, 113 S.E.2d 1 (1960).

The United States Supreme Court has recognized that "[t]he attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 141 L. Ed. 2d 379, 384 (1998). The attorney-client privilege survives not only the end of the legal relationship between the attorney and his client but also the death of his client. *Id.* However, long recognized exceptions exist to the survival of the privilege after death. One such exception is the "testamentary exception." *Id.* at 404, 141 L. Ed. 2d at 385.

The testamentary exception was recognized by the United States Supreme Court in *Glover v. Patten*, 165 U.S. 394, 41 L. Ed. 760 (1897). In *Glover*, the Court held:

> [I]n a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin.

165 U.S. at 406, 41 L. Ed. at 767. The Supreme Court cited an earlier case which held that "a solicitor, by whom the will was drawn, should be allowed to testify what was said by the testator contemporaneously upon the subject." *Id.* at 407, 41 L. Ed. at 767 (citing *Russell v. Jackson*, 9 Hare 387, 392).

The Supreme Court restated the holding of *Glover* in *Swidler & Berlin* by explaining that "testamentary disclosure was permissible because the privilege, which normally protects the client's interests,

could be impliedly waived in order to fulfill the client's testamentary intent." *Swidler & Berlin*, 524 U.S. at 405, 141 L. Ed. 2d at 385. The American Bar Association ("ABA") long ago stated "where the controversy is between claimants to the estate, both parties claiming as successors to the deceased client, neither can set up a claim of privilege against the other." ABA Comm. on Professional Ethics and Grievances, Formal Op. 91 (8 March 1933).

North Carolina has recognized the testamentary exception to the common law rule that the attorney-client privilege survives the death of the client. In *In re Will of Kemp*, 236 N.C. 680, 73 S.E.2d 906 (1953), our Supreme Court stated:

> "it is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and so, where the controversy is to determine who shall take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards the communications of deceased with his attorney."

236 N.C. at 684, 73 S.E.2d at 910 (quoting 70 C.J., Witnesses, § 587). In R.P.C. 206 (14 April 1995), the ABA ethics committee restated the reasons for the testamentary exception: "It is assumed that a client impliedly authorized the release of confidential information . . . in order that the estate might be properly and thoroughly administered."

Previous cases have allowed the testamentary exception only to the attorney who drafted the will propounded concerning confidential communications about the will. See e.g., *In re Will of Kemp*, supra.; RPC 206 (14 April 1995). Precedent recognizes that the testamentary exception may extend beyond the will in probate to "other similar document[s]." *Glover*, 165 U.S. at 406, 41 L. Ed. at 767.

This caveat proceeding is limited to heirs and next of kin, all of whom claim through the decedent. The exception exists to ensure decedent's estate is "properly and thoroughly administered." RPC 206 (14 April 1995). None of the heirs is able to assert the privilege against the other.

IV. Other Confidential Communications

Although the heirs of the decedent may not assert the decedent's privilege against each other, propounder, as well as decedent's cor-

poration, were also clients of Mr. Rountree. Both the propounder and the corporation may waive or assert the attorney-client privilege regarding any confidential communications between them and Mr. Rountree. Caveators are free to question Mr. Rountree regarding his conversations with the decedent which occurred outside of or after termination of the attorney-client relationship.

V. Conclusion

The trial court did not state any other reason, such as "relevancy" or "materiality," to support its denial of the motion to compel and to quash Mr. Rountree's subpoena. The trial court erred by denying the motion to compel and quashing the subpoena based on the propounder's assertion of decedent's attorney-client privilege. I would reverse and remand the case to the trial court for further proceedings. I respectfully dissent.

STATE OF NORTH CAROLINA v. STEVEN MARK FINNEY

No. COA02-608

(Filed 15 April 2003)

1. Evidence— hearsay—unavailable witness—admissibility under Rule 804(b)(5)

The trial court did not err in a first-degree rape case by allowing a detective to read the victim wife's statement to the jury under N.C.G.S. § 8C-1, Rule 804(b)(5), because: (1) although the victim appeared at trial pursuant to a subpoena, she refused to answer any questions before the jury; (2) sufficient written notice was given to the defense by the State as to the victim's unavailability in light of the fact that the State did not learn that the victim would not testify until the first day of trial; (3) the statement possessed equivalent circumstantial guarantees of trustworthiness; (4) the statement was offered as evidence of a material fact including a description of the assailant as well as the details of the offense; (5) the hearsay was more probative than any other evidence produced by the State when the victim refused to testify at trial; (6) the general purposes of the Rules of Evidence and the interests of justice were best served by allowing the statement into evidence; (7) there was no violation of defendant's right to confrontation when the testimony was admit-

ted as an exception to the hearsay rule; and (8) the unavailability of the victim was not the result of the conduct of the State.

2. Evidence— victim's prior testimony disallowed—failure to reopen case

The trial court did not err in a first-degree rape case by refusing to allow defendant to present the prior voir dire testimony of the victim because defendant was presented with the opportunity to reopen his case and call the victim as a witness, but he failed to do so.

3. Rape— first-degree—instruction—serious physical injury—mental injury

The trial court did not commit plain error by its jury instruction on first-degree rape, because: (1) the trial court correctly defined serious physical injury; and (2) there is no additional burden on the State to show that a mental injury was more than that normally experienced in every forcible rape in addition to showing that the mental injury extended for some appreciable time.

Appeal by defendant from judgment entered 16 October 2001 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 20 February 2003.

Roy Cooper, Attorney General, by David N. Kirkman, Assistant Attorney General, for the State.

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

STEELMAN, Judge.

Defendant, Steven Mark Finney, appeals a conviction of first-degree rape. He sets forth three assignments of error. For the reasons discussed herein, we find no error.

The State's evidence tends to show the following: After midnight on 23 November 2000, Virginia Finney (Finney), wife of defendant, was preparing Thanksgiving dinner when defendant came home, demanding that she make him dinner. Defendant was drunk. Finney told defendant he could not eat what she had prepared for Thanksgiving. Defendant threw the food on the floor and slammed Finney's head against a cabinet. He verbally threatened Finney, tried to choke her, and eventually forced her to engage in sexual intercourse.

Afterwards, when defendant fell asleep, Finney left the house and ran to her mother's home between two and three o'clock in the morning.

Finney's mother, Etta Lewis (Lewis), called for emergency help. She noted that Finney's face, lips and neck were swollen, her eyes "blurred out," and her arms, chest, vagina and rectum were bruised.

At the hospital, Finney was examined by Dr. Ivy Shuman and Jamie Maybin Gibbs, a nurse. Finney was upset and did not want to speak with a male when she checked in the emergency room. She was able to recount her ordeal with a female nurse. Dr. Shuman noted numerous bruising about Finney's face and neck. Finney was prescribed antibiotics and a rape kit was completed.

Suzi Barker, a special agent with the crime lab of the North Carolina State Bureau of Investigation, found evidence of semen in Finney's rape kit. Dr. David Freeman, also a special agent, analyzed blood stains and vaginal swabs. DNA from Finney and defendant were present in the swabs.

Detective Walter C. Harper of the Henderson County Sheriff's Department investigated the allegations. He took a statement from Finney on 24 November 2000. She stated that just prior to the incident, she had undergone a hysterectomy which rendered it nearly impossible for her to have comfortable sexual intercourse. Detective Harper searched the Finney home on 27 November 2000, where he found stained sheets and bloodstains in a bathroom. He noted that defendant is approximately six feet tall, weighing 210 pounds. Finney is approximately five feet, two inches tall.

Defendant did not present any evidence at trial. He was found guilty of first-degree rape by a jury. Defendant was sentenced to 307 to 378 months in prison. He appeals.

I.

[1] In his first assignment of error, defendant argues the trial court erred by allowing Detective Harper to read Finney's statement to the jury. Defendant contends that the statement was inadmissible hearsay. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c)

(2003). The prohibition against hearsay bars the admission of out-of-court statements offered to prove the truth of the matter asserted. *Id.* Numerous exceptions to the hearsay rule exist, however, so that out-of-court statements may be admissible under some circumstances. *See* N.C. Gen. Stat. § 8C-1, Rule 804 (2003).

Under Rule 804(a)(2), a hearsay statement is admissible if the declarant is unavailable and the statement falls into one of the exceptions. " 'Unavailability as a witness' includes situations in which the declarant . . . [p]ersists in refusing to testify concerning the subject matter of [her] statement despite an order of the court to do so[.]" N.C. Gen. Stat. § 8C-1, Rule 804(a)(2) (2001).

The State sought to admit a statement under Rule 804(b)(5). Before admitting evidence under Rule 804(b)(5), the trial judge must engage in a six-part inquiry: (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 and the interests of justice will best be served by admission of the statement into evidence. *See 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); *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986). We note that detailed findings of fact are not required. *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741. In the instant case, the trial court found that all of these factors were present.

First, although Finney appeared at trial pursuant to a subpoena, she refused to answer any questions before the jury. The trial judge excused the jury and proceeded with the witness on *voir dire*. During this examination, Finney stated, "I do not wish to testify and I want to leave." She then refused to answer any further questions. The trial court made a finding of fact that sufficient written notice was given to the defense by the State as to Finney's unavailability in light of the fact that the State did not learn that Finney would not testify until the first day of trial. In *State v. Triplett*, 316 N.C. 1, 13, 340 S.E.2d 736, 743 (1986), the trial court found no error when the proponent of the evidence provided notice on the day of trial, in light of the facts. Likewise, here, the defense was present when Finney made her sur-

prising statement that she would not testify. We hold there was no error in the notice requirement under these circumstances.

Later in the trial, the trial court conducted a lengthy *voir dire* hearing to determine whether Finney's statement to Detective Harper was admissible. Prior to ruling on defendant's objection to the admissibility of the statement, the trial judge noticed that Finney was present in the courtroom. The prosecutor called Finney to come forward. The trial judge ordered Finney to come forward and take the stand three times. Finney refused, stating, "I will not go to the stand without my lawyer." Finney left the courtroom. The trial court then found that Finney was unavailable. *See State v. Linton*, 145 N.C. App. 639, 551 S.E.2d 572 (2001), *rev. denied*, 355 N.C. 498, 564 S.E.2d 229 (2002).

Second, the statement at issue is not covered by any of the hearsay exceptions listed in Rule 804(b)(1)-(4), which include former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history. *See* N.C. Gen. Stat. § 8C-1, Rule 804(b) (2001).

Third, the statement possessed equivalent circumstantial guarantees of trustworthiness. In determining whether a hearsay statement has sufficient indicia of trustworthiness, a trial court should consider: (1) the declarant's personal knowledge of the underlying incident; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason for the declarant's unavailability. *State v. Bullock*, 95 N.C. App. 524, 383 S.E.2d 431 (1989) (citing *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988)).

Finney clearly had personal knowledge of the sexual assault and had motivation to speak the truth. She never recanted. In fact, her statement to Officer Harper was substantially similar to her statements made to Lewis, Dr. Shuman and Nurse Gibbs about the incident. There were no contradictions within the version of the incident as told by Finney to Detective Harper. All of Finney's accounts of the incident were consistent. Further, Finney's reason for being unavailable stemmed in part from her negative feelings for the assistant district attorney. Her unavailability had nothing to do with the trustworthiness of her statement to Detective Harper. In addition, the other witnesses' observation of Finney's physical injuries corroborated the statement.

Fourth, the statement was clearly offered as evidence of a material fact; *i.e.*, the circumstances surrounding the sexual assault. In *North Carolina v. Fowler*, 353 N.C. 599, 548 S.E.2d 684 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002), our Supreme Court upheld a trial court's finding that statements sought to be admitted were material because the statements described the assailants and the details of the crime. Likewise, in the present case, Finney's statement to Detective Harper described the assailant and the details of the offense.

Fifth, the trial judge found that the hearsay was more probative than any other evidence produced by the State. A statement is more probative than any other evidence if: (1) the State's efforts to procure more probative evidence were diligent; and (2) the State could not reasonably procure other evidence. *Id.* at 613, 548 S.E.2d at 695. Here, the trial court's findings support a conclusion that the State acted diligently in attempting to get Finney to take the stand. Their efforts included a subpoena for Finney to appear and testify. Although her live testimony would have been more probative than her prior statement, it was clear that she would not testify at this trial.

Sixth, the general purposes of the Rules of Evidence and the interests of justice were best served by allowing the statement into evidence. The record supports the trial judge's findings. We therefore hold that the trial court made the appropriate findings and did not err in allowing Finney's statement into evidence. *See generally, State v. Fowler*, 353 N.C. 599, 548 S.E.2d 684 (2001).

Defendant further argues that the admission of Finney's statement to Detective Harper violated his confrontation rights. Nonetheless, "if testimony is admitted under the hearsay rule, or as an exception to it, there is no right of confrontation." *State v. Willis*, 332 N.C. 151, 167, 420 S.E.2d 158, 165 (1992) (citing *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977)). *See also Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), *cert. denied*, 397 U.S. 1014, 25 L. Ed. 2d 428 (1970). Here, testimony was admitted as an exception to the hearsay rule and, consequently, a right of confrontation does not apply.

In addition, defendant argues that because Finney was unavailable due to the actions of the State, her statement to Detective Harper should have been excluded, citing Rule 804 and *State v.*

Small, 20 N.C. App. 423, 201 S.E.2d 584 (1974). Rule 804 provides that "[a] declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence 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 (2001). However, there is no evidence that the prosecution in any way acted for the purpose of preventing Finney from testifying. In fact, the conduct of the State reveals the exact opposite. Finney was subpoenaed to testify by the State and was called to the witness stand before the jury. At a later stage in the trial, the State attempted the call her again to the stand to testify.

The trial judge found that there were a number of possible reasons why Finney refused to testify, including that she was angry with the assistant district attorney for subpoenaing her to testify in the case. This does not support defendant's contention that the State acted for purposes of preventing Finney to testify, so that they could introduce her statement to Detective Harper to the jury.

In *State v. Small, supra*, the defendant fled the courtroom in the middle of the trial. His attorney then sought to introduce defendant's *voir dire* testimony to the jury. The trial court denied this request because the defendant was unavailable due to his own actions. In the present case, the unavailability of Finney was not the result of the conduct of the State. This assignment of error is without merit.

II.

[2] In his second assignment of error, defendant argues the trial court erred in refusing to allow defendant to present the prior testimony of the victim. We disagree.

After the State rested its case, defendant was given the opportunity to present evidence, but declined. During the course of the charge conference, the defense requested that the court have Finney's *voir dire* testimony read to the jury. The trial judge noted that Finney had again returned to the courtroom and told defense counsel that defendant would be allowed to reopen his case and call Finney to testify before the jury. Defendant refused. He cannot now assert prejudice when he was afforded the opportunity to reopen his case and call Finney as a witness. *See generally*, N.C. Gen. Stat. § 15A-1443(a) (2001). This assignment of error is without merit.

III.

[3] By his third assignment of error, defendant argues the trial court committed plain error in its jury instruction on first-degree rape. We disagree.

Plain error is an error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

We note that the defense did not object to the trial court's proposed jury instruction at the charge conference or following the charge being given to the jury. The trial judge instructed the jury upon first-degree rape, and a lesser-included offense of second-degree rape, in accordance with the North Carolina Pattern Jury Instructions. As to the fourth element of first-degree rape, the court charged on serious physical injury, stating that this could include a serious mental injury, and that for the jury to find a serious mental injury, it had to extend for some appreciable time beyond the incident surrounding the crime itself.

After deliberating for a few minutes, the jury asked for an explanation of the difference between first-degree and second-degree rape. The trial judge re-instructed the jury on all elements of first-degree rape and advised them that the difference between first-degree and second-degree rape was that the State was not required to prove a serious personal injury in second-degree rape.

Defendant contends the trial court erroneously eliminated the instruction on serious physical injury. However, the transcript shows that in re-charging the jury, the trial judge correctly defined serious physical injury.

Defendant further contends that the trial court failed to instruct the jury that in order to support a conviction for first-degree rape, the alleged mental injury must be more than or different from the injury usually associated with a forcible rape, citing *State v. Baker*, 336 N.C. 58, 441 S.E.2d 551 (1994).

The trial judge's instruction when re-charging the jury on the definition of "serious physical injury" was as follows:

> Now serious personal injury is such injury as causes such physical—serious physical injury—such physical injury as causes great pain and suffering. Serious mental injury is that type of injury to the mind or to the nervous system that not only results or occurs as a result of the trauma of the event being complained of but that type of mental—of injury to the mind or nervous system that extends and lasts for an appreciable period of time beyond the incident surrounding the crime involved—alleged crime involved.

Under *Baker*, "the mental injury [must] extend for some appreciable time beyond the incidents surrounding the rape and [it must be] a mental injury beyond that normally experienced in every forcible rape." *Id.* at 64. Mental injuries normally experienced in rape case are those " 'so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening.' " *Id.* at 63.

In *State v. Easterling*, 119 N.C. App. 22, 457 S.E.2d 913, *rev. denied*, 341 N.C. 422, 461 S.E.2d 762 (1995), this Court held that there was no additional burden on the State to show a mental injury must be more than that normally experienced in every forcible rape in addition to showing the mental injury extended for some appreciable time. "Rather, . . . if a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape." *Id.* at 40, 457 S.E.2d at 924. We therefore find no plain error. This assignment of error is without merit.

NO ERROR.

Judges McGEE and HUDSON concur.

STATE OF NORTH CAROLINA v. TANNA BARNARD SAKOBIE

No. COA02-677

(Filed 15 April 2003)

1. Kidnapping— release in a safe place—prosecutor's argument

A prosecutor's argument in a kidnapping prosecution was not so grossly improper as to warrant the trial court intervening ex mero motu where the prosecutor argued that the only safe place to leave a child is with his mother or with someone with a duty of

care. This statement was a small part of the prosecutor's argument about the element of failing to release the victim in a safe place, the State emphasized that the challenged statement was the State's opinion, and the trial court did not have a clearly defined standard with which to compare the prosecutor's statement.

2. Kidnapping— release in a safe place—sufficiency of evidence

There was sufficient evidence that a child who had been kidnapped was not released in a safe place where the five-year-old boy was released on a cold night in an isolated, rural, wooded area unfamiliar to him with a dog barking at the him. Although defendant told the child that his mother would be inside, all reasonable inferences are that defendant knew she would not be; although defendant claimed that she knew the occupants of the trailer, they denied knowing her; and it is not clear the defendant waited to identify the occupants of the trailer before pulling away.

3. Larceny— motor vehicle—intent to deprive of possession—sufficiency of evidence

There was sufficient evidence that a larceny defendant intended to deprive her victim of possession of the victim's vehicle where defendant stole the vehicle from a convenience store parking lot at 9:00 p.m.; defendant drove the car until she was stopped at 2:45 a.m.; she had just driven past the place where she stole the vehicle when she was stopped; defendant did not give any indication at any time that she intended to return the vehicle; and defendant continued in possession of the vehicle even after she released the victim's child, who was in the car when defendant drove it away.

Appeal by defendant from judgments entered 31 January 2002 by Judge William C. Gore, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 13 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Leslie C. Rawls for defendant-appellant.

McGEE, Judge.

Tanna Barnard Sakobie (defendant) was convicted of first degree kidnapping, larceny of a motor vehicle, and possession of a stolen automobile. The trial court determined that defendant had a prior record level of III. The trial court arrested judgment as to the charge of possession of a stolen vehicle. The trial court sentenced defendant to a minimum of 95 months to a maximum of 125 months active imprisonment for first degree kidnapping. The trial court sentenced defendant to a minimum of 10 months and to a maximum of 12 months suspended with 24 months of supervised probation for the larceny of a motor vehicle, to run consecutively from the first degree kidnapping sentence. Defendant appeals.

The evidence presented by the State at trial tended to show that on the evening of 4 October 2000, Joi Rivers (Rivers) drove to the Quick Stop convenience store in Hope Mills, North Carolina in her Chevrolet Cavalier to purchase soft drinks. Rivers' five-year-old son (the child) was with Rivers in the vehicle. When Rivers pulled up to the Quick Stop, she left the child in the front seat of the vehicle with the engine running. While Rivers was inside the Quick Stop, a woman, later identified as defendant, got into River's vehicle and drove away with the child still in the vehicle. When Rivers reached the counter to pay for her purchases, she did not see her vehicle outside. Rivers ran outside into the parking lot, saw that her vehicle and the child were gone, and began to scream and cry. Rivers went back into the Quick Stop and the store clerk called the police.

As defendant pulled out of the Quick Stop parking lot she almost caused a collision. Defendant drove approximately six and a half miles to a second convenience store, the Pit Stop, in Hope Mills, arriving around 10:30 p.m. Defendant got out of the vehicle, pulled the child out of the vehicle, and took him into the Pit Stop with her. Defendant told the child to stand at the counter and not say a word. The child remained at the counter, crying, while defendant purchased a forty-ounce bottle of beer. Defendant then grabbed the child by the arm and pulled him back out of the Pit Stop.

Defendant drove the child to a trailer, where she left him in the vehicle while she got a bag from the occupants of the trailer. Defendant then drove 12.7 miles into the countryside to the home of defendant's acquaintance, Robert Johnson (Johnson). Johnson's son, Robert "Shakeel" Johnson, and Johnson's cousin, Sarah Pennick, were also living at the home. Several other people were also on the

premises when defendant arrived. Defendant had a conversation with some of these people and a man struck her. The child was crying and told Johnson that he wanted to go back to the store where his mother was. However, defendant went inside the house to drink wine, leaving the child outside in the car for at least five to ten minutes. When defendant came out of the house, Johnson said he would accompany defendant to return the child to the child's mother. However, defendant did not accept Johnson's offer and drove away with the child.

Around midnight, defendant drove approximately 3.7 miles to a trailer where Vicky Ray (Vicky) and Jerome Leak (Jerome) lived. The trailer was in a rural area, with only one other trailer behind it, and a house across the road. The trailer was approximately 12.6 miles from the Quick Stop. There were lights on in the trailer. Defendant stopped about twenty feet from the backdoor of the trailer and told the child his mother was inside. The child responded that his mother did not go to trailers; however, defendant pushed him out of the car. The child heard a dog barking and went to the back door of the trailer and knocked. Defendant drove away while the child was knocking at the door.

Vicky answered the door and found the child standing there. Vicky saw a car turning onto the main road. The child kept saying that he wanted his mother, so Vicky told him to come in because it was cold. Vicky did not own a telephone or a car and there was no telephone within miles of the trailer. Vicky put the child to bed on a couch and told him that she would try and find a way to return him to his mother in the morning. Defendant, after leaving the child at Vicky and Jerome's trailer, returned to Johnson's residence to have a few more drinks. Defendant later left with Larry Johnson, Robert Johnson's brother.

At approximately 2:45 a.m., Officer Garrett Gwin of the Hope Mills Police Department saw defendant driving Rivers' vehicle and stopped defendant. Defendant was placed in police custody. Officer Gwin determined the child was not in the vehicle, and an extensive search for the child began, involving several officers and a helicopter. Defendant initially led the officers to many irrelevant locations in the search for the child. However, after about an hour, an officer became angry and told defendant he was going to take her to jail, to which defendant responded by leading the officers to Vicky and Jerome's trailer. The officers located the child in the trailer and returned him to Rivers.

Defendant's witness, Dewey Jackson (Jackson), testified that he and defendant lived together between 1996 and June of 2000. Jackson testified that he was acquainted with Vicky and Jerome. He testified that his car was stolen in February of 2000, and that James Baldwin (Baldwin) and Vicky's niece were involved. Baldwin and Vicky's niece had previously lived with Vicky and Jerome and had left their baby with Vicky and Jerome. Jackson testified that Vicky had taken him to various locations in search of her niece and Baldwin. He also testified that he and defendant had occasionally taken Vicky to pay her rent and to get groceries, and that they once drank beer in Vicky's trailer. However, Vicky testified at trial that she was not acquainted with defendant. Jerome also testified that he did not recognize defendant. Further facts will be set out below as necessary.

Defendant failed to put forth an argument in support of assignments of error 1, 2, 3, 4, 6, and 7. These assignments of error are therefore deemed abandoned. N.C.R. App. P. 28(b)(6).

I.

[1] Defendant assigns as plain error the trial court's allowing the State to argue that, for the purposes of first degree kidnapping, the only safe place to leave a child is with his parent or with someone who has a duty of care, and by failing to take adequate steps to correct the misstatement. We note that where a defendant has failed to object at trial to a prosecutor's closing argument but attempts to challenge the argument on appeal, the standard of review is gross impropriety, rather than plain error. *State v. Thomas*, 350 N.C. 315, 360-61, 514 S.E.2d 486, 514, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). We are therefore required to determine whether the prosecutor's jury argument was so grossly improper as to warrant the trial court's intervention *ex mero motu*. *State v. Cummings*, 352 N.C. 600, 621, 536 S.E.2d 36, 52 (2000), *cert. denied*, 532 U.S. 997, 151 L. Ed. 2d 286 (2001). Our Supreme Court recently summarized:

> "Under this standard, '[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.' *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). '[D]efendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' "

> *State v. Davis*, 349 N.C. [1,] 23, 506 S.E.2d [455,] 467 [(1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)].

State v. Nicholson, 355 N.C. 1, 41-42, 558 S.E.2d 109, 137, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (quoting *State v. Anthony*, 354 N.C. 372, 427-28, 555 S.E.2d 557, 592 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002)).

Defendant challenges the prosecutor's statement to the jury that defendant refused to take the child to his mother, "the only place, the [S]tate submits, that that child was safe or to someone that had a duty of care." If such a statement stood in isolation as the only explanation of the element of failure to release a victim in a safe place, such a statement could arguably be classified as "an extreme impropriety on the part of the prosecutor." However, the prosecutor's statement quoted above was just a small part of the argument she made concerning the element of failure to release the victim in a safe place, the rest of which defendant does not challenge.

The prosecutor several times foreshadowed how the judge would instruct the jury in relation to that portion of the charge; however, the prosecutor did not do so as to the statement defendant now challenges. In fact, the State emphasized that the challenged statement was the State's opinion of what would have been a safe place in the present case by using the language, "the [S]tate submits."

The General Assembly has not provided a definition or guidance to the courts in defining the term, "safe place." *See* N.C. Gen. Stat. § 14-39 (2001). Nor do our pattern jury instructions include such a definition. *See* N.C. Pattern Jury Instructions for Criminal Cases § 210.20. Further, the cases that have focused on whether or not the release of a victim was in a safe place have been decided by our Courts on a case-by-case approach, relying on the particular facts of each case. *See State v. Heatwole*, 333 N.C. 156, 161, 423 S.E.2d 735, 738 (1992); *State v. Sutcliff*, 322 N.C. 85, 89, 366 S.E.2d 476, 479 (1988); *State v. Pratt*, 306 N.C. 673, 682-83, 295 S.E.2d 462, 468 (1982); *State v. Pratt*, 152 N.C. App. 694, 700, 568 S.E.2d 276, 280 (2002); *State v. White*, 127 N.C. App. 565, 573, 492 S.E.2d 48, 53 (1997); *State v. Smith*, 110 N.C. App. 119, 137, 429 S.E.2d 425, 434, *aff'd per curiam*, 335 N.C. 162, 435 S.E.2d 770 (1993). The trial court therefore did not have a clearly defined standard with which to compare the prosecutor's statement. While the challenged statement may have been inappropriate, we do not agree that the statement rose to the level of an "extreme impropriety on the part of the prosecutor" that

"so infected the trial with unfairness that [it] rendered the conviction fundamentally unfair." *Nicholson*, 355 N.C. at 41, 558 S.E.2d at 137 (citations omitted). *See also State v. Haselden*, 357 N.C. 1, 22, 577 S.E.2d 594, 608 (2003) ("defendant must show that the prosecutor's argument 'so infected the trial with unfairness as to render the resulting conviction a denial of due process.' ") (citations omitted). Therefore, we hold that the trial court did not err in failing to correct, on its own motion, the prosecutor's challenged statement in her closing argument. This assignment of error is overruled.

II.

Defendant also assigns as error the trial court's denial of defendant's motion to dismiss. Defendant argues the evidence was insufficient to support the charges of first degree kidnapping and larceny of a motor vehicle, even taken in the light most favorable to the State. The trial court did not err in refusing to dismiss either of these charges.

When reviewing a defendant's motion to dismiss for insufficiency of the evidence, "the evidence must be considered in a light most favorable to the State and the State must be given the benefit of every reasonable inference arising therefrom." *State v. Davis*, 97 N.C. App. 259, 264, 388 S.E.2d 201, 204, *aff'd per curiam*, 327 N.C. 467, 396 S.E.2d 324 (1990) (citations omitted). We must determine "whether there is substantial evidence of each essential element of the crime charged and that the defendant committed it." *State v. Damon*, 78 N.C. App. 421, 422, 337 S.E.2d 170, 170 (1985) (citing *State v. Riddle*, 300 N.C. 744, 746, 268 S.E.2d 80, 81 (1980)).

A.

[2] Defendant in the present case was charged with first degree kidnapping, based on the unlawful confinement, restraint, or removal of the child without consent, for the purpose of facilitating the commission of a felony, being larceny of a motor vehicle, and the failure of defendant to release the child in a safe place. *See* N.C.G.S. § 14-39. It is the State's burden to prove the applicable elements of first degree kidnapping, including, in this case, that defendant failed to release the child in a safe place. *State v. Corley*, 310 N.C. 40, 55, 311 S.E.2d 540, 549 (1984). Defendant specifically argues that the State did not present sufficient evidence that defendant failed to release the child in a safe place, and thus the charge of second degree kidnapping should have been submitted to the jury, instead of the charge of first degree kidnapping.

We again note that the General Assembly has neither defined nor given guidance as to the meaning of the term "safe place" in relation to the offense of first degree kidnapping. *See* N.C.G.S. § 14-39. Further, our case law in North Carolina has not set out any test or rule for determining whether a release was in a "safe place." Several of the cases that have addressed the question of whether the defendant released the victim in a safe place have centered on whether there was a voluntary release by the defendant. *See Heatwole*, 333 N.C. at 161, 423 S.E.2d at 738 (holding that releasing a victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not "voluntary"); *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (holding the evidence sufficient to permit the jury to infer the victim escaped from the defendant at a convenience store, as opposed to being released in a safe place); *State v. Parker*, 143 N.C. App. 680, 688, 550 S.E.2d 174, 178-79 (2001) (finding no evidence the defendants voluntarily released the victims in a safe place where the evidence showed that the defendants fled after shooting one victim and chasing another victim); *State v. Raynor*, 128 N.C. App. 244, 251, 495 S.E.2d 176, 180 (1998) (holding the evidence supported the inference that the victim was not released in a safe place where the victim overpowered the defendants and effected his own escape). Other cases, which do address whether a place is safe or not, have not provided any clear standard to apply, taking a case-by-case approach. *See Heatwole*, 333 N.C. at 161, 423 S.E.2d at 738 (holding, *inter alia*, that sending a victim out into the focal point of law enforcement officers' weapons is not a safe place); *Sutcliff*, 322 N.C. at 89, 366 S.E.2d at 479 (permitting the inference that the victim was not released in a safe place where the victim, who was new to the area and disoriented, was released at approximately 5:00 a.m. on a mid-January morning at an intersection a mile from a shopping mall, with no source of protection until after she reached the shopping mall); *Pratt*, 306 N.C. at 682-83, 295 S.E.2d at 468 (holding the evidence supported a finding that the handicapped victim was not in a safe place where the victim was tied and undressed in the wintertime and left in an unfamiliar area); *Pratt*, 152 N.C. App. at 700, 568 S.E.2d at 280 (stating that there was evidence before the trial court that the victims were not left in a safe place when they were left bound and gagged in the woods at night); *White*, 127 N.C. App. at 573, 492 S.E.2d at 53 (holding the evidence established the victim was released in a safe place when the victim was taken to a motel near a major shopping center in the middle of the afternoon, was voluntarily dropped off with change to make a phone call, and received assistance from

hotel employees in the office); *Smith*, 110 N.C. App. at 137, 429 S.E.2d at 434 (holding sufficient evidence existed that the victim was not released in a safe place where the victim was left tied to a tree in a damp wooded area, forty-five feet off a dirt road, and ninety-three feet down a path).

In the present case, defendant did voluntarily release the child behind the trailer where Vicky and Jerome lived, telling him to go knock on the door of the trailer because his mother would be inside. Defendant had no knowledge that the child's mother would be inside, and based on the record, all reasonable inferences would indicate defendant knew the child's mother was not in the trailer. The evidence shows that the five-year old child was released in the middle of the night, in an isolated rural, wooded area the child was unfamiliar with. It was a cold evening, a dog was barking at the child, and defendant had pushed him out of the vehicle into this foreign environment.

Defendant argues that she knew Vicky and Jerome, the occupants of the trailer, and therefore the release of the child was in a safe place. Vicky and Jerome both testified that they did not know defendant. Defendant's alleged knowledge of the occupants was questionable at best, and taken in a light most favorable to the State, fails to establish that the child was released in a safe place. Further, it is not clear that defendant even waited to see if Vicky and Jerome were indeed the occupants of the trailer before pulling away and leaving the child by the trailer. Taken in a light most favorable to the State, there was substantial evidence that the child was not released in a safe place. Based on these facts we hold that the trial court did not err in submitting the charge of first degree kidnapping to the jury.

B.

[3] In order to prove larceny of a motor vehicle, the State must show that defendant "(1) took the [motor vehicle] of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of his [motor vehicle] permanently." *State v. Perry*, 305 N.C. 225, 235 n.7, 287 S.E.2d 810, 816 n.7 (1982). On appeal defendant contends that the State presented insufficient evidence of the fourth element, that defendant intended to deprive Rivers of her vehicle permanently. We reject this argument.

The evidence taken in a light most favorable to the State, *Davis*, 97 N.C. App. at 264, 388 S.E.2d at 204 (citations omitted), tended to

show that defendant stole River's vehicle from the Quick Stop parking lot at approximately 9:00 p.m. on 4 October 2002. She drove the vehicle for her personal use all through the night until she was stopped at approximately 2:45 a.m. on 5 October 2000 by law enforcement officers. When defendant was first located by law enforcement officers at approximately 2:45 a.m, she had just driven past the location where she had stolen the automobile. At no time did defendant give any indication that she intended to return Rivers' vehicle. In fact, defendant did relinquish possession of Rivers' child, who had been in the vehicle when defendant stole it, but continued in her possession of the stolen vehicle. The evidence is more than sufficient to establish that defendant intended to permanently deprive Rivers of the possession of her vehicle. There is substantial evidence of each element of larceny of a motor vehicle. *See Damon*, 78 N.C. App. at 422, 337 S.E.2d at 170 (citation omitted). This assignment of error is overruled.

No error.

Judges HUDSON and STEELMAN concur.

RAMONA MASON, PLAINTIFF v. JESSE ERWIN, DEFENDANT

No. COA02-338

(Filed 15 April 2003)

1. Child Support, Custody, and Visitation— support—modification—earnings capacity rule

The trial court did not abuse its discretion by modifying the parties' child support agreement under N.C.G.S. § 50-13.7(a) and by increasing defendant father's child support obligation, because: (1) the trial court properly used the earnings capacity rule when defendant, a fifty-two-year-old able-bodied worker with no physical disabilities retired and voluntarily reduced his income in deliberate disregard of his obligation to provide reasonable support for his minor child; and (2) defendant failed to persuade the trial court that he could no longer perform that job based on age, disability, illness or any factor beyond defendant's choosing.

2. Costs— attorney fees—child support action

The trial court did not abuse its discretion in a child support case by awarding plaintiff mother attorney fees, because: (1) defendant failed to present evidence to rebut plaintiff's evidence that she was a party acting in good faith; and (2) defendant was paying an inadequate amount of support on the date the motion for modification of child support was filed.

3. Child Support, Custody, and Visitation— support—reasonable needs of child

The trial court did not err in a child support case by finding on remand that the total reasonable monthly needs for the child were $1,626, excluding health care and child care costs, and the trial court was not required to find specific detailed facts with regard to the child's reasonable expenses because the trial court awarded the presumptive amount of support to plaintiff according to defendant's imputed income.

4. Child Support, Custody, and Visitation— support—retroactive award

The trial court did not err in a child support case by awarding retroactive child support to plaintiff mother, because: (1) the modification of a child support order takes effect on the date the petition for modification was filed; and (2) contrary to defendant's assertion, the trial court did not order payment of a specific amount in back child support that defendant was required to pay.

5. Child Support, Custody, and Visitation— support—modification—credit

The trial court did not err in a child support case by allegedly failing to properly credit defendant father for child support payments made between the filing of the modification petition and the date of the entry of the trial court's amended child support order, because: (1) defendant presented no evidence to the trial court of these alleged payments before the order on remand was issued; and (2) the issue of alleged overpayment is not properly before the Court of Appeals since the trial court has not yet considered the issue of defendant's possible overpayment.

Appeal by defendant from order entered 26 October 2001 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 10 February 2003.

Timothy M. Stokes for plaintiff-appellee.

Hoover, Williams & Exum, P.A., by Donnie Hoover, for defendant-appellant.

EAGLES, Chief Judge.

Jesse Erwin ("defendant") appeals from a district court order increasing his monthly child support obligation. Defendant asserts several arguments on appeal, including: (1) that the trial court erred in awarding an increase in child support based on defendant's imputed income; (2) that the trial court erroneously awarded attorney fees to plaintiff; (3) that the trial court incorrectly found that the child's reasonable monthly needs had increased; (4) that the award of retroactive child support was erroneous; and (5) that the trial court failed to credit defendant for overpayment of child support. After careful review of the record, briefs, and arguments of counsel, we affirm.

Defendant is the biological father of a minor child named Joy, who was born 26 June 1991. Plaintiff, Ramona Mason, is the biological mother and has custody of Joy. On 19 September 1991, plaintiff commenced an action for child support against defendant. Defendant signed a voluntary support agreement on 9 March 1992. In this agreement, defendant acknowledged his paternity of Joy and stated that he would pay $54 each week as child support.

In October 1995, defendant's wife won a prize in the Canadian lottery valued at approximately $4.4 million in American currency. Mrs. Erwin invested most of her winnings in a revocable trust. She pays all of the household expenses for herself and defendant from the income received from the trust. Defendant retired on 31 December 1995; he was 52 years old and had over 25 years of service with UPS. Before his retirement from UPS, defendant earned $19.38 per hour or approximately $3,350 each month. After his retirement, defendant received a pension of $1,500 per month.

On 20 March 1996, defendant and plaintiff changed the amount of child support by signing a second voluntary child support agreement which increased defendant's child support obligation to $300 per month. The agreement was incorporated into a consent order on 15 April 1996. Defendant paid $300 monthly according to the terms of the 1996 order. On 16 September 1998, plaintiff filed a motion to increase child support.

After hearing evidence regarding the child's needs and testimony on defendant's financial status, the trial court issued an order increasing defendant's child support obligation to $922 per month. The trial court based its order upon its imputation of income to defendant in the amount of $5,000 each month. Defendant appealed the order to this Court, which reversed the portion of the order imputing income to defendant and remanded the cause for additional factual findings on defendant's income. *See Mason v. Erwin*, 146 N.C. App. 110, 553 S.E.2d 247 (2001) (unpublished). This Court also reversed the award of attorney fees and the award of retroactive child support. *Id.*

On remand, the trial court issued a second order without hearing further evidence. The amended order increased defendant's child support responsibility to $622 per month and awarded retroactive child support. Defendant was required to provide health insurance for the minor child and to pay 77 percent of her uninsured health care expenses. The trial court also ordered defendant to pay plaintiff's attorney fees. From this order, defendant appeals.

[1] Defendant argues that the trial court abused its discretion on remand by modifying the child support agreement and increasing his child support obligation. Defendant contends that the trial court incorrectly imputed income to him and again based the increase in child support on that imputed income. We disagree.

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002) (citing *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985)). Defendant argues that the trial court abused its discretion by awarding plaintiff an increase in child support. When this action was filed in 1998, plaintiff and defendant were operating under a consent order which required defendant to pay plaintiff $300 each month for Joy's support. Our General Assembly set the standard for adjusting a pre-existing child support award as follows: "An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." G.S. § 50-13.7(a) (2001). The definition of "changed circumstances" has been delineated by this Court:

> A *voluntary* decrease in a parent's income, even if substantial, does not constitute a changed circumstance which alone can jus-

> tify a modification of a child support award. A *voluntary* and substantial decrease in a parent's income can constitute a changed circumstance only if accompanied by a substantial decrease in the needs of the child. In determining whether the party has sustained a decrease in income, the party's actual earnings are to be used by the trial court if the voluntary decrease was in good faith. If the voluntary decrease in income is in bad faith, the party's earning capacity is to be used by the trial court in determining whether there has in fact been a decrease in income. The burden of showing good faith rests with the party seeking a reduction in the child support award.

Mittendorff v. Mittendorff, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 1999) (emphasis in original) (citations omitted). Where a parent seeks a reduction in his child support obligation, the trial court must find a voluntary reduction in a parent's income combined with an increase or decrease in the child's needs in order to find "changed circumstances" that justify a child support modification. *See King v. King*, 153 N.C. App. 181, 568 S.E.2d 864 (2002); *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002); *Mittendorff*, 133 N.C. App. 343, 515 S.E.2d 464 (1999); *Burnett v. Wheeler*, 133 N.C. App. 316, 515 S.E.2d 480 (1999); *Chused v. Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (1998).

Here, it is undisputed that defendant retired from UPS with over 25 years of service with that company. Furthermore, both parties agree that defendant retired within three months after his wife began collecting her lottery winnings. As part of defendant's retirement, he surrendered a salary of approximately $3,350 per month in exchange for a monthly pension worth $1,500. Neither party contests the fact that the reduction in defendant's income results from a voluntary action by defendant. However, the parties strongly contest whether defendant's retirement qualifies as an action taken in bad faith. The North Carolina Child Support Guidelines state:

> If either parent is voluntarily unemployed or underemployed to the extent that the parent cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing so, and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income.

N.C. Child Support Guidelines, 2003 Ann. R. (N.C.) 33, 35. The primary issue is "whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent." *Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519. The earnings capacity rule can be applied if the evidence presented shows that a party has disregarded its parental obligations by:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.

Wolf, 151 N.C. App. at 526-27, 566 S.E.2d at 518-19 (citing *Bowes v. Bowes*, 287 N.C. 163, 214 S.E.2d 40 (1975)). The situations enumerated in *Wolf* are specific types of bad faith that justify the trial court's use of imputed income or the "earnings capacity" rule.

Here, the trial court made sufficient findings of fact to support its conclusion that defendant retired and voluntarily reduced his income "in deliberate disregard of his obligation to provide reasonable support for Joy." The trial court stated that it found defendant's testimony about the reasons for his retirement to be unpersuasive. Defendant cited health concerns and accidents on the job as the reasons for his retirement. However, sufficient evidence existed to rebut defendant's testimony about health problems, namely his own promise to retire if he ever won the lottery. In addition, the trial court found that defendant's actual income of $1,500 per month was mostly unencumbered income, since defendant effectively had no monthly expenses or bills for which he was solely responsible. Despite this readily available pension income, the evidence tended to show that defendant was reluctant about his responsibility to provide support for Joy.

Defendant knew of extensive and expensive dental work that Joy needed in 1995, but refused to pay for that dental care. At the time plaintiff informed defendant of the needed dental care, defendant was still employed full-time. The trial court found that defendant willingly increased his child support payments from $52 per week to $300 per month in March 1996. However, the trial court also noted that

according to defendant's actual income of $1,500 and the Child Support Guidelines, defendant should have been presumptively paying at least $380 per month. Also, the trial court found that defendant claimed that he could not provide insurance for Joy in March 1996 but did apply for insurance in October 1998 after the motion to modify child support was filed. We view all this evidence in the context of defendant's voluntary decision to retire though he was an able-bodied, 52 year old worker with no physical disabilities who was capable of earning sufficient funds to provide for his daughter. Accordingly, we hold that the trial court did not abuse its discretion by computing defendant's child support obligation according to the earnings capacity rule.

The Child Support Guidelines direct that "[t]he amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community." N.C. Child Support Guidelines, 2003 Ann. R. (N.C.) 33, 35. Here, the trial court imputed a monthly income of $3,359 to defendant. Defendant earned this amount monthly in his last job prior to retirement, based upon calculations of a forty-hour work week and defendant's earnings of $19.38 per hour. Defendant failed to persuade the trial court that he could no longer perform that job because of age, disability, illness or any factor beyond defendant's choosing. Therefore, the trial court did not abuse its discretion when it imputed income to defendant in the amount of $3,359 per month. Accordingly, this assignment of error is overruled.

[2] Defendant further argues that the trial court erred in awarding plaintiff attorney fees. Defendant states that the trial court's findings of fact are not sufficient to support the award of attorney fees to plaintiff. Defendant contends that plaintiff has failed to show that defendant refused to provide adequate support. We disagree.

The standard for the award of attorney fees in a child support action is as follows:

> In an action or proceeding for the custody or support, or both, of a minor child . . . 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 . . . .

G.S. § 50-13.6 (2001). Here, the trial court specifically found as a fact that (1) plaintiff was "a party acting in good faith to obtain reasonable support for her daughter"; (2) that plaintiff lacked sufficient means to pay her attorney fees; and (3) that defendant "refused to provide support which was reasonable under the circumstances existing in September 1998 . . . ." These findings of fact are sufficient to support the trial court's conclusions of law. Also, the findings of fact are supported by evidence in the record and by other findings of fact. For example, the finding that plaintiff was unable to afford her attorney fees was buttressed by the additional finding that she had debts totaling over $3,700 and it took plaintiff six months to save the money necessary to pay her attorney's retainer. Defendant failed to present evidence to rebut plaintiff's evidence that she was a party acting in good faith. Finally, the trial court found that defendant was paying an inadequate amount of support on the date the motion for modification of child support was filed. To support this finding, the trial court made the following finding of fact:

> 20. Applying the Child Support Guidelines to father's "actual" income of $1,500 per month, his obligation would be $380 per month, plus 60% of [uninsured medical, dental and prescription] expenses.

Defendant was not paying the presumptive amount of child support based upon his actual income. When the trial court imputed a higher income to defendant, his child support obligation also increased. Defendant's adherence to the consent order does not prevent a modification of that order or his payment of attorney fees. The parties maintain the right to contract child support arrangements. However, once that contract is adopted as a consent order, the trial court may modify the terms of the order according to G.S. § 50-13.7. *In re Custody of Mason*, 13 N.C. App. 334, 185 S.E.2d 433 (1971), *cert. denied*, 280 N.C. 495, 186 S.E.2d 513 (1972). Therefore, the trial court's findings and conclusions that defendant paid inadequate child support provides justification for the trial court acting within its discretion to order defendant to pay appropriate attorney fees. Accordingly, this assignment of error is overruled.

[3] Defendant next assigns error to the trial court's findings on remand that the total reasonable monthly needs for the child were

$1,626, excluding health care and child care costs. Defendant argues that the trial court erred by making insufficient findings of fact to deviate from the presumptive child support award outlined by the North Carolina Child Support Guidelines. The trial court in this case awarded child support according to the North Carolina Child Support Guidelines. The trial court was not required to find specific, detailed facts with regard to the child's reasonable expenses because it awarded the presumptive amount of support to plaintiff according to defendant's imputed income. This assignment of error is overruled.

[4] Defendant assigns error to the trial court's award of retroactive child support to plaintiff. Defendant argues that no basis exists for an increase in child support and the award of retroactive support was incorrectly calculated. We disagree.

Since we have already concluded that the increased award of child support was correct, defendant's argument here has no merit. It is well settled that the modification of a child support order takes effect on the date the petition for modification was filed. *See Mackins v. Mackins*, 114 N.C. App. 538, 442 S.E.2d 352, *disc. rev. denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). Here, plaintiff filed the modification petition on 16 September 1998. The trial court concluded as a matter of law that the increase in child support was effective on 16 September 1998. The trial court did not explicitly state a specific amount that defendant owed in retroactive support from the entry of its order on 26 October 2001 back to the petition filing date on 16 September 1998. Defendant's assignment of error to the trial court's inclusion of a specific amount of owed child support is without merit since the trial court did not order payment of a specific amount in back child support that defendant was to required to pay.

[5] Defendant also argues that the trial court did not properly credit him for child support payments made between the filing of the modification petition and the date of the entry of the trial court's amended child support order. Defendant contends that the trial court failed to give him credit for the amounts he paid as a result of the original November 1999 child support award by the trial court. According to defendant, he paid at least $9,699 in child support arrears and $7,600 in attorney fees as a result of the November 1999 order that was vacated by this Court. However, defendant presented no evidence of these payments to the trial court before the order on remand was issued. Both parties and the trial court agreed that the order on remand could be issued without further presentation of evidence. The trial court, in its final child support order, has retained jurisdic-

tion over this matter specifically to make adjustments based on previous overpayments. Therefore, the issue of alleged overpayment is not properly before this Court because the trial court has not yet considered the issue of defendant's possible overpayment. The final assignment of error fails.

For the reasons stated, the trial court's order awarding child support and attorney fees to plaintiff is affirmed.

Affirmed.

Judges MARTIN and GEER concur.

COUNTY OF MOORE, PLAINTIFF v. HUMANE SOCIETY OF MOORE COUNTY, INC., DEFENDANT

No. COA02-562

(Filed 15 April 2003)

1. Deeds— reverter clause—not triggered—sufficiency of evidence

The evidence in a bench trial supported the court's finding that a reverter clause in a deed to property used by the Humane Society was not triggered by the termination of its contract with the County where the plain language of the deed provided a right to re-entry only when the Society ceased to operate an animal shelter and there was testimony about the services the Society continued to offer after termination of the contract with the County.

2. Deeds— reverter clause—meaning of animal shelter—continued operation

The trial court correctly concluded in a bench trial that a reverter clause in a deed to property used by the Humane Society was not triggered by the termination of its contract with the County where the court properly considered the ordinary meaning of "animal shelter" and found that the Society was still operating a shelter. The deed did not reflect any intention that the termination of the relationship would trigger the reverter clause.

3. Contracts— breach—animal shelter site—sufficiency of evidence

There was insufficient evidence for the trial court to find in a bench trial that the County had breached an agreement with the Humane Society to assist the Society in finding a new site for an animal shelter where the evidence showed that zoning conflicts were the cause of the Society's failure to construct a new facility.

4. Costs— recovery of real property—reverter clause in deed

The trial court properly awarded costs to the Humane Society as the prevailing party under N.C.G.S. § 6-18 and N.C.G.S. § 6-19 where the County unsuccessfully claimed the right of re-entry under a reverter clause in a deed to real property occupied by the Society.

Appeal by plaintiff from judgment entered 18 December 2001 by Judge Russell G. Walker, Jr. in Moore County Superior Court. Heard in the Court of Appeals 23 January 2003.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Burley B. Mitchell, Jr., and Mark A. Davis and Moore County Attorneys Lesley F. Moxley, and Brannon Burroughs, for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah, & Fouts, P.L.L.C., by M. Jay DeVaney, and Edward P. Lord, for defendant-appellee.

CALABRIA, Judge.

Plaintiff, the County of Moore ("Moore County" or "the County") appeals from judgment entered 18 December 2001 by Judge Russell G. Walker, Jr. ("Judge Walker") in Moore County Superior Court finding Moore County breached its agreement with defendant, the Humane Society of Moore County, Inc. ("Society") by not assisting the Society in locating a site for a new animal shelter. Judge Walker ordered Moore County to pay the Society $75,000.00 in damages. Judge Walker further issued a declaratory judgment that the reverter clause on property previously deeded from Moore County to the Society was not triggered by the termination of the contract between the parties.

In the early 1970s, the Society contracted with the County to operate an animal shelter to care for lost, stray and homeless animals and thereby fulfill the County's statutory obligations. The County permitted the Society to build an animal shelter on its property. In 1990,

the parties renegotiated their contract. As part of the renegotiation, the County deeded the property to the Society. The conveyance was made subject to a reverter clause which provided "in the event property described above ever ceases to be used as an animal shelter for lost, stray or homeless animals, then in such event The County shall have the right to immediately re-enter." In addition, the parties' contract provided that upon termination of the contract "the Society shall cease its activities within thirty (30) days of said termination." Therefore, pursuant to the 1990 contract, upon termination of that contract, the Society would cease operating the animal shelter and the County's right to re-enter would be triggered.

In 1997, the parties again renegotiated the contract, and the clause requiring the Society to cease operating an animal shelter upon termination of the contract was removed. The 1997 contract added provisions which required the County to "assist the Society in locating a mutually acceptable site for a new animal shelter" and upon completion of the new facility "the Society shall convey by Special Warranty Deed the remaining property upon which the Animal Shelter is located back to the County, and the County shall make a one-time contribution of Seventy-Five Thousand [dollars] ($75,000.00) to the Society at that time." The 1997 contract also required the Society convey to the County an easement. Thereafter, the easement was conveyed. In 1998, the parties again renegotiated the contract; it remained substantially the same.

In March 2000, the Society notified the County of its intent to terminate the 1998 contract effective 30 June 2000. The County responded that upon termination the Society would have to vacate the premises, and the County would exercise its right to re-enter. The Society responded that it intended to continue operating an animal shelter, albeit not pursuant to a contract with the County, and therefore the reverter clause was not triggered. Until September 2000, pursuant to an oral agreement, the parties continued operating in accordance with the 1998 contract. In September 2000, the County began operating an animal shelter and sued the Society seeking, *inter alia*, a declaratory judgment that the reverter clause was triggered by termination of the contract. The Society answered and asserted counterclaims including a declaratory judgment to quiet title alleging that the reverter clause had not been triggered and breach of the animal shelter agreement. Summary judgment motions by both plaintiff and defendant were denied. At trial, held 15 October 2001 in the Moore County Superior Court, Judge Walker found the reverter clause was

not triggered, and the County had breached the 1997 and 1998 contracts by failing to assist the Society in locating a new site for a new animal shelter. Judge Walker awarded the Society $75,000.00 in damages.

Moore County appeals Judge Walker's judgment asserting the trial court erred in finding: (I) reverter clause was not triggered; (II) damages in the amount of $75,000.00 for breach of the 1998 contract; and (III) the Society was entitled to costs pursuant to N.C. Gen. Stat. §§ 6-18 and 6-19 (2001).

"Initially, we note that a trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though there may be evidence that would support findings to the contrary." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001). On the other hand, "[c]onclusions of law are entirely reviewable on appeal." *Creech v. Ranmar Properties*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001), *cert. dismissed*, 356 N.C. 160, 568 S.E.2d 190, *cert. denied*, 356 N.C. 160, 568 S.E.2d 191 (2002).

I. Reverter Clause

[1] Moore County appeals asserting the trial court erred in finding the reverter clause, contained in the 1990 deed conveying the property from the County to the Society, was not triggered by the termination of the County and Society's contract. The County argues the trial court's findings of fact are unsupported by the evidence and the trial court's conclusions of law are the result of errors of law.

We first address the findings of fact. The court found as fact:

> 2. By deed dated April 26, 1990 (the "Deed"), the County deeded the Property to the Humane Society. The Deed was drafted by the attorney for the County and the transfer of the Property to the Humane Society pursuant to the Deed was unanimously approved by the Moore County Commissioners. The Property was transferred to the Humane Society pursuant to N.C. Gen. Stat. § 160A-279.
>
> 3. The Deed contained a reverter clause that provides that should the Humane Society cease to use the Property as an animal shelter for lost, stray or homeless animals, the County shall have the right to re-enter and take possession of the Property. The reverter clause did not state that the County's right to re-

> enter the Property is triggered by the termination of the contractual relationship between the County and the Humane Society, does not define 'animal shelter' and does not refer to or incorporate any definition of 'animal shelter.' When it drafted the Deed, the County was aware that it could transfer the Property upon any conditions that it chose to impose.

The court went on to find the parties did not intend to incorporate any particular definition of animal shelter, but that the 1995 edition of Webster's College Dictionary "defines 'shelter' as 'a building serving as a temporary refuge or residence for homeless persons or abandoned animals.' " The court made extensive findings of fact regarding the services the Society rendered and continued to render, including accepting stray animals, housing animals treated cruelly or taken from their owners, holding animals for adoption to the public, and euthanizing unadoptable animals.

Moore County argues the findings of fact are not supported by competent evidence. The plain language of the deed reads:

> This conveyance is made upon the condition that *in the event property described above ever ceases to be used as an animal shelter for lost, stray or homeless animals, then in such event The County shall have the right to immediately re-enter upon said premises and take and hold possession of said premises without let or hindrance*; provided, however, the breach of any said conditions or any re-entry by reason of such breach or forfeiture of title to this property by reason of such breach shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value on any of said property; the said right to re-enter or declare a forfeiture of title shall be made subject to the lien of any such mortgage or deed of trust given and created by the Humane Society to secure a debt hereafter contracted or made.

(emphasis added). We find this is competent evidence to support the trial court's findings of fact that the deed provides for a right of re-entry only when the Society has ceased to operate an animal shelter. Moreover, the testimony of Susan Rowe, the executive director of the Society, amply supports the trial court's findings of fact regarding the Society's acceptance, boarding and adoption of lost, stray and homeless animals. Therefore, we hold the trial court's findings of fact are supported by competent evidence, and thus are binding on appeal.

[2] We next address the County's assertion that the conclusion of law regarding the reverter clause was the result of an error of law. The court concluded as a matter of law:

> The actions of the Humane society have not triggered the County's right to re-enter the Property, and the Humane Society holds the Property in fee simple on condition subsequent. The language of the reverter clause in the Deed must be strictly construed against the drafting party, the County, and must be strictly construed to limit forfeiture by the Humane Society. The Court finds that the language of the Deed is unambiguous and that under the plain language of the Deed, the Humane Society is currently using the Property as an animal shelter for lost, stray or homeless animals.

Moore County asserts the trial court erred by not construing the deed in accord with the intention of the parties.

In construing the deed, although "discerning the intent of the parties is the ultimate goal in construing a deed," we look to the language of the deed for evidence of this intent. *Station Assoc., Inc. v. Dare County*, 350 N.C. 367, 373, 513 S.E.2d 789, 794 (1999).

> 'The language of the deed being clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise. 'The grantor's intent must be understood as that expressed in the language of the deed and not necessarily such as may have existed in his mind if inconsistent with the legal import of the words he has used." When terms with special meanings or terms of art appear in an instrument, they are to be given their technical meaning; whereas, ordinary terms are to be given their meaning in ordinary speech.

Southern Furniture Co. v. Dep't of Transp., 133 N.C. App. 400, 403, 516 S.E.2d 383, 386 (1999) (quoting *Parker v. Pittman*, 18 N.C. App. 500, 506, 197 S.E.2d 570, 574 (1973) (citation omitted)). Here, the trial court properly considered the ordinary meaning of the term "animal shelter" and found the Society was still operating an animal shelter. Although it is apparent from the deed that the parties intended to continue their contractual relationship, with the Society providing the County with an animal shelter that fulfilled the County's statutory duties, any intention that termination of this relationship would trigger the reverter clause was not evidenced in the deed. The County certainly could have evidenced its intention in the deed, but chose not to, and this Court may not rewrite the deed in hindsight for the

County. Therefore, we conclude the trial court did not commit an error of law when concluding as a matter of law the reverter clause had not been triggered and the Society lawfully remains on the property operating an animal shelter.

II. Breach of Contract

[3] Moore County appeals asserting the trial court erred in finding the County breached the 1997 and 1998 agreements with the Society and therefore owes the Society $75,000.00 in damages. Moore County asserts the following arguments: (1) the findings of fact regarding the breach of contract are unsupported by the evidence; (2) the findings of fact regarding the award of damages are unsupported by the evidence; and (3) the contracts are void for lack of a pre-audit certificate as required by N.C. Gen. Stat. § 159-28(a) (2001).

We first address the County's argument that the findings of fact determining the County breached the 1997 and 1998 contracts are not supported by the evidence. The contract provision provides:

> [t]he County, including its staff and the Board of County Commissioners, will assist the Society in locating a mutually acceptable site for a new animal shelter, except, with respect to the Board of County Commissioners, in such cases in which assistance could result in a conflict of interest, such as a contested zoning request.

The court made the following finding of fact:

> [t]he County did not provide any assistance to the Humane Society in locating an acceptable site for a new facility as required by the 1997 and 1998 contracts. The County located two potential sites for a new Humane Society animal shelter, one near the Moore County landfill and one on Joel Road; however, the County identified both sites to the Humane Society before entering the 1997 Contract.
>
> . . .
>
> During the term of the 1998 Contract, the County owned a piece of property in Carthage. The County is currently building its new animal control facility on that property. However, the County never offered that property to the Humane Society or identified it as a potential site for the Humane Society's new facility.
>
> . . .

> The County's failure to assist the Humane Society in locating a site for a new facility is directly responsible for the inability of the Humane Society to find a location for and to construct a new facility. As a direct result of that failure, the Humane Society was unable to transfer the Property to the County during the term of the 1997 and 1998 Contracts and lost the opportunity to receive from the County the $75,000 payment required by those Contracts.

The court then concluded as a matter of law:

> [t]he County breached the 1997 and 1998 Contracts by failing to provide assistance to the Humane Society in locating a mutually acceptable piece of property on which the Humane Society could build a new facility. The Humane Society has been damaged by the County's breach of contract in the amount of $75,000.

Despite these findings and conclusion, the evidence tended to show that although Moore County was not active in assisting the Society, the cause of the Society's failure to construct a new facility was not due to inability to locate land but rather conflicts in rezoning the land.

We note that the precise duty imposed upon the County by the clause "assist in locating" is open to interpretation. David McNeil, the Moore County Manager, testified he thought compliance with the provision required the County to "see[] if we had any county-owned property" and offer any such property to the Society. On the other hand, the Society asserted the County breached the contract by never providing assistance. Despite this assertion, the uncontradicted evidence demonstrated the Society never requested assistance from the County in locating property.[1] Moreover, McNeil explained that although no one from the Society approached the County to request assistance in locating a new site, the County reasonably did not actively seek to assist the Society because:

> MCNEIL: the Humane Society ha[d] zeroed in on a site on NC 73 that they were seeking re-zoning for. We pretty much thought that

1. For example, Richard Frye, the private real estate broker for the Society testified he never asked the County for assistance in locating property, although he testified: "I've talked with the county manager a couple of times in his office concerning Humane Society expenses, philosophies, different things concerning the Humane Society." Corrine O'Conner, President of the Humane Society of Moore County since 1998, also testified that the only assistance she requested was for rezoning and not locating property.

was the property they were going to try to acquire. So we didn't actively pursue any other properties. Then after that did not materialize, we later learned there was a property in Southern Pines they had zeroed in on and were seeking proper zoning for that and therefore we didn't pursue any other.

COUNTY ATTORNEY: Why wouldn't you pursue others?

MCNEIL: We didn't see a need. We thought they had identified property that they wanted to do this on and build their new facility.

Corrine O'Conner, President of the Society since 1998, explained the Society was not only looking for the County's assistance in locating properties but was "looking at whatever assistance [the County] could give us."

In addition to the conflict of what the contract required from the County, the evidence established that inability to locate property did not cause the Society to be unable to build a new shelter. O'Conner testified that the Society's trouble in erecting a new animal shelter was not due to difficulty in locating properties. Rather, having property rezoned was the obstruction. Richard Frye, the real estate broker for the Society, testified that at the conditional-use hearing for the NC 73 land, citizens from the neighboring area opposed it and there was a "big battle with the neighbors." Diana Douglas, President of the Society from 1996 through 1997, testified regarding the attempted rezoning of the NC 73 property, "we had it surveyed and were really hopeful for getting it, but there was—a doctor owned the property across the street and he was not thrilled to have us there, nor were the surrounding residents. As a consequence, it never came to fruition."

The Society sought assistance from the County solely on rezoning issues:

O'CONNER: I spoke to him [the Chairman of the County Commissioners] in regard to the property we're trying to get in Southern Pines. He told me Southern Pines was difficult to work with and maybe we should look in Aberdeen.

. . .

COUNTY ATTORNEY: Do you think that [when he told you to check out Aberdeen] was advice?

> O'CONNER: I don't think it was very helpful. . . . Was that advice? Yes; I would say it was advice, but I didn't think it was helpful advice.

In addition to seeking advice from the County Commissioners, O'Conner also sought advice from McNeil:

> SOCIETY ATTORNEY: Did you ever request of Mr. McNeil assistance in finding property for a new site for the Humane Society?
>
> O'CONNER: I wouldn't say I requested his assistance. I took him the map of the property on highway 73 and showed him what we were looking at trying to purchase and tried to get his feelings on it, and he said he didn't see a problem, but it was up to the planning board [for rezoning], it really wasn't his thing. I just told him I wanted to get his feelings on it.

The evidence established that little action was taken by either party to effectuate the "assist in locating" provision of the contract. However, there is insufficient evidence for the court's finding that the County "is directly responsible for the inability of the Humane Society to find a location for and to construct a new facility." Accordingly, we reverse the trial court.

Since there was insufficient evidence for breach of the contract, we need not address the County's remaining assignments of error regarding the validity of the contracts and the insufficiency of evidence for the award of damages.

III. Award of costs

[4] Moore County appeals asserting the trial court erred in awarding the Society, as the prevailing party, costs pursuant to N.C. Gen. Stat. §§ 6-18 and 6-19. Section 6-18 provides that "[c]osts shall be allowed of course to the plaintiff, upon a recovery, in the following cases: (1) In an action for the recovery of real property" and section 6-19 provides the same for the defendant if the plaintiff is not entitled to costs. In this case, the Society recovered the real property. Therefore, pursuant to the statutes, the trial court properly awarded costs to the Society.

Affirmed in part, reversed in part.

Judges McGEE and HUNTER concur.

MARQUIS D. STREET, PLAINTIFF ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED V. SMART CORPORATION, DEFENDANT

No. COA02-661

(Filed 15 April 2003)

Parties— real party in interest—lack of standing

The trial court did not err by granting defendant corporations's N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff personal injury attorney's complaint for lack of standing in an action concerning defendant corporation's alleged overcharging for the purchase of photocopies of medical records for plaintiff's clients in excess of the amount allowable under N.C.G.S. § 90-411, because: (1) while plaintiff might have an interest in the action based on the fact that he advanced certain costs on behalf of his clients, he does not have an interest in the subject matter of the litigation since he is not ultimately responsible for those costs; (2) plaintiff will not benefit from or be injured by the judgment since he is not ultimately responsible for the costs; and (3) plaintiff is not the real party in interest, and the record does not reflect any attempt on behalf of plaintiff or request by plaintiff to substitute the real party in interest.

Appeal by plaintiff from order entered 4 April 2002 by Judge Charles C. Lamm, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 24 February 2003.

Donaldson & Black, P.A., by Arthur J. Donaldson and John T. O'Neal, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Hada V. Haulsee and Michael Montecalvo, for defendant-appellee.

EAGLES, Chief Judge.

Marquis D. Street ("plaintiff") appeals from the trial court's order dismissing plaintiff's complaint because of lack of standing. After careful consideration of the briefs and record, we affirm.

Plaintiff is a personal injury attorney and a resident of Greensboro. Four individuals were injured in separate motor vehicle accidents occurring from 31 December 1998 to 16 October 2000. Two of the individuals received medical treatment from Moses H. Cone Memorial Hospital and/or Moses Cone Health System, one received

treatment from Southeastern Orthopaedic Specialists, and another received treatment from Wesley Long Hospital. The four individuals each retained plaintiff to represent them in their separate liability claims for personal injury. For each individual client, plaintiff, with proper authorization, requested his client's "medical records relating to the medical services rendered" by the respective medical treatment providers.

Smart Corporation ("defendant"), a California corporation, provides photocopies and reproductions of medical records for healthcare providers in North Carolina for a fee. Defendant provided photocopies of medical records for each of plaintiff's four clients. For each client's records, defendant sent plaintiff an invoice which was paid by plaintiff.

Plaintiff commenced this action alleging that defendant submitted invoices charging in excess of the amount allowable under North Carolina state law, G.S. § 90-411. Plaintiff also alleged that defendant's actions constituted an unfair and deceptive trade practice in violation of G.S. § 75-1.1. Defendant answered and raised several defenses including lack of standing, failure to name the real party in interest, and lack of subject matter jurisdiction.

Defendant moved to dismiss pursuant to the North Carolina Rules of Civil Procedure Rule 12(b)(1) and (6) alleging that "the [p]laintiff is not the real party in interest and therefore lacks standing," that "there is no private cause of action under [G.S.] § 90-411" and that "[p]laintiff's claims are barred by the voluntary payment doctrine." The trial court granted defendant's motion to dismiss with prejudice "on the grounds that the plaintiff is not the real party in interest and has no standing to prosecute this action." Plaintiff appeals.

On appeal, plaintiff contends that the trial court erred in granting defendant's Rule 12(b)(6) motion to dismiss because plaintiff is the real party in interest and does have standing. After careful consideration, we disagree and affirm.

Plaintiff argues that he is the direct purchaser of the photocopies of the medical records which provides him with standing. In the alternative, plaintiff argues that he is an indirect purchaser and would have standing in a state action. Plaintiff further argues that equity would dictate that he be allowed to pursue an action because he could be sued by defendant for not paying for the records. Also, plain-

tiff argues that instead of dismissing the action, the trial court should have continued the matter to allow the plaintiff to substitute the real party in interest. Though we are concerned with the cumulative effect of defendant's alleged overcharges, we are not persuaded.

Here, the trial court's order does not specify whether it applied Rule 12(b)(1) or (6). The trial court's order states that the motion to dismiss "is GRANTED and this action is dismissed with prejudice on the grounds that the plaintiff is not the real party in interest and has no standing to prosecute this action." We note that the plaintiff contends that the trial court erred in granting defendant's Rule 12(b)(6) motion to dismiss for lack of standing. However, defendant's motion to dismiss raises both Rule 12(b)(1) and (6) as grounds for dismissal. While the practical effect of either a Rule 12(b)(1) or 12(b)(6) dismissal of a complaint is the same, i.e. the case is dismissed, "the legal effect is quite different." *Cline v. Teich*, 92 N.C. App. 257, 263, 374 S.E.2d 462, 466 (1988). " '[A] *dismissal under b(1) is not on the merits and thus is not given res judicata effect.*' " *Id.* at 264, 374 S.E.2d at 466 (citation omitted) (emphasis in original). A Rule 12(b)(6) dismissal "is an adjudication on the merits" that "bars subsequent relitigation of the same claim." *Id.* Here, the trial court dismissed the action with prejudice. This implicates a Rule 12(b)(6), rather than a Rule 12(b)(1), dismissal.

"A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted. Rule 12(b)(6) 'generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.' " *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citations omitted). When deciding a Rule 12(b)(6) motion to dismiss, "all factual allegations in the complaint are taken to be true." *Cline*, 92 N.C. App. at 259, 374 S.E.2d at 463.

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *American Woodland Industries v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002). " 'Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.' " *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)). "The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as

to bring forth a clear articulation of the issues before the court." *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980). "Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." *Neuse River Foundation, Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52.

"Every claim must be prosecuted in the name of the real party in interest." *Goodrich v. Rice*, 75 N.C. App. 530, 536, 331 S.E.2d 195, 199 (1985). *See also* G.S. § 1A-1, Rule 17(a) (2001); G.S. § 1-57 (2001). " ' "A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject-matter of the litigation." ' " *Energy Investors Fund, L.P.*, 351 N.C. at 337, 525 S.E.2d at 445 (citations omitted).

The Revised Rules of Professional Conduct of The North Carolina State Bar state:

> Rule 1.8 Conflict of interest: Prohibited transactions and other specific applications.
>
> . . . .
>
> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a lawyer may advance court costs and expenses of litigation including expenses of investigation and medical examinations and cost of obtaining and presenting evidence, *provided the client remains ultimately liable for such costs and expenses.*

Rev. R. Prof. Conduct N.C. St. B. 1.8(e), 2003 Ann. R. (N.C.) 625 (emphasis added).

Here, the plaintiff alleged in his amended complaint that each of the four named clients were overcharged by defendant for photocopies of their medical records. Plaintiff further alleged that the "[p]laintiff, in order to obtain the medical records, paid the defendant's invoice in an amount in excess of amounts chargeable under N.C.G.S. 90-411." The plaintiff advanced the costs "in order to obtain the medical records" but the individual clients remain liable for those costs. While the plaintiff might have an interest in the action because he advanced certain costs on behalf of his clients, he does not have an interest in the subject matter of the litigation because he is not ultimately responsible for those costs. The plaintiff has not suffered

an injury and does not have standing to pursue this action. The plaintiff is not the real party in interest. The plaintiff will not benefit from or be injured by the judgment because he is not ultimately responsible for the costs.

The plaintiff cites *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842 (3rd Cir. 1996) to support his contention that he has standing. In *McCarthy,* plaintiff-clients brought an action against defendants that included hospitals and medical records providers. *Id.* at 845. The issue there was "whether the plaintiff-clients, whose attorneys purchased photocopies of the clients' hospital records for the purpose of prosecuting their clients' personal injury and medical malpractice claims, have standing to bring an antitrust action against the sellers of the photocopies." *Id.* at 844. *McCarthy* held that the plaintiff-clients were not "direct purchasers" of the photocopies and lacked standing to bring a federal antitrust action. *Id.* The court noted that the plaintiff-clients' attorneys were the direct purchasers of the records. *Id.* at 852. *McCarthy* is distinguishable from this case. In *McCarthy*, the plaintiff-clients entered into contingent fee agreements with their respective attorneys. *Id.* at 845. The agreements provided that plaintiff-clients would not be responsible for reimbursing the law firms for advancing certain costs of litigation if the plaintiff-clients did not receive a monetary award. *Id.* at 845-46. The Pennsylvania Rules of Professional Conduct provide that "a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." *Id.* at 858 n.2 (Stapleton, J., dissenting). Here, the Revised Rules of Professional Conduct of The North Carolina State Bar do not allow the reimbursement of costs advanced by an attorney to be contingent upon the outcome of the action. An attorney in North Carolina may only advance costs on behalf of a client so long as the plaintiff client remains ultimately liable for those costs. Rev. R. Prof. Conduct N.C. St. B. 1.8(e), 2003 Ann. R. (N.C.) 625.

In the alternative, the plaintiff argues that he is an indirect purchaser and would have standing in a state action. Plaintiff cites *Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 473 S.E.2d 680, *disc. review denied*, 344 N.C. 734, 478 S.E.2d 5 (1996) in support of his argument. In *Hyde*, this Court held "that indirect purchasers have standing under [G.S.] § 75-16 to sue for Chapter 75 violations." *Id.* at 584, 473 S.E.2d at 688.

In *Hyde*, the plaintiffs were "indirect purchasers from the defendant manufacturers because they purchased infant formula

through parties other than the manufacturer." *Id.* at 574, 473 S.E.2d at 681-82. This Court further held that "the General Assembly clearly intended to expand the class of persons with standing to sue for a violation of Chapter 75 to include any *person who suffers an injury* under Chapter 75, regardless of whether that person purchased directly from the wrongdoer." *Id.* at 577, 473 S.E.2d at 684 (emphasis added).

Here, the plaintiff is not an indirect purchaser either. The plaintiff has not suffered an injury. He has advanced the costs of the medical records on behalf of his clients yet his clients remain ultimately liable for those costs.

Plaintiff also argues that *Gualtieri v. Burleson*, 84 N.C. App. 650, 353 S.E.2d 652, *disc. review denied*, 320 N.C. 168, 358 S.E.2d 50 (1987) supports his contention that he is the real party in interest and has standing. In *Gualtieri*, an expert witness sued an attorney to recover unpaid compensation for services rendered by the expert witness. *Id.* at 651, 353 S.E.2d at 653. On appeal, the defendant lawyer argued that he was "not liable because he 'identified himself as an attorney representing [his client],' thereby making 'it clear that he acted in a representative capacity for a disclosed principal.' " *Id.* at 653, 353 S.E.2d at 655. The *Gualtieri* court affirmed the trial court's conclusion that the "defendant [attorney] personally contracted to pay plaintiff [expert witness] for the services admittedly rendered." *Id.* The *Gualtieri* court noted that "[t]rial lawyers are always making contracts with court reporters, investigators, and experts" and that "there is no inhibition in the law against a lawyer contracting to pay for services needed in a case he is handling." *Id.* at 653-54, 353 S.E.2d at 655. The court further provided that the Rules of Professional Conduct of The North Carolina State Bar allow an attorney to "advance or guarantee litigation expenses for his clients, provided the client remains ultimately liable to him for such expenses." *Id.* at 654, 353 S.E.2d at 655. The court noted that the evidence did not show that plaintiff expert witness was aware of defendant attorney's client "as a hirer of expert services" or that defendant attorney's client "authorized defendant [attorney] to do so upon her credit." *Id.* The court stated that

> identifying himself as a lawyer with a disabled client, all that defendant did according to the evidence, was not sufficient in our opinion to establish that he was not the one contracting to pay for plaintiff's services. For when a lawyer hiring an expert to help

> on a case says or does nothing to indicate that the obligation to pay is not his, the expert can reasonably assume, it seems to us, that the lawyer is acting openly and in good faith, rather than evasively, and that he is the contracting party, rather than a stranger he has had no contact with.

Id.

Here, plaintiff's amended complaint alleges that he represented the four clients. With each request for medical records, the plaintiff provided "the requisite client authorization for release of medical records." The issue is not whether the plaintiff contracted with the defendant to provide medical records, but whether the plaintiff has standing to sue the defendant for alleged overcharging of costs for which the plaintiff is not ultimately liable.

Plaintiff also argues that the trial court should have allowed a continuance for the plaintiff to substitute the real party in interest instead of dismissing the action. We do not agree.

Rule 17(a) of the North Carolina Rules of Civil Procedure states "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time has been allowed after objection* for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." G.S. § 1A-1, Rule 17(a) (emphasis added).

Here, the record does not reflect any attempt on behalf of plaintiff or request by plaintiff to substitute the real party in interest. The defendant raised the defense of real party in interest in their answer of 24 August 2001. Defendant moved to dismiss on 8 March 2002 and the trial court heard the motion in April 2002. Plaintiff was aware of the real party in interest defense for approximately seven months before the hearing based on defendant's answer and for approximately three weeks based on the motion to dismiss.

Here, the plaintiff has not personally suffered an injury because of the alleged overcharge for records. The plaintiff is relying on injuries that have been sustained by individuals plaintiff represents in an attorney-client relationship. Because of the Revised Rules of Professional Conduct, plaintiff cannot pay those costs on his clients' behalf, he may only advance the costs so long as his clients remain ultimately liable for them. Because the plaintiff here is not ultimately responsible for the costs, the plaintiff neither has standing to pursue the action nor is the real party in interest.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges MARTIN and GEER concur.

KATHERINE T. LANGE, PLAINTIFF v. DAVID R. LANGE, DEFENDANT

No. COA02-567

(Filed 15 April 2003)

Appeal and Error— appealability—mootness—motion for recusal

Although defendant appeals the trial court's decision in a child custody case concluding that a judge should have recused himself from hearing a motion to modify custody and by ordering a new hearing based on the fact that the judge co-owned a vacation home with defendant's attorney, the appeal is dismissed as moot because the pertinent judge retired, and the proposed custody judgment that led to the motion for recusal was never signed or entered and was not filed with the clerk of court.

Judge CALABRIA dissenting.

Appeal by defendant from order entered 4 October 2001 by Judge William A. Christian in Mecklenburg County District Court. Heard in the Court of Appeals 12 February 2003.

Reid, Lewis, Deese, Nance & Person, L.L.P., by Renny W. Deese, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., Katherine S. Holliday and Preston O. Odom, III, for defendant-appellant.

TYSON, Judge.

I. Background

Katherine T. Lange ("plaintiff") and David R. Lange ("defendant") were married on 27 May 1989. Two children were born during

the marriage: Jacob Ross Lange on 18 August 1992 and Sophia Katherine Lange on 18 August 1994. Plaintiff and defendant separated in February 1997 and divorced in August of 1998. On 11 September 1998, an Order Approving Parenting Agreement was entered that approved a shared custody arrangement of the children. Plaintiff was granted primary physical custody with defendant having custody on alternating weekends and each Wednesday evening until the Thursday morning.

In February 2000, plaintiff informed defendant that she intended to move to Southern Pines in June 2000 and take the children with her. Plaintiff was engaged to a man who lived in Southern Pines and who could not relocate because of his business. On 23 March 2000, plaintiff moved to modify custody. On 26 April 2000, plaintiff made a motion in the cause for contempt for failure to pay child support, and a show cause order was issued by the trial court. On 13 May 2000, defendant remarried. On 2 June 2000, defendant responded to plaintiff's motion to modify custody requesting the original shared custody agreement be continued or the substitution of him as primary custodial parent.

Judge William G. Jones conducted a three-day trial concerning the custody modification dispute between 13 and 16 June 2000. Dorian Gunter ("Gunter") represented plaintiff, and Katherine Holliday ("Holliday") represented defendant at the trial. By letter dated 30 June 2000, Judge Jones announced his decision that the children continue to reside in Charlotte, with the original parenting agreement remaining in effect if plaintiff remained in the Charlotte area. If plaintiff moved to Southern Pines, defendant would be awarded primary physical custody. Judge Jones asked Holliday to draft the order.

Judge Jones, Holliday, and Gunter subsequently met to discuss the details of the order. In early November 2000, before Judge Jones could sign the final order, Gunter informed Judge Jones and Holliday that he was going to file a recusal motion. Judge Jones refused to voluntarily recuse himself but declined to sign the order. Gunter's recusal motion was based upon the co-ownership of Judge Jones and defendant's attorney, Holliday, of a vacation home and was filed on 13 November 2000. Judge Jones referred the matter to the Administrative Office of the Courts ("AOC"). The AOC appointed Judge William Christian to hear plaintiff's motion to recuse Judge Jones.

On 11 June 2001, Judge Christian heard the motion for recusal. Judge Christian issued an order that concluded there had been "no specifically enumerated violation of Canons 2, 3, or 5 of the North Carolina Code of Judicial Conduct." The order granted plaintiff's recusal motion and awarded a new hearing because "a reasonable person [would] question whether [Judge Jones] could rule impartially." Defendant appeals that decision. Judge Jones subsequently retired from the bench.

II. Issue

The issue is whether Judge Christian erred in concluding that Judge Jones should have recused himself from hearing the motion and consequently ordering a new hearing. We find it unnecessary to reach this issue because Judge Jones' retirement renders this appeal moot.

III. Mootness

Mootness arises where the original question in controversy is no longer at issue. *In re Denial of Request by Humana Hospital Corp.*, 78 N.C. App. 637, 640, 338 S.E.2d 139, 141 (1986). "Whenever, during the course of litigation it develops that the relief sought has been granted or that questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Id.* (quoting *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)).

The moment Judge Jones retired, all issues regarding recusal became moot. The proposed custody judgment that led to the motion for recusal was never signed or entered, and was not filed with the clerk of court. North Carolina Rule of Civil Procedure 58 governs entry of judgments. "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58 (2001).

"The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. The entry of judgment is the event which vests this Court with jurisdiction." *Worsham v. Richbourg's Sales and Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) (citations omitted).

Judge Jones cannot sign the order or preside over any further hearing after retirement. Judge Jones is now retired. He cannot

execute any orders, or re-hear the case. *See In re Pittman*, 151 N.C. App. 112, 564 S.E.2d 899, *appeal dismissed*, 356 N.C. 163, 568 S.E.2d 609 (2002).

All parties agree that the case must be considered by a new judge, whether Judge Christian's ruling granting a new trial is affirmed or reversed and remanded for a further proceeding under Rule 63 of the North Carolina Rules of Civil Procedure. Judge Jones' retirement ended all issues on appeal, and there is no possibility that the recusal issue regarding Judge Jones will reoccur.

The dissenting opinion would have this Court overcome formidable hurdles of an interlocutory appeal and abuse of discretion review to unnecessarily reach the issue of recusal.

The parties engaged in three days of presenting evidence and argument, and are bound by that evidence if a new hearing is held. Whether a new hearing is held or the new judge enters the prior order as written lies within the new judge's discretion and is irrelevant to the issue on appeal.

We do not reach the merits of the parties' assignments of error. Such action is unnecessary to the issue on appeal. In the interests of judicial economy and judicial restraint, this appeal is dismissed as moot.

Appeal Dismissed.

Judge McCULLOUGH concurs.

Judge CALABRIA dissents.

CALABRIA, Judge, dissenting.

I. Mootness

The majority concludes the controversy in this case became moot when Judge Jones retired. I respectfully dissent.

The issue of mootness may arise at any time since "mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceed-

ings, the usual response should be to dismiss the action." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). Our Supreme Court explained the mootness doctrine:

> [t]hat a court will not decide a 'moot' case is recognized in virtually every American jurisdiction. In federal courts the mootness doctrine is grounded primarily in the 'case or controversy' requirement of Article III, Section 2 of the United States Constitution and has been labeled 'jurisdictional' by the United States Supreme Court. In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint.

Id., (internal citations omitted). The Court set forth:

> [w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

Id. Therefore, "[a] case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996).

The question presented to this Court is whether Judge Christian abused his discretion in ordering a new trial after determining Judge Jones should have recused himself from presiding over the case. That this question is still "in controversy between the parties[,]" and this Court's determination will have a "practical effect on the existing controversy" is manifest.

Were this Court to affirm Judge Christian's order, we would remand for a new trial. On the other hand, were this Court to reverse Judge Christian's order, finding Judge Jones need not have recused himself, we would remand pursuant to Rule 63 of the North Carolina Rules of Civil Procedure. Rule 63 sets forth:

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

hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:

. . .

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

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

N.C. Gen. Stat. § 1A-1, Rule 63 (2001).

The majority correctly asserts Judge Jones "cannot execute any orders."[1] However, Judge Jones' order may nevertheless be entered by a substituted judge, usually the Chief District Court Judge of that District, pursuant to Rule 63. Only if "the substituted judge is satisfied that he or she cannot [enter the order] . . . [may the judge], in the judge's discretion, grant a new trial or hearing." N.C. Gen. Stat. § 1A-1, Rule 63. Regardless of whether a new trial is granted or the order is entered, the procedure set forth under Rule 63 is addressed solely to the trial court, and this Court cannot usurp the trial court's discretion by determining a new trial is the inevitable result.[2]

Therefore, in the case at bar, if this Court were to affirm on the merits, the new trial ordered by Judge Christian would result, whereas if this Court were to reverse on the merits, the case would

1. Any dispute as to whether Judge Jones could properly enter his order was resolved by this Court's decision in *In re Pittman*, 151 N.C. App. 112, 564 S.E.2d 899, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 609, *appeal dismissed*, 356 N.C. 163, 568 S.E.2d 609 (2002), wherein this Court held a judgment void because it was entered pursuant to the signature of a judge whose term had expired.

2. To permit the majority's result would require finding that the substituted judge in this action cannot enter Judge Jones' order and any such entry would inevitably result from an abuse of discretion. The majority states "Judge Jones, Holliday, and Gunter subsequently met to discuss the details of the order." While this is true, the attorneys negotiated over the precise wording of the order for several months, from July until November 2000. In November 2000, Judge Jones participated in a meeting with the attorneys to clarify and finalize the order. As the meeting concluded, defendant's attorney raised the recusal issue. Although Judge Jones' order remains unsigned, it was in final form when defendant motioned for recusal. Considering the ample evidence, I cannot hold an entry of Judge Jones' order would inevitably result from an abuse of discretion. More importantly, that issue is not properly before this Court, as our role would simply be to remand for a determination pursuant to Rule 63.

be remanded to the trial court for either entry of Judge Jones' order or exercise of the substituted judge's discretion consistent with Rule 63. Since the Court's determination has a practical effect, and the questions in controversy are still very much at issue, I would hold this case is not moot.

II. Interlocutory

"A ruling on a motion to recuse a trial judge is an interlocutory order and is not immediately appealable." *Lowder v. All Star Mills*, 60 N.C. App. 699, 702, 300 S.E.2d 241, 243, *rev'd in part on other grounds*, 309 N.C. 695, 309 S.E.2d 193 (1983) (citation omitted). An interlocutory order may nevertheless be immediately appealed as provided for by North Carolina General Statutes §§ 1-277, 7A-27 and 1A-1, Rule 54(b). Both sections 1-277 and 7A-27 provide for immediate appeal of an interlocutory order when the order "grants or refuses a new trial." N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d) (2001). Here, since Judge Christian's order granted a new trial, the order, although interlocutory, is immediately appealable pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)[3].

III. Standard

Defendant asserts Judge Christian erred by applying the incorrect standard for violating Canon 3, which provides "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Code of Judicial Conduct, Canon 3(C)(1). Defendant argues the reasonable man is the appropriate test, and Judge Christian erroneously cited the average citizen test. Judge Christian, in expressing the applicable law, quoted the following language from *Scott v. U.S.*, 559 A.2d 745, 748-49 (D.C. 1989) (citations omitted):

> The necessity for recusal in a case is premised on an objective standard . . . [A] Judge must recuse from any cause in which there is 'an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question [the] judge's impartiality.' . . . The objective standard is required in the interest of ensuring justice in the individual case and maintaining public confidence in a integrity of the judicial process which 'depends on a belief, in

3. Judge Christian certified the order a final order pursuant to North Carolina General Statute § 1A-1, Rule 54(b), however, since the new trial provisions of North Carolina General Statutes §§ 1-277 and 7A-27 apply, there is no need to reach this for review of Judge Christian's order.

> the impersonality of judicial decision making.' . . . Neither bias in fact nor actual impropriety is required to violate the Canons.

North Carolina follows the reasonable person standard: "[t]he test to apply in deciding what is reasonable is whether 'a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner.' " *Savani v. Savani*, 102 N.C. App. 496, 500, 403 S.E.2d 900, 902 (1991) (quoting *McClendon v. Clinard*, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978)). Since North Carolina law required Judge Christian to apply the objective reasonable man standard, and Judge Christian referenced the incorrect standard, I find merit to defendant's assignment of error.

For the foregoing reasons, I would reverse Judge Christian's order and remand the case for application of the appropriate standard. Since I would reverse on this basis, I do not reach the remaining assignments of error raised by plaintiff and defendant.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, PLAINTIFF v. ZURICH-AMERICAN INSURANCE COMPANY AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, DEFENDANTS

No. COA02-720

(Filed 15 April 2003)

1. Insurance— commercial automobile liability policy— leased vehicle—driving with lessee's permission—statutory minimum coverage

The insurer that provided commercial automobile liability insurance to the owner-lessor of an automobile was required by the Financial Responsibility Act to provide the statutory minimum coverage for claims against an employee of an automobile tire shop who caused an accident while test-driving the automobile with the lessee's permission even though the commercial liability policy provided that, regardless of whether the lessee or person in lawful possession had insurance, the lessee and anyone driving with permission of the lessee were not covered under the policy. N.C.G.S. §§ 20-279.21(b), 20-281.

2. Insurance— motor vehicle—Financial Responsibility Act—umbrella liability policy

An umbrella liability policy issued to a vehicle owner did not provide excess coverage to a third-party driver for an automobile accident, even though coverage was written into another policy to the same insured by the Financial Responsibility Act. The Financial Responsibility Act only requires coverage to minimum limits, not additional umbrella coverage.

3. Insurance— motor vehicles—Financial Responsibility Act—duty to defend

The Financial Responsibility Act does not impose a duty to defend, and the insurer of a vehicle owner did not have the duty to defend a third-party driving the vehicle after it had been leased, where coverage was available only through the Financial Responsibility Act.

Appeal by plaintiff from order filed 12 March 2002 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 12 March 2003.

Pinto Coats Kyre & Brown, PLLC, by David L. Brown and John I. Malone, Jr., for plaintiff-appellant.

Bailey & Thomas, P.A., by David W. Bailey, Jr. and John R. Fonda, for defendant-appellee St. Paul Fire and Marine Insurance Company.

TYSON, Judge.

I. Background

On 12 July 1999, an employee of Briggs, Inc. d/b/a Briggs & Sons Tire ("Briggs") was test driving a car owned by Frank Consolidated Enterprises, Inc. d/b/a Wheels, Inc. ("Wheels, Inc.") and leased to Nationwide Mutual Insurance Company ("Nationwide") when he collided with an automobile owned and operated by Helen Harris. Harris sustained injuries as a result of the accident and filed a lawsuit against Briggs, Wheels, Inc., and Nationwide, *Harris v. Briggs* in Cumberland County. Wheels, Inc. and Nationwide settled with Harris prior to trial. The jury awarded $1.5 million to plaintiff.

At the time of the accident, Harleysville Mutual Insurance Company ("Harleysville") had issued a Commercial Garage Owners

Liability Policy to Briggs. Zurich-American Insurance Company ("Zurich") issued a business automobile liability policy naming Nationwide as the insured. St. Paul Fire and Marine Insurance Company ("St. Paul") issued both a commercial automobile liability insurance policy and an umbrella policy naming Wheels, Inc. as the insured.

On 23 October 2000, Harleysville brought the present declaratory judgment action against Zurich and St. Paul for contribution and a pro rata share of the costs. Zurich and Harleysville settled and Zurich was dismissed. Harleysville and St. Paul filed cross-motions for summary judgment. The trial court granted summary judgment in favor of St. Paul. We reverse.

II. Issue

The issue is whether the insurance policies issued by St. Paul provides coverage to Briggs and its employee.

III. Standard of Review

Summary judgment is proper if the movant is entitled to judgment as a matter of law. *Integon Indem. Corp. v. Universal Underwriters Ins. Co.*, 131 N.C. App. 267, 270, 507 S.E.2d 66, 68 (1998) (*Integon II*). "The meaning of specific language used in a policy of insurance is a question of law." *Id.*

IV. Liability Coverage

Harleysville contends that language in St. Paul's policy is in direct conflict with N.C. Gen. Stat. § 20-279.1 *et seq.* (1999) ("Financial Responsibility Act") and that coverage is provided to the statutory minimum amounts based on the Financial Responsibility Act. St. Paul argues that its policy satisfies the Financial Responsibility Act and does not provide any coverage.

A. St. Paul's Basic Automobile Liability Protection Policy

St. Paul's basic Automobile Liability Protection policy provides:

> **Bodily injury and property damage liability.** We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:
>
> • results from the ownership, maintenance, use, loading or unloading of a covered auto; and
>
> • is caused by an accident that happens while this agreement is in effect.

Protected person is defined as "any person or organization who qualifies as a protected person under the Who Is Protected Under This Agreement section." Protected person under the policy includes:

> **Any permitted user**. Any person or organization to whom you've given permission to use a covered auto you own, rent, lease, hire or borrow is a protected person.
>
> However, we won't consider the following to be a protected person:
>
> . . .
>
> • Anyone using a covered auto while working in the business of selling, servicing, repairing, storing or parking autos, unless the business is yours.

The policy provides that "This agreement is primary insurance for covered autos you own and excess insurance for those you don't own." An endorsement to the policy provides:

> Your Automobile Liability Protection is broadened to protect your business when you lease or rent autos to others.
>
> We'll provide Automobile Liability Protection for a covered leased or rented auto if you have required the person or organization who leased or rented the auto from you to provide primary liability insurance for you.
>
> COVERED LEASED OR RENTED AUTO means an auto you lease or rent to someone under a written lease or rented agreement; which requires the person or organization to whom you lease or rent the auto to provide primary liability insurance for you. A leased or rented auto also includes a substitute or additional auto when part of the same agreement.
>
> Limit of this coverage. The limit of this coverage for you or your employees or agents is excess liability protection over the amount of primary liability insurance that the person or organization who leased or rented the auto from you has.
>
> However, we won't protect the person or organization to whom you lease or rent the auto, including employees, agents, or anyone using such auto with their permission.

The named insured on the St. Paul policy was "Frank Consolidated Enterprises, Inc., Wheels, Inc., Four Wheels Company, Wheels Leasing Canada, Ltd." Wheels, Inc. owned the vehicle that was leased

by Nationwide. Nationwide gave Briggs and its employee permission to drive the leased vehicle when it was delivered to Briggs for service. The employee of Briggs caused the accident involving the leased vehicle and injured Ms. Harris.

St. Paul contends the express terms of the policy do not provide insurance to Nationwide because the lease agreement requires Nationwide to provide its own insurance. St Paul argues in its brief that "lessees of vehicles and their permittee drivers are not protected persons."

B. Financial Responsibility Act

Where the policy does not provide voluntary coverage, we must determine whether coverage is mandated by the provisions of N.C. Gen. Stat. §§ 20-281 and 20-279.21. The two statutes " 'prescribe mandatory terms which become part of every liability policy insuring automobile lessors.' " *Ins. Co. of N. America v. Aetna Life and Casualty Co.*, 88 N.C. App. 236, 242, 362 S.E.2d 836, 840 (1987) (quoting *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 346, 338 S.E.2d 92, 96 (1986)). The Financial Responsibility Act requires each automobile owner to carry a minimum amount of liability insurance. "When a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in it." *American Tours*, 315 N.C. at 344, 338 S.E.2d at 95. The provisions of the Financial Responsibility Act "are written into every automobile policy as a matter of law." *Integon Indemnity Corp. v. Universal Underwriters Ins. Co.*, 342 N.C. 166, 168, 463 S.E.2d 389, 390-91 (1995) (*Integon I*).

N.C. Gen. Stat. § 20-279.21(b) provides:

> Such owner's policy of liability insurance: . . . (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000)

> because of bodily injury to or death of two or more persons in any one accident, and fifteen thousand dollars ($15,000) because of injury to or destruction of property of others in any one accident.

N.C. Gen. Stat. § 20-281 makes it unlawful:

> for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee, in such an amount as is hereinafter provided, ... Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle, subject to the following minimum limits: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and fifteen thousand dollars ($15,000) because of injury to or destruction of property of others in any one accident.

These sections were amended, with an effective date of 1 July 2000, to increase the minimums; however, the above amounts were in effect at the time of the accident. "Section 281, which applies specifically to automobile owners who lease their cars for profit, is a companion section to and supplements § 279.21, which applies to automobile owners generally." *American Tours*, 315 N.C. at 346, 338 S.E.2d at 96.

C. Coverage

[1] The terms of N.C. Gen. Stat. § 20-281 expressly require that the insurance policy secured by Wheels, Inc. provides coverage for its lessee, Nationwide, and to Nationwide's agents for the set minimum amounts. The terms of N.C. Gen. Stat. § 20-279.21(b)(2) require that the insurance policy secured by Wheels, Inc. provide coverage for at least the statutory minimum amounts for anyone in lawful possession, including the employee of Briggs. If the policy's language does

not provide coverage, then coverage in the amounts of the statutory minimum is written into the policy.

Our Courts have held that the Financial Responsibility Act is "satisfied if the terms of the policy exclude coverage in the event the driver of a vehicle is covered under some other policy for the minimum amount of liability coverage required by law." *Integon I*, 342 N.C. at 169, 463 S.E.2d at 391 (citing *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 352, 152 S.E.2d 436, 444-45 (1967)). In *Integon I*, Universal's policy expressly limited coverage by stating "With respect to persons or organizations required by law to be an INSURED, the most WE will pay, in the absence of any other applicable insurance, is the minimum limits required by the Motor Vehicle Laws of North Carolina. When there is other applicable insurance, WE will pay only OUR pro rata share of such minimum limits." *Id.* at 169-70, 463 S.E.2d at 391. This Court found that, even though the driver of the vehicle had other insurance, she was still "required by law" to be an "insured" based on the Financial Responsibility Act. *Id.* Universal was required to pay its pro rata share of the minimum limits. *Id.*

Unlike the policy in *Integon I* and the policy in *United Services Auto Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 420 S.E.2d 155 (1992), relied upon in *Integon I*, St. Paul's policy does not make reference to the Financial Responsibility Act and the obligations statutorily imposed upon the insurance companies and their policies. St. Paul's policy does not limit its exclusion of coverage to when the driver of the vehicle was covered under some other policy for the statutory minimum amount. It provides that, regardless of whether the lessee or the person in lawful possession had insurance, the lessee and anyone driving with permission of the lessee are not covered under the policy. This provision does not satisfy the Financial Responsibility Act. Because the policy does not satisfy N.C. Gen. Stat. §§ 20-281 and 20-279.21, the terms of those statutes are written into St. Paul's basic Automobile Liability Protection policy. There is coverage in the statutory minimum amounts for claims against Briggs' employee, a person in lawful possession of the vehicle and operating with the permission and authority of Nationwide. The trial court erred in granting summary judgment to St. Paul.

D. St. Paul's Umbrella Policy

[2] Harleysville contends that under the Umbrella Policy, St. Paul is required to pay its pro rata share of liability in excess of $1 million. We disagree.

The St. Paul Umbrella policy protects "Any person or organization who is a protected person under your automobile Basic Insurance for the use of an auto is a protected person under this agreement." As discussed above, Briggs is excluded from being a "protected person" under the terms of the policy. Thus, Briggs is not covered by the umbrella policy. The Financial Responsibility Act only requires coverage to the minimum limits, not additional umbrella coverage.

Further, the St. Paul's Umbrella policy expressly states:

> If there is any other insurance for injury or damage covered by this agreement, we won't make any payments until the other insurance has been used up with the payment of damages.

Because Harleysville has a policy for $1,000,000 and an excess liability policy for $1,000,000, there is other insurance which has not "been used up with the payment of damages." By the terms of the policy, St. Paul's umbrella policy does not provide excess coverage.

V. Expenses and Costs

[3] The express terms of St. Paul's insurance policy do not provide coverage for Briggs and its employee. St. Paul does not have a contractual duty to defend Briggs. Coverage is available only through the Financial Responsibility Act. Because the Financial Responsibility Act does not impose on the insurance company a duty to defend, no duty to defend is written into the policy as a matter of law.

VI. Conclusion

The trial court erred in granting summary judgment to St. Paul. The policy, by virtue of N.C. Gen. Stat. §§ 20-281 and 279.21, has statutory minimums written into the policy to provide coverage for claims against Briggs. St. Paul's umbrella policy does not provide excess liability coverage. Harleysville is entitled to summary judgment to the extent of St. Paul's pro rata share of the statutory coverage.

Affirmed in part, reversed and remanded in part.

Judges McCULLOUGH and CALABRIA concur.

MILLETTE M. CLONTZ, PLAINTIFF v. ST. MARK'S EVANGELICAL LUTHERAN CHURCH, A/K/A ST. MARK LUTHERAN CHURCH, A/K/A ST. MARK'S LUTHERAN CHURCH, HARRY A. SLOOP, AND H. ALLEN SLOOP, DEFENDANTS

No. COA02-606

(Filed 15 April 2003)

1. Appeal and Error— appealability—dismissals of some parties—substantial right affected

An appeal from the dismissal of two of the three parties in a negligence action was interlocutory, but trying issues of liability before the same jury and the avoidance of inconsistent verdicts are substantial rights and the order was appealable.

2. Negligence— rescue doctrine—defined

The rescue doctrine holds the tortfeasor liable for injury to a rescuer on the grounds that a rescue attempt is foreseeable. The doctrine recognizes the need to bring an endangered person to safety, but does not apply unless it can be shown that the peril was caused by the negligence of another.

3. Premises Liability— church hayride on farm—liability of church

A church which sponsored a hayride at which an injury occurred was not liable on a premises liability claim, if indeed the church occupied the land, because the acts alleged to show a lack of reasonable care relate to the way the hayride was conducted, not the maintenance or condition of the property.

4. Premises Liability— church hayride on farm—liability of farmer

A premises liability claim against a farmer who allowed a church to conduct a hayride on his farm was correctly dismissed for failure to state a claim because there were no allegations of willful or wanton infliction of injury. N.C.G.S. § 38A-4.

5. Motor Vehicles— carrying children on trailer—hayride on farm

The statute prohibiting the transportation of children under 12 in the open bed or cargo area of a vehicle applies only to vehicles operated on highways, and did not apply to a church hayride held on a farm. N.C.G.S. § 20-135.2B(2001).

6. Negligence— hayride—improper lighting—overloading

Allegations that an injury on a church hayride occurred because the lighting was inadequate and the trailer overloaded stated a claim against the church, which was alleged to have organized the hayride, but not against the farmer who owned the trailer. The church determined the safety precautions to be taken, but the farmer was not involved in lighting or loading the trailer and the trailer was not alleged to be defective.

7. Negligence— hayride—failure to properly control tractor

The trial court properly granted defendants' motions to dismiss claims that defendants failed to keep a tractor under proper control during a hayride where no allegations supported the propositions that the vehicle was out of control or that a loss of control contributed to the plaintiff's injury.

8. Negligence— hayride—lack of supervision

In a negligence action arising from a church hayride, the trial court properly dismissed a claim against the farmer for failure to exercise reasonable care in the supervision of the children, but should not have dismissed the same claim against the church. There were no allegations that the farmer had responsibility for any of the children, but the complaint alleged facts indicating that the welfare of the children had been entrusted to supervisors appointed by the church.

9. Negligence— volunteers' immunity—lack of liability insurance not shown

The immunity granted to volunteers for charitable organizations by N.C.G.S. § 1-539.10 did not justify dismissing a claim arising from a church hayride where the required showing that defendants did not have liability insurance was not made.

Appeal by plaintiff from order entered 20 March 2002 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 9 January 2003.

Parker & Howes, L.L.P., by David P. Parker, for plaintiff-appellant.

Caudle & Spears, P.A., by Lloyd C. Caudle and Cameron B. Weber, for defendants-appellees.

CALABRIA, Judge.

On 24 October 1998, St. Mark's Evangelical Lutheran Church ("St. Mark's") held their annual Halloween festival on a farm owned by H. Allen Sloop ("Allen Sloop"). As part of the festivities, St. Mark's organized a hayride for the younger members or guests attending the event. Both children and adults rode through the woods and around the farm on a flatbed trailer pulled by a farm tractor driven by Allen Sloop's son, Harry A. Sloop ("Harry Sloop").

Millette Clontz ("Clontz") was not a member of St. Mark's but was invited to help with the hayride by standing in the woods and making scary noises. When the last hayride of the night passed Clontz, she came out from the woods and started walking alongside the flatbed. While walking, Clontz saw a child near the edge of the trailer, waving his arms and appearing to be losing his balance. Clontz stepped up to the side of the trailer, and as she pushed the child back onto the trailer bed to prevent his fall, Clontz fell under the trailer. Clontz was impaled by part of the trailer, dragged underneath the trailer for a short distance, and finally run over by the trailer. Clontz suffered extensive and permanent bodily injuries.

Clontz filed suit on 16 October 2001 in the Superior Court of Iredell County against St. Mark's, Allen Sloop, and Harry Sloop, jointly and severally, alleging negligence arising from premises liability, negligent supervision, and negligent infliction of emotional distress. On 6 November 2001, St. Mark's and Allen Sloop filed motions to dismiss under Rules 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 20 March 2002, the Honorable Mark E. Klass granted both motions to dismiss pursuant to Rule 12(b)(6). Clontz gave notice of appeal on 8 April 2002, assigning error to the trial court's order on the grounds that the complaint stated a claim upon which relief could be granted.

[1] This appeal is interlocutory because the dismissals do not extend to the third defendant, Harry Sloop, and therefore do not finally determine all claims, rights, and liabilities of all the parties. *Leasing Corp. v. Myers*, 46 N.C. App. 162, 164-65, 265 S.E.2d 240, 242-43 (1980). Interlocutory orders are appealable if the order appealed affects a "substantial right." N.C. Gen. Stat. §§ 1-277 (2001) and 7A-27(d) (2001). Both "[t]he 'right to have the issue of liability as to all parties tried by the same jury' and the avoidance of inconsistent verdicts in separate trials . . . [are] substantial rights." *Vera v. Five Crow Promotions, Inc.*, 130 N.C. App. 645, 648, 503 S.E.2d 692, 695

(1998) (quoting *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408-09 (1982)). Because the dismissal was granted in favor of Allen Sloop and St. Mark's before the final resolution of Clontz's action against Harry Sloop, the right to try the issues of liability as to all parties before the same jury as well as the right to avoid inconsistent verdicts in separate trials are implicated. Clontz's appeal is properly before this Court.

[2] Clontz asserts the trial court erred in allowing the motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "A motion to dismiss . . . presents the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991).

> A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1980).

Clontz, in her complaint, alleged defendants were negligent and that, pursuant to the rescue doctrine, she is entitled to recover.

> In order to establish actionable negligence, [a] plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and that such negligence was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed.

Jackson v. Gin Co., 255 N.C. 194, 196, 120 S.E.2d 540, 542 (1961). The rescue doctrine encourages "the rescue of others from peril and immediate danger . . . by holding the tortfeasor liable for any injury to the rescuer on the grounds a rescue attempt is foreseeable. [It] recognizes the need to bring an endangered person to safety." *Westbrook v. Cobb*, 105 N.C. App. 64, 69, 411 S.E.2d 651, 654 (1992). Functionally, "the doctrine stretches the foreseeability limitation to help bridge the proximate cause gap between defendant's act and plaintiff's injury."

Id., 105 N.C. App. at 69, 411 S.E.2d at 654. "[T]he rescue doctrine does not apply unless it be shown that the peril was caused *by the negligence* of another." *Caldwell v. Deese*, 288 N.C. 375, 380, 218 S.E.2d 379, 382 (1975) (emphasis in original).

In her complaint, Clontz sets forth five specific grounds in support of her claims of negligence: (I) premises liability; (II) violation of N.C. Gen. Stat. § 20-135.2B in the operation of a vehicle with children under twelve years of age in an open bed or cargo area; (III) operation of an overloaded vehicle without adequate lighting; (IV) failure to keep the vehicle under proper control; and (V) negligent supervision.

I. Premises Liability

A. St. Mark's

[3] Clontz asserts St. Mark's is liable as the inviting agency under general principles of premises liability. The duty imposed on occupiers of land is "to exercise reasonable care in the maintenance of the[] premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). Even assuming *arguendo* St. Mark's is an occupier of land, the acts alleged to show a lack of reasonable care (i.e. overloading the vehicle, violating N.C. Gen. Stat. § 20-135.2B, and failing to adequately light the trailer) relate not to the maintenance or condition of the property but merely to the way the hayride was conducted. Hazards relating only to an activity and existing separate and apart from the condition or maintenance of property do not give rise to a claim of premises liability.

B. Allen Sloop

[4] Clontz also asserts Allen Sloop is liable for injuries on the basis of premises liability. The General Assembly has modified the general principles of premises liability for landowners who allow their land to be used for recreational purposes:

> Except as specifically recognized by or provided for in this chapter, an owner of land who either directly or indirectly invites or permits without charge any person to use such land for educational or recreational purposes owes the person the same duty of care that he owes a trespasser . . . . This section does not apply to an owner who invites or permits any person to use land for a purpose for which the land is regularly used and for which a price or fee is usually charged even if it is not charged in that instance, or

> to an owner whose purpose in extending an invitation or granting permission is to promote a commercial enterprise.

N.C. Gen. Stat. § 38A-4 (2001). Where applicable, N.C. Gen. Stat. § 38A-4 imposes upon a landowner the duty to "refrain from the willful or wanton infliction of injury." *Nelson*, 349 N.C. at 618, 507 S.E.2d at 884 (citation omitted).

In the instant case, Allen Sloop gratuitously permitted members of St. Mark's to use his farm for recreational purposes. The property was generally used for routine farming activities, and there is no allegation that the purpose of the invitation was to promote a commercial enterprise. Accordingly, Allen Sloop had no duty except to refrain from willfully or wantonly inflicting injury. The complaint fails to allege willful or wanton infliction of injury by Allen Sloop; therefore, the trial court correctly granted the Rule 12(b)(6) motion on the claim of premises liability.

II. Violation of N.C. Gen. Stat. § 20-135.2B

[5] Clontz asserts defendants failed to use reasonable care by violating N.C. Gen. Stat. § 20-135.2B (2001), a provision of the Motor Vehicle Act prohibiting the transport of children under twelve years of age in the open bed or cargo area of a vehicle. The scope and applicability of this provision is limited to vehicles "driven or moved on any highway." N.C. Gen. Stat. § 20-115 (2001). The Motor Vehicle Act defines highways as "open to the use of the public as a matter of right for the purposes of vehicular traffic." N.C. Gen. Stat. § 20-4.01 (13) (2001). The complaint fails to allege the trail through the woods over which the tractor and trailer traveled was a "highway" as defined in N.C. Gen. Stat. § 20-4.01 (13). Because N.C. Gen. Stat. § 20-115 limits the applicability of N.C. Gen. Stat. § 20-135.2B to vehicles operated on highways and the activities conducted on Allen Sloop's property were not alleged to fall within the scope of its regulation, application of the statute is precluded.

III. Overloading and Improper Lighting

[6] Clontz asserts defendants failed to use reasonable care by overloading and improperly lighting the trailer. Although the complaint alleges Allen Sloop owned the trailer, the trailer itself was not alleged to be defective, nor was Allen Sloop alleged to have been involved in the loading or lighting of the trailer. Therefore, Clontz's complaint failed to allege a claim of negligence against Allen Sloop based upon overloading or improperly lighting the trailer, and the motion to dis-

miss was properly granted. Clontz's complaint alleges St. Mark's organized the hayride and determined what precautions should be taken for the riders' protection. St. Mark's, not Allen Sloop, decided whether the lighting on the trailer was adequate and how many passengers were permitted on each ride. The allegations of the complaint do not fail, as a matter of law, to state a claim of negligence against St. Mark's. Accordingly, a motion to dismiss in favor of St. Mark's is premature.

IV. Failure to Keep Vehicle under Proper Control

[7] Clontz asserts defendants failed to keep the vehicle under proper control. However, no facts alleged in the complaint support the proposition that the vehicle was, at any time, out of control, nor is there an allegation that the child was in danger due to any lack of control. The only fact in the complaint relating to the control of the tractor is that it was going no faster than a walking pace. Since there are no allegations regarding loss of control or that said loss of control contributed to the unfortunate injury that occurred, the trial court properly granted defendants' motion to dismiss.

V. Negligent Supervision of Children

[8] Finally, Clontz asserts defendants also failed to exercise reasonable care in the supervision of the children on the hayride. Where an adult host or supervisor is entrusted with and assumes the responsibility for the welfare of a child, they "have a duty to the children to exercise a standard of care that a person of ordinary prudence, charged with similar duties, would exercise under similar circumstances." *Royal v. Armstrong*, 136 N.C. App. 465, 471, 524 S.E.2d 600, 603-04 (2000). "[T]he amount of care due . . . increases with . . . immaturity, inexperience, and relevant physical limitations." *Payne v. N.C. Dept. of Human Resources*, 95 N.C. App. 309, 314, 382 S.E.2d 449, 452 (1989) (citations omitted).

The complaint alleges facts contradicting the exercise of reasonable care including that (1) there was a lot of loud screaming and horsing around; (2) the light illuminating the trailer was insufficient to properly illuminate the entire bed preventing proper visibility and supervision by the adults present; and (3) a child was close enough to the edge of the trailer bed to be within easy reach of one walking alongside of it.

The complaint does not allege Allen Sloop was entrusted with or assumed responsibility for the welfare of any child. Thus, no allega-

tion gives rise to a duty to supervise, and this claim against Allen Sloop fails to state necessary elements of negligent supervision. However, the complaint, taken as true, does allege facts indicating the welfare of the children on the hayride had been entrusted to the supervisors appointed by St. Mark's for purposes of safely operating the hayride. Therefore, a motion to dismiss in favor of St. Mark's is premature.

VI. Applicability of N.C. Gen. Stat. § 1-539.10

[9] Defendants assert a motion to dismiss is warranted because Clontz failed to allege St. Mark's and Allen Sloop waived immunity from civil liability afforded to volunteers. North Carolina General Statute § 1-539.10 (2001) provides for immunity from civil liability for volunteers performing services for charitable organizations under specific circumstances. To the extent the organization or volunteer has liability insurance, that immunity, which is in the nature of a defense, is waived. *Id.* Where disclosure of some fact necessarily defeats a claim, dismissal under Rule 12(b)(6) is appropriate. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1980). No immunity necessarily defeating the claim has been proffered. The immunity conferred by N.C. Gen. Stat. § 1-539.10 depends on the absence of liability insurance carried by defendants. Since no showing has yet been made by defendants that the immunity applies, it does not act as a bar to recovery that would otherwise justify the granting of a motion to dismiss.

For the foregoing reasons, the dismissal by the trial court of all claims against Allen Sloop is affirmed. The dismissal by the trial court of the claims of premises liability and violation of N.C. Gen. Stat. § 20-135.2B against St. Mark's is also affirmed. The dismissal by the trial court of the remaining claims against St. Mark's is reversed.

Affirmed in part and reversed in part.

Judges McGEE and HUNTER concur.

WILLIAM C. TEAGUE, PLAINTIFF v. CHARLES RANDALL ISENHOWER AND THE PARTNERSHIP, SIGMON, SIGMON AND ISENHOWER, DEFENDANTS

No. COA02-788

(Filed 15 April 2003)

Statutes of Limitation and Repose— legal malpractice—expiration of time limit

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's legal malpractice action arising out of the handling of plaintiff's equitable distribution and alimony claims attendant to plaintiff's divorce based on the expiration of the statute of limitations under N.C.G.S. § 1-15(c), because: (1) plaintiff's claim arising out of the alleged mishandling of the equitable distribution claim should have been filed by 22 May 2001, and it was filed on 12 October 2001; and (2) plaintiff's claim arising out of the alleged mishandling of the alimony claim should have been filed by 6 August 2001, and it was filed on 12 October 2001.

Appeal by plaintiff from order entered 23 April 2002 by Judge Claude S. Sitton, Superior Court, Burke County. Heard in the Court of Appeals 19 February 2003.

Moore & Brown, by B. Ervin Brown, II, for plaintiff-appellant.

Eisele, Ashburn, Greene & Chapman, P.A., by Douglas G. Eisele, for defendants-appellees.

WYNN, Judge.

By this appeal, plaintiff, William C. Teague, contends that the trial court erroneously dismissed his legal malpractice action under Rule 12(b)(6). We affirm the trial court's order of dismissal.

In December 1995, Mr. Teague retained defendants, Charles R. Isenhower and his law firm—Sigmon, Sigmon and Isenhower, to handle his divorce action. In October 1996, the trial court entered a judgment of divorce and left pending the equitable distribution, alimony and child support claims. In 1998, the trial court entered an equitable distribution judgment and alimony award in favor of Mrs. Teague. Through his attorney (Mr. Isenhower), Mr. Teague appealed the alimony award; ultimately, this Court affirmed the award in a decision filed on 30 December 1999. *See Teague v. Teague*, 136 N.C. App.

442, 529 S.E.2d 704 (1999). During the pendency of that appeal, Mrs. Teague moved for contempt against Mr. Teague alleging a failure to pay alimony; that motion resulted in the execution of a consent order by the trial court and the parties. Mr. Teague discharged Mr. Isenhower in January 2000.

In October 2001, Mr. Teague brought an action against Mr. Isenhower and his law firm alleging a failure to meet the standard of professional legal practice in the representation of Mr. Teague on the equitable distribution and alimony claims. He filed an amended complaint on 28 December 2001. From the trial court's dismissal of his action under Rule 12(b)(6), Mr. Teague appeals.

"An order granting a motion to dismiss is erroneous if the complaint, liberally construed, shows no insurmountable bar to recovery. Dismissal is generally precluded unless plaintiff can prove no set of facts to support the claim for relief. For purposes of a motion to dismiss, the allegations in the complaint must be treated as true, and the complaint is sufficient if it supports relief on any theory. Under the notice theory of pleading of our Rules of Civil Procedure a complaint should not be dismissed merely because it amounts to a 'defective statement' of a good cause of action." *Jenkins v. Wheeler*, 69 N.C. App. 140, 143, 316 S.E.2d 354, 356 (1984).

Plaintiff's amended complaint alleges defendants committed legal malpractice in their handling of the equitable distribution and alimony claims attendant to plaintiff's divorce.[1] In particular, plaintiff alleges defendants "failed to conduct formal discovery, when formal discovery was necessary and beneficial to plaintiff's case; failed to communicate with plaintiff in crucial matters, and to heed plaintiff on those occasions when there was communications; failed to diligently investigate the factual basis of the case; and failed to present evidence and claims beneficial to his client." As a result, plaintiff alleges he is entitled to damages in excess of $10,000.

The dispositive issue on appeal is whether the statute of limitations barred plaintiff's legal malpractice claims. "It is proper under a Rule 12(b)(6) motion to determine whether the applicable statute of limitations bars the plaintiff's claims if such bar appears on the face

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1. Although plaintiff's complaint brings forth claims for breach of fiduciary duty and legal malpractice, a "breach of fiduciary duty claim is essentially a negligence or professional malpractice claim." *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985); *see also Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990).

of the complaint." *State of North Carolina v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 440, 499 S.E.2d 790, 795 (1998). The statute of limitations applicable to this case is contained in N.C. Gen. Stat. § 1-15(c) (2001) which provides that actions for "malpractice arising out of the performance of or failure to perform professional services" must be brought within three years of the "accrual" of the cause of action. Specifically, N.C. Gen. Stat. § 1-15(c) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .

Thus, N.C. Gen. Stat. § 1-15(c) prescribes that a malpractice claim accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action."

An analysis of plaintiff's complaint reveals the actions complained of refer to defendants' trial court representation of plaintiff on the equitable distribution and alimony claims.

A. Equitable Distribution

In plaintiff's amended complaint, he alleges defendants:

> 42. . . . never issued subpoenas to financial institutions to investigate the claims of Wife that are reflected in the Pre-Trial Order in 95 CVD 1363 . . .;
>
> 43. . . . never made use of information provided to him by the Plaintiff regarding various payments Plaintiff made on marital debts for the benefit of Mrs. Teague;

44. . . . never filed an equitable distribution affidavit in 95 CVD 1363.

On 22 May 1998, the equitable distribution judgment was entered. Taking these allegations as true and assuming these allegations constitute a valid claim of legal malpractice, plaintiff's claim is nevertheless barred by the statute of limitations.

Indeed, the acts of negligence set forth by the plaintiff relate only to defendants' representation at the trial court level and plaintiff did not appeal from the equitable distribution judgment. Thus, the last act of defendants giving rise to a cause of action relating to defendants' equitable distribution representation occurred on 22 May 1998. By that date, plaintiff should have known defendants had allegedly failed to present certain information or challenge his ex-wife's evidence because of the findings of fact in the judgment. Accordingly, plaintiff's legal malpractice claim arising out of the alleged mishandling of the equitable distribution claim arose on 22 May 1998; therefore, any legal malpractice claim arising from defendants' trial court representation of plaintiff should have been filed prior to 22 May 2001. Since plaintiff filed his complaint on 12 October 2001, after the statute of limitations lapsed, we uphold the trial court's dismissal of his claims arising from the equitable distribution action.

B. Alimony

In plaintiff's amended complaint, he alleges:

39. . . . Plaintiff advised Defendant Isenhower that Wife had agreed with Plaintiff that she would waive alimony in return for which Plaintiff had agreed he would not pursue his right to claim custody of the minor child of the parties, and child support;

48. . . . Prior to September 3, 1997, Plaintiff had provided Defendant Charles Randall Isenhower with allegations of fault against Wife in relation to her claim for alimony. More particularly, Plaintiff informed Isenhower that Wife had, for the past year, refused conjugal relations with him.

49. . . . Prior to September 3, 1997, Plaintiff had provided information regarding his financial status to Defendant Isenhower, in relation to Wife's claim for alimony;

50. . . . On information and belief, Defendant conducted no formal written discovery or depositions regarding the fault claims of Wife, as set forth in her Answer and Counterclaims;

51. . . . Defendant Isenhower never presented evidence of Plaintiff's ex-wife's agreement with Plaintiff not to seek alimony, nor did Isenhower ever file a motion for summary judgment on the issue of alimony based on said agreement;

52. . . . The judgment entered September 26, 1997, does not reflect that any evidence of fault on the part of Wife was presented by counsel for the Plaintiff at that hearing, including evidence of Wife having denied Plaintiff his conjugal rights for more than one year preceding the hearing. Upon information and belief, no such evidence was presented;

53. Defendant . . . did not appeal the Alimony Judgment entered September 26, 1997, nor did he seek to have the Judgment modified or amended, so that the Plaintiff's fault allegations could be considered and ruled upon by the court;

55. An Alimony Judgment was entered on August 6, 1998, there having been an Alimony Hearing on June 30 and July 1 of 1998;

56. At the June/July Alimony Hearing, Defendant Isenhower failed to present important evidence that would have demonstrated the ability of the Plaintiff to pay alimony to Defendant, and failed to investigate the resources of the Defendant. By way of example only, Defendant . . . left many portions of the form affidavit regarding Plaintiff's financial status blank, and did not inquire of Plaintiff as to information necessary to present his financial status properly to the court. Perhaps most importantly, largely due to the failure of defendant . . . to present evidence distinguishing Plaintiff's recurrent sources of income from withdrawals from Plaintiff's retirement accounts, the Court erroneously concluded that Plaintiff understated his income on his affidavit. This resulted in the Court concluding that Plaintiff's income was much greater than was actually the case;

57. A Notice of Appeal of the Alimony Judgment entered on July 1, 1998 was filed by Defendant Isenhower in July 1998, subsequent to the Hearing on Alimony, and prior to the entry of the Judgment in August.

In its 6 August 1998 alimony judgment, the trial court incorporated its 27 September 1997 judgment that "Plaintiff did willfully bring the parties cohabitation to an end without just cause or provocation. . . ." Taking plaintiff's allegations as true and again, assuming these alle-

gations constitute a valid claim of legal malpractice, plaintiff's claims arising from defendants' representation in the alimony action are nonetheless barred by the statute of limitations.

As with the legal malpractice claims relating to the equitable distribution action, the acts of negligence set forth by the plaintiff concerning the alimony action relate only to defendants' representation at the trial court level. Moreover, although defendants represented plaintiff in the appeal of the alimony award, plaintiff makes no contention that defendants failed to properly represent him in the appeal of his case. Thus, the last act of defendants giving rise to a cause of action relating to defendants alimony representation occurred on 6 August 1998. By that date, plaintiff should have been aware of defendants' failure to present accurate information regarding plaintiff's and his ex-wife's financial status. Since plaintiff filed his complaint on 12 October 2001, after the statute of limitation lapsed on 6 August 2001, we uphold the trial court's 12(b)(6) dismissal of his claims arising from the equitable distribution action.[2]

We have reviewed plaintiff's remaining arguments and find them to be without merit. Accordingly, the trial court's order dismissing plaintiff's cause of action is,

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

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2. We note in passing that plaintiff argues this Court should adopt the continuous representation doctrine and apply it to the facts of this case. "Under this doctrine, the statute of limitations and the statute of repose do not accrue until the earlier of either the date the attorney ceases serving the client in a professional capacity with regard to the matters which are the basis of the malpractice action *or the date the client becomes aware or should become aware of the negligent act.*" *Sharp v. Teague*, 113 N.C. App. 589, 594, 439 S.E.2d 792, 795 (1994) (emphasis supplied).

Assuming without deciding that North Carolina recognizes the continuous representation doctrine, plaintiff's action is still barred by the statute of limitations. Although defendants were not discharged until January 2000, plaintiff became aware or should have become aware of the defendants' alleged negligent acts by 22 May 1998 and 6 August 1998 when the equitable distribution and alimony judgments were entered. By those dates, plaintiff should have known defendants had allegedly failed to raise certain defenses, present certain information, or challenge his ex-wife's evidence because of the findings of fact in the judgments.

JENNIFER DENISE MIMS, PLAINTIFF v. SHARON KAYE WRIGHT, DEFENDANT

No. COA02-902

(Filed 15 April 2003)

1. Appeal and Error— appealability—privileged records—discovery—substantial right

The granting of an order to compel discovery of medical records affected a substantial right and was immediately appealable.

2. Evidence— physician-patient privilege—automobile accident case—privilege not waived by driving

A defendant in an automobile accident case did not waive the physician-patient privilege simply by driving. Nothing in defendant's answer or subsequent conduct during the course of discovery opened the door to an inquiry into defendant's medical history.

3. Discovery— medical records—medical condition not raised in pleadings—discovery an abuse of discretion

The trial court abused its discretion by compelling discovery of defendant's medical records in an automobile accident case because there was nothing in the pleadings to raise the issue of defendant's medical condition.

Appeal by defendant from order dated 2 April 2002 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 26 March 2003.

Gray, Newell, Johnson & Blackmon L.L.P., by Mark V.L. Gray, for plaintiff appellee.

Davis & Hamrick, L.L.P., by H. Lee Davis, Jr. and Ann C. Rowe, for defendant appellant.

BRYANT, Judge.

Sharon Kaye Wright (defendant) appeals a discovery order dated 2 April 2002 requiring the disclosure of her medical records to Jennifer Denise Mims (plaintiff).

On 2 August 2001, plaintiff filed a complaint alleging defendant negligently operated a vehicle on 26 August 1998, causing a collision

with the vehicle driven by plaintiff that resulted in personal injuries to plaintiff. In her answer filed 1 October 2001, defendant denied any negligence but argued in the alternative that to the extent she was negligent, plaintiff's claim was barred by her own contributory negligence. In plaintiff's first request for production of documents dated 15 November 2001, defendant was asked to turn over to plaintiff copies of "all [her] medical records . . . covering the period five (5) years proceeding August 26, 1998 to the present day." Following defendant's objection to this request, plaintiff filed a motion to compel discovery.

In an order dated 2 April 2002, the trial court made the following findings:

> 10. Plaintiff, through counsel, served Plaintiff's First Set of Interrogatories to Defendant and Plaintiff's First Request for Production of Documents Addressed to the Defendant upon counsel for [d]efendant on or about November 15, 2001.
>
> . . . .
>
> 12. . . . Defendant objected to producing all of [d]efendant's medical records for the time period of five years prior to the accident through the present, as vague, overly broad, unduly burdensome, irrelevant and not calculated to lead to the discovery of relevant or admissible evidence and as a violation of the physician-patient privilege.
>
> 13. Defendant offered to the [c]ourt and to [p]laintiff's counsel to answer the questions as to whether . . . [d]efendant had any eye condition or other medical condition that would affect her driving at the time of the accident and such offer was rejected by [p]laintiff's counsel and the [c]ourt.

The trial court then concluded:

> 7. The [d]efendant, by driving, waived the physician-patient privilege, and the medical records of [d]efendant are relevant and material and may lead to the discovery of admissible or relevant evidence and should be produced in discovery.
>
> 8. Plaintiff is entitled to obtain and review [d]efendant's medical records for the time period of five years prior to the date of the accident . . . through the present.
>
> 9. Defendant's argument that [d]efendant's medical records are privileged and that said physician-patient privilege has not in

any way been waived, as [d]efendant is not claiming an injury or pursuing a claim for an injury, is denied by the [c]ourt.

10. Defendant's suggestion that the [c]ourt review [d]efendant's medical records *in camera* and that the [c]ourt then determine whether any of [d]efendant's medical records are relevant to the accident at issue and should be produced to [p]laintiff was denied by the [c]ourt.

11. The [c]ourt concludes that its ruling requiring . . . [d]efendant to produce her medical records affects a substantial right, that is her right to confidentiality of the physician-patient privilege.

The issues are whether: (I) the discovery order appealed from affects a substantial right; (II) defendant impliedly waived the physician-patient privilege; and (III) the interests of justice demanded disclosure even if the privilege was not waived.

I

[1] As a general rule, discovery orders are interlocutory and therefore not immediately appealable. *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598, 600 (1999), *aff'd*, 351 N.C. 349, 524 S.E.2d 804 (2000) (per curiam); *see Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("[a] discovery order is interlocutory because it does not 'dispose of the case, but instead leave[s] it for further action by the trial court in order to settle and determine the entire controversy' ") (citation omitted). Such orders are, however, immediately appealable if "delaying the appeal will irreparably impair a substantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999); *see Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (substantial right affected if order " 'deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered' ") (citation omitted). "[W]hen, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right . . . ." *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581; *see also Lockwood v. McCaskill*, 261 N.C. 754, 757, 136 S.E.2d 67, 69 (1964) (noting that once a physician were to testify at a deposition hearing concerning privileged matters, as required by the trial court's discovery order, the statutory physician-patient privilege

would be destroyed). Accordingly, defendant's appeal is properly before this Court. We now consider whether the trial court abused its discretion in granting plaintiff's motion to compel production of defendant's medical records. *See Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 595, 551 S.E.2d 873, 877 (2001) (orders regarding discovery matters are reviewed for abuse of discretion).

II

[2] Pursuant to Rule 26(b)(1) of the North Carolina Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." N.C.G.S. § 1A-1, Rule 26(b)(1) (2001). Any unprivileged matter that is relevant is thus discoverable. On the other hand, if the matter of which discovery is sought is privileged, it is not discoverable, even if relevant, "unless the interests of justice outweigh the protected privilege." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 314, 248 S.E.2d 103, 106 (1978).

Defendant argues her medical records were protected by the physician-patient privilege and that the trial court erred in concluding she had impliedly waived that privilege "by driving." We agree. Defendant's medical records are protected by N.C. Gen. Stat. § 8-53, which sets forth the physician-patient privilege. *See* N.C.G.S. § 8-53 (2001). Because this statutory privilege is to be strictly construed, *Sims v. Insurance Co.*, 257 N.C. 32, 36-37, 125 S.E.2d 326, 329-30 (1962), the patient bears the burden of establishing the existence of the privilege and objecting to the discovery of such privileged information, *Adams v. Lovette*, 105 N.C. App. 23, 28, 411 S.E.2d 620, 624, *aff'd*, 332 N.C. 659, 422 S.E.2d 575 (1992) (per curiam). Moreover, the privilege is not absolute and may be waived, either by express waiver or by waiver implied from the patient's conduct. *Id.* at 28-29, 411 S.E.2d at 624.

In this case, there is absolutely no authority to support the trial court's conclusion that defendant waived the physician-patient privilege simply by driving. Instead, our courts have ruled that implied waivers occur where: the patient fails to object to testimony on the privileged matter; the patient herself calls the physician as a witness and examines him as to the patient's physical condition; or the patient testifies to the communication between herself and the physician. *Capps v. Lynch*, 253 N.C. 18, 23, 116 S.E.2d 137, 141 (1960). Subsequent case law has also recognized an implied waiver where a

patient by bringing an action, counterclaim, or defense directly placed her medical condition at issue. *See Jones v. Asheville Radiological Grp.*, 134 N.C. App. 520, 531, 518 S.E.2d 528, 535 (1999) (Walker, J., dissenting in part) (citing *Cates v. Wilson*, 321 N.C. 1, 17, 361 S.E.2d 734, 744 (1987) (Mitchell, J., concurring in the result)), *rev'd*, 351 N.C. 348, 524 S.E.2d 804 (2000) (per curiam); *see also State v. Smith*, 347 N.C. 453, 461-62, 496 S.E.2d 357, 362 (1998) (where the defendant sought to suppress his statements to the police by arguing he had been suffering from controlled substance withdrawal symptoms, the defendant placed at issue his past state of mind, and the State properly sought to rebut this evidence with his medical records); *Laznovsky v. Laznovsky*, 745 A.2d 1054, 1067 (Md. Ct. App. 2000) ("[w]hen a party-patient places a condition in issue by way of a claim, counterclaim, or affirmative defense, she waives the physician-patient privilege as to all matters causally or historically related to that condition, and information which would otherwise be protected from disclosure by the privilege then becomes subject to discovery"). Thus, had defendant, through her answer, placed her medical condition at issue, there would be an implied waiver of the physician-patient privilege; however, defendant simply denied plaintiff's allegation of negligence and, in the alternative, raised the defense of contributory negligence. As nothing in her answer or subsequent conduct during the course of discovery opened the door to an inquiry into defendant's medical history, the trial court abused its discretion in concluding defendant had waived her privilege.

III

[3] Privileged medical information may still be discoverable if "disclosure is necessary to a proper administration of justice." N.C.G.S. § 8-53. "The decision that disclosure is necessary to a proper administration of justice 'is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling.' " *Smith*, 347 N.C. at 461, 496 S.E.2d at 362 (citation omitted). Whether the trial court has to make a specific finding that disclosure is necessary for the proper administration of justice is unclear though. *See id.* ("N.C.G.S. § 8-53 does not require such an explicit finding. The finding is implicit in the admission of the evidence."); *but see Cates*, 321 N.C. at 13, 361 S.E.2d at 742 ("a trial court may permit opinion evidence by non-party treating physicians only after finding, pursuant to the statute, that the proper administration of justice necessitates such testimony"); *Insurance Co. v. Boddie*, 194 N.C. 199, 201, 139 S.E. 228, 229 (1927) (the trial

court is required to make a finding, appearing in the record, that disclosure is necessary to a proper administration of justice). Assuming no such finding was required in this case, we nevertheless hold that the record fails to indicate that discovery of defendant's medical records was warranted.

"The purposes of North Carolina's statutory physician-patient privilege are to encourage the patient to fully disclose pertinent information to a physician so that proper treatment may be prescribed, to protect the patient against public disclosure of socially stigmatized diseases, and to shield the patient from self-incrimination." *Crist v. Moffatt*, 326 N.C. 326, 333, 389 S.E.2d 41, 45 (1990). Accordingly, "the proviso [allowing for compelled disclosure of privileged information] was intended to refer to exceptional rather than ordinary factual situations." *Lockwood*, 261 N.C. at 758, 136 S.E.2d at 70.

In this case, there is nothing in the pleadings that would raise the issue of defendant's medical condition. Plaintiff did not allege that defendant's physical or medical condition contributed to the automobile accident. Defendant also did not counterclaim for any injuries she may have sustained during the accident. As such, the record is devoid of any allegations which might lead to a justifiable conclusion that the interests of justice outweighed the protected privilege. *See Shellhorn*, 38 N.C. App. at 314, 248 S.E.2d at 106. Under these circumstances, the trial court abused its discretion in compelling discovery of defendant's medical records.

Reversed.

Judges TIMMONS-GOODSON and GEER concur.

PATRICIA DIGGS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA02-550

(Filed 15 April 2003)

Declaratory Judgments— public assistance paid to adult caretaker—person aggrieved

Although petitioner contends the trial court erred by reversing a declaratory ruling of the North Carolina Department of Health and Human Services under N.C.G.S. § 150B-4 holding that

the practice of calculating the debt owed to the State when an adult caretaker accepts payment of benefits under the Work First Families Assistance (WFFA) and Temporary Assistance to Needy Families (TANF) programs or its predecessor Aid to Families with Dependent Children (AFDC) was valid, the declaratory ruling has no effect because petitioner is not presently a person aggrieved and was not entitled to request a declaratory ruling under N.C.G.S. § 150B-4.

Appeal by petitioner and respondent from order entered 17 December 2001 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 2003.

Legal Services of Southern Piedmont, Inc., by Douglas Stuart Sea, and Legal Aid of North Carolina, Inc., by Theodore O. Fillette, for petitioner-appellant-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for respondent-appellant-appellee.

CALABRIA, Judge.

This appeal arises from an order issued by the trial court reversing a declaratory ruling of the North Carolina Department of Health and Human Services ("DHHS") requested by Patricia Diggs ("petitioner"). Petitioner, a custodial parent of three children and the former adult caretaker of her niece, Shae Little, petitioned DHHS on 1 June 2001 for a declaratory ruling pursuant to N.C. Gen. Stat. § 150B-4 alleging the practice of calculating the debt owed to the State when an adult caretaker accepts payment of benefits under the Work First Families Assistance ("WFFA") and Temporary Assistance to Needy Families ("TANF") programs or its predecessor, Aid to Families with Dependent Children ("AFDC"), was invalid. By doing so, petitioner represented she was aggrieved as defined by the North Carolina Administrative Procedure Act ("NCAPA") by the challenged practice. DHHS issued a declaratory ruling on 30 July 2001 upholding the validity of the challenged practice. Petitioner sought judicial review of the declaratory ruling in the Superior Court of Mecklenburg County, and in an amended order entered 17 December 2001, the Honorable Claude S. Sitton reversed the ruling of DHHS, finding the challenged practice violated North Carolina law and was, therefore, void and of no effect. The trial court limited its order to petitioner's case only. Petitioner appeals as to the scope

of the order. DHHS cross-appeals as to the merits of the order of the trial court.

DHHS, through the Office of Child Support Enforcement of the Division of Social Services, is responsible for the operation of North Carolina's child support enforcement program. North Carolina provides assistance to families with dependent children who are deprived of financial support through the WFFA program, operated pursuant to a federal block grant under the TANF program.[1] Acceptance of public assistance creates a debt due and owing to the State in an amount up to the amount of public assistance paid. N.C. Gen. Stat. § 110-135 (2001). When public assistance is paid out to an adult caretaker, a single account for all unreimbursed public assistance ("URPA account") is created by DHHS to measure the debt due to the State. The adult caretaker receiving public assistance funds assigns to the State the right to collect child support from the party responsible for supporting the child or children benefitted by the public assistance. N.C. Gen. Stat. § 110-137 (2001). Thereafter, child support paid by a responsible party for such children is retained by the State until this debt is repaid. Thus, the single URPA account does not differentiate between the debts created by public assistance grants paid for the benefit of different individuals or groups where they have the same adult caretaker. In addition, the account operates without regard to who is ultimately responsible for reimbursing the State for the public assistance previously paid. Therefore, DHHS reimburses the URPA account by retaining child support for any child paid to a previous recipient of public assistance regardless of whether the child support retained is intended to benefit the same child as the previous public assistance.

Petitioner asserts she is a "person aggrieved" within the meaning of N.C. Gen. Stat. §§ 150B-2(6) and 150B-4 and is entitled to request a declaratory ruling to determine her rights, duties, and obligations because DHHS combines the debts to the State for all monthly cash assistance grants ever paid to the same adult caretaker into a single URPA account.

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1. Prior to January 1, 1997, assistance was provided under the AFDC program. With the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress repealed the AFDC program and replaced it with the TANF program.

Under N.C. Gen. Stat. § 150B-4 (2001)[2], only a "person aggrieved" may request a declaratory ruling concerning the applicability of a statute, rule or order of an agency to a given state of facts. A "person aggrieved" is "any person or group of persons of common interest directly or indirectly *affected substantially* in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (2001) (emphasis added). "In order for [a] petitioner to prevail on her claim to status as a 'person aggrieved' under the NCAPA, [a] petitioner must first demonstrate that her personal, property, employment or other legal rights have been in some way impaired." *In re Denial of Request for Full Admin. Hearing*, 146 N.C. App. 258, 261, 552 S.E.2d 230, 232, *disc. rev. denied*, 354 N.C. 573, 558 S.E.2d 867 (2001) (citation omitted).

Petitioner asserts she is a person aggrieved. As a former public assistance recipient under both the TANF program and the preceding AFDC program, petitioner argues DHHS' practice of debt repayment may directly affect her. Specifically, petitioner contends future child support payments for the care of her children may be usurped to repay the public assistance previously paid solely for Shae Little.

Petitioner illustrates this contention with two hypothetical situations involving whether child support paid by the biological father of petitioner's children, James Stitt ("Stitt"), pursuant to a court order for the support of their biological children may be taken by the State for reimbursement of earlier and separate public assistance grants made solely for the use and benefit of petitioner's niece, Shae Little. Shae Little no longer lives with petitioner's family, nor does petitioner receive public assistance. While petitioner cared for Shae Little, public assistance in the form of "child-only" grants was paid solely for the needs of Shae Little.

In her first hypothetical, petitioner argues if she becomes unemployed and if Stitt ceases to pay child support, petitioner may need TANF assistance for her children. Petitioner further hypothesizes if she has no other income at that time and if all other facts remain as they are presently, she would be eligible for a TANF grant. Thereafter, if Stitt pays child support in the same month petitioner receives

2. North Carolina General Statute § 150B-4 states in relevant part:

> On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable.

TANF assistance, petitioner correctly asserts that, under the current practice, DHHS would keep the entire amount of the payment made by Stitt until the entire URPA balance is reduced to zero, meaning part of Stitt's child support payments would be used to pay the debt created by the previous State support payments for petitioner's niece, to whom Stitt owes no obligation of support.

In her second hypothetical, petitioner argues if she and her children receive TANF assistance and if Stitt pays no child support during that time, petitioner's URPA balance and Stitt's unpaid child support arrearages will increase. If Stitt's federal tax refunds are intercepted for purposes of paying child support arrearages, then petitioner correctly asserts that, under the current practice, DHHS would retain all of that interception until the URPA balance is reduced to zero, meaning part of Stitt's intercepted tax refund would be used to pay the debt created by the previous State support payments for petitioner's niece, to whom Stitt owes no obligation of support.

The flaw in these arguments is manifest: petitioner is not presently aggrieved. At most, petitioner may be aggrieved at some unspecified point in the future if certain events occur. Nothing in the record indicates these events are certain to come to pass, are imminently threatened, or are even likely to occur. At most, if a number of variables happen in the manner laid out by petitioner's hypotheticals, then at that point, petitioner *will become* aggrieved; however, it is quite clear that petitioner has not "demonstrate[d] that her . . . legal rights have been in some way impaired." *In re Denial of Request for Full Admin. Hearing*, 146 N.C. App. at 261, 552 S.E.2d at 232. Therefore, petitioner is not presently a "person aggrieved" and was not entitled to request a declaratory ruling under N.C. Gen. Stat. § 150B-4.

Petitioner asserts, in the alternative, that an issued declaratory ruling is binding on both the requesting party and the issuing agency unless it is altered or set aside by the courts; therefore, petitioner would be bound in the future by DHHS' practice absent judicial review of the ruling. N.C. Gen. Stat. § 150B-4 (2001). In short, petitioner argues because DHHS chose to issue a declaratory ruling and because a validly issued declaratory ruling is binding on the requesting party, petitioner *became* a "person aggrieved" within the meaning of the NCAPA when DHHS issued the ruling.

The declaratory ruling in the case *sub judice* was issued pursuant to N.C. Gen. Stat. § 150B-4, which, absent good cause shown, requires an agency to issue a declaratory ruling when two prerequisites are satisfied: (1) a request for a declaratory ruling is made (2) by a person aggrieved. N.C. Gen. Stat. § 150B-4 (2001). The validity of any declaratory ruling issued pursuant to N.C. Gen. Stat. § 150B-4 is contingent upon the satisfaction of those two prerequisites. Because petitioner was not aggrieved at the time the request was made, the request was ineffective to trigger the issuance of a declaratory ruling, and the declaratory ruling has no effect, binding or otherwise, on petitioner from which an aggrieved status may arise.

In sum, we find it is not necessary to reach the merits or scope of the declaratory ruling. Petitioner was not aggrieved, as required by N.C. Gen. Stat. § 150B-4, by the URPA accounting method at the time the request for a declaratory ruling was made; therefore, no valid declaratory ruling issued. Accordingly, petitioner's claim of aggrieved status due to the issuance of a valid and binding declaratory ruling is without merit. The order of the trial court is set aside. We remand to the trial court with instructions to remand to and order that the agency vacate the declaratory ruling.

Vacated and remanded with instructions.

Judges McGEE and HUNTER concur.

ALAN DEAN LAMBETH, PETITIONER v. TOWN OF KURE BEACH; AND KURE BEACH BOARD OF ADJUSTMENT, RESPONDENTS

No. COA02-777

(Filed 15 April 2003)

1. Zoning— mootness—building permit—amendment of ordinance

A claim arising from the denial of a permit to widen a driveway was not rendered moot by a subsequent amendment of the impervious surfaces ordinance because the amendment did not give petitioner the relief he sought and did not change his reliance on the prior ordinance. He was entitled to rely on the language of the ordinance in effect at the time he applied for the permit.

2. Zoning— impervious surfaces—widening of driveway

A building inspector and a board of adjustment erred by denying a permit to widen a driveway to 24 feet under an impervious surfaces ordinance even though petitioner had already built a walkway across the town right-of-way to another street. The unambiguous language of the ordinance (prior to an amendment) limited driveways to 24 feet but did not limit all impervious surfaces across right-of-ways to 24 feet, and the total impervious area would not exceed the ordinance's percentage limit after the driveway was enlarged.

Appeal by petitioner from order signed 24 January 2002 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 25 March 2003.

Roger Lee Edwards, P.A., by Roger Lee Edwards, for petitioner-appellant.

Nunalee & Nunalee, L.L.P., by Mary Margaret McEachern Nunalee, for respondents-appellees.

TYSON, Judge.

I. Background

On 15 March 2001, Alan Dean Lambeth ("petitioner") applied for a permit from Respondent Town of Kure Beach ("Town") to widen his driveway from nineteen feet to twenty-four feet from his residence to 5th Avenue North. Petitioner sought to widen his driveway to provide easier access into and out of vehicles for the wheelchair of his handicapped daughter. Petitioner had previously constructed a five foot wide concrete walkway extending from his house across the street right-of-way to L. Avenue.

At the time of petitioner's application, the Town's ordinance, read as follows:

> Except as provided in section 5-62, no building, building repairs, remodeling, installation, driveway, parking lot, or other ground covering impervious surface, other construction or demolition shall begin in the town until a permit has been obtained from the building inspector. No permit shall be issued if the total square footage of the buildings and impervious ground covering surface will exceed sixty-five (65) percent of the lot. . . .

> Driveways across the town right-of-way shall be limited to twenty-four (24) feet wide.

Kure Beach Code § 5-61.

Petitioner's permit was denied by the Town's building inspector on the basis that the expansion would violate the ordinance as it had been applied to other landowners. Petitioner appealed to Respondent Kure Beach Board of Adjustment ("Board"). The building inspector testified before the Board to the history and purpose of the ordinance. Petitioner responded that he was not seeking a variance and claimed that the building inspector had wrongly interpreted the ordinance. Petitioner asked the Board to reverse the inspector's interpretation and to grant his permit. The Board found as fact that the inspector had interpreted the ordinance uniformly in cases involving "[o]ver two hundred residences." The Board affirmed the building inspector's decision on 3 May 2001.

Petitioner petitioned for a writ of certiorari and filed a complaint on 23 May 2001. On 19 June 2001, the Town amended its ordinance to limit landowners to twenty-four feet of "impervious surface" across any Town right-of-way. Respondents filed an answer and motion to dismiss on 20 June 2001. On 5 July 2001, respondents' motion to dismiss was denied and certiorari was granted. On 24 January 2002, an order was signed dismissing petitioner's action and entering judgment in favor of respondents. Petitioner appeals.

II. Issues

Petitioner argues that (1) the trial court erred by interpreting the Kure Beach Ordinance to include the area of sidewalks into the maximum areas for driveways, and (2) that the trial court applied the wrong standard of review in its interpretation. Although petitioner alleges in his brief that his argument concerning standard of review was an assignment of error in the record, we do not find this assignment of error. We do not address this argument because it was not preserved pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure.

Respondents cross-assign two errors on appeal: (1) whether the trial court erred in failing to rule on the Town's argument that certain revisions to the ordinance rendered petitioner's claim moot, and (2) whether the trial court should have dismissed petitioner's claims for unripeness because he failed to exhaust all administrative remedies. We decline to address respondents' second cross-assignment of error.

There is no evidence in the record, aside from respondents' assigning it as error, that it was argued at trial and properly preserved for appeal under North Carolina Rule of Appellate Procedure 10(b)(1). The two issues on appeal are (1) the threshold question of mootness and (2) whether the trial court erred in its interpretation of the Kure Beach ordinance.

III. Mootness

[1] Respondents argue that petitioner's claim was rendered moot by the amendment to the ordinance.

The Board amended the ordinance on 19 June 2001, replacing the word, "driveways", with the phrase, "[a]ny type of impervious surface." Respondents contend that this modification did not render the ordinance more restrictive, but only clarified the terms of the prior ordinance.

Respondents rely upon *Davis v. Zoning Board of Adjustment*, 41 N.C. App. 579, 255 S.E.2d 444 (1979) to assert that dismissal of an appeal is proper where the ordinance was amended to allow the use petitioner sought during pendency of the appeal. We find *Davis* irrelevant at bar. Davis's claim on appeal became moot because the ordinance modification gave petitioner the relief he sought.

The amendment to the ordinance at bar has not changed petitioner's position in relying upon the prior ordinance and did not give him the relief sought. Petitioner's claim and injury remain viable. The amendment to the ordinance further restricts petitioner's use of his property. Petitioner was entitled to rely upon the language of the ordinance in effect at the time he applied for the permit. *See Northwestern Financial Group v. County of Gaston*, 329 N.C. 180, 405 S.E.2d 138 (1991).

Respondents argue that petitioner did not argue or show a vested right in the ordinance he relied upon.

> A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations "substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building," *Town of Hillsborough v. Smith*, 276 N.C. at 55, 170 S.E.2d at 909; (2) the obligations and/or expenditures are incurred in good faith, *Id.*; (3) the obligations and/or ex-

penditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party, *Id.* . . . ; and (4) the amended ordinance is a detriment to the party. *See Russell v. Guilford County*, 100 N.C. App. 541, 545, 397 S.E.2d 335, 337 (1990); . . . The burden is on the landowner to prove each of the above four elements.

Browning-Ferris Industries v. Guilford County Bd. of Adj., 126 N.C. App. 168, 171-72, 484 S.E.2d 411, 414 (1997).

Presuming petitioner failed to show a vested right in the original ordinance, it is not fatal to his claim. Petitioner was never issued the permit required to expand his driveway and did not apply for another permit or a variance under the amended ordinance. The building inspector's decision not to grant defendant's permit was based upon his interpretation of the original ordinance. The Board and trial court reviewed and affirmed that decision. The ordinance was not amended until after the Board had acted on petitioner's application. Respondents' cross-assignment of error is overruled.

IV. Interpretation of the Ordinance

[2] Petitioner argues that the trial court erred in its interpretation of the Kure Beach Ordinance. The ordinance requires the total square footage of the buildings and impervious ground covering surface to not exceed sixty-five percent of the area of the lot. The ordinance also limits driveways across town right-of-ways to twenty-four feet in width. The trial court's sole conclusion of law was that the evidence was insufficient to grant petitioner relief.

The trial court "sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993). The whole record test applies to findings of fact and compels a determination of whether the findings of fact of the Board are supported by competent evidence in the record. *Id.* Questions of law presented are reviewable *de novo*. *Id.* at 137, 431 S.E.2d at 187.

The trial court's order lists the "facts" of the case but fails to determine whether the Board's findings of fact were supported by competent evidence. The trial court's order does not find facts but merely sets forth a chronology of the case. The sole conclusion of law holds for the respondents because the petitioner presented "insuffi-

cient evidence" to warrant relief. Petitioner appeals from the trial court ruling accepting the Board's interpretation of the statute.

The Town has authority under N.C.G.S. § 160A-307 to restrict the width of driveways through ordinances. "A city may by ordinance regulate the size, location, direction of traffic flow, and manner of construction of driveway connections into any street or alley." N.C.G.S. § 160A-307 (2001).

Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property. *See Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983). "When statutory language is clear and unambiguous, 'words in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning.' " *Proctor v. City of Raleigh Bd. of Adjust.*, 140 N.C. App. 784, 85-86, 538 S.E.2d 621, 622 (2000) (quoting *Kirkpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000)).

The plain meaning of the Town's ordinance prior to its amendment does not support the decision of the Board as affirmed by the trial court. The ordinance unambiguously states that "[d]riveways across the town right-of-way shall be limited to twenty-four (24) feet wide." Driveways are by definition and common usage for driving. *Webster's Third New International Dictionary* 692 (1966) (defining driveway as a "private road giving access from a public way to a building or buildings on abutting grounds.") Sidewalks or walkways are for walking. *See Webster's Third New International Dictionary* 2113, 2572. Both driveways and walkways may be considered "impervious surfaces" if constructed to prevent water seepage. The ordinance did not limit all impervious surface across the town right-of-way to twenty-four feet, only "[d]riveways," prior to amendment. Petitioner's driveway measured nineteen feet wide at the time of application. He was entitled to an expansion of five additional feet. It is immaterial that petitioner had previously installed a walkway across the right-of-way of another street. The total impervious area did not and would not exceed sixty-five percent of the area of the lot with the driveway extended to twenty-four feet.

While we are cognizant of the ordinance's objective to prevent flooding, this particular issue will not rise again. The Town's amending the ordinance after its decision on petitioner's application is some evidence, if not an implied admission, that the language of the prior

ordinance permitted the expanded driveway. It was error for the building inspector and Board to deny petitioner the permit he was entitled to as a matter of law. We hold that petitioner is entitled to a permit to extend his driveway under the prior ordinance.

Reversed and Remanded.

Judges WYNN and STEELMAN concur.

DARREN LAMAR WILSON, PLAINTIFF v. BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT

No. COA02-585

(Filed 15 April 2003)

Unfair Trade Practices— selection of corporate director—not a business activity

Plaintiff's allegations that defendant utility cooperative changed its corporate bylaws to keep him off the board of directors did not constitute an unfair trade practice. Alteration of corporate bylaws is not a day-to-day business activity and matters of internal corporate management do not affect commerce as contemplated by N.C.G.S. § 75-1.1.

Judge HUDSON dissenting.

Appeal by plaintiff from an order entered 20 February 2002 by Judge Julius A. Rousseau, Jr., in Caldwell County Superior Court. Heard in the Court of Appeals 13 February 2003.

Phyllis A. Palmieri, for plaintiff-appellant.

Smith Moore LLP, by J. Donald Cowan, Jr., and Ellis & Winters, by Julia F. Youngman, for defendant-appellee.

STEELMAN, Judge.

Plaintiff worked as a construction specialist for defendant, a utility cooperative incorporated in North Carolina, until he was discharged on 31 March 1997. Two weeks after his discharge, plaintiff applied for membership on defendant's board of directors ("board"). Plaintiff subsequently received a letter dated 15 April 1997 from

defendant's chief executive officer denying his application for membership on the board. The letter stated that according to a new by-law adopted by the board, plaintiff was not eligible to seek membership on the board as a former employee for six years following his last date of employment.

On 30 May 2001, plaintiff filed a complaint alleging a single cause of action against defendant for unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (2001). Plaintiff alleged defendant "sought to conceal its management and service deficiencies" by altering its by-laws to prohibit board membership by former employees until six years following the last date of employment. Plaintiff also alleged that this prohibition was not added to the by-laws until after he applied for board membership and that defendant did not announce the by-law change until publication of its newsletter in June 1997, after plaintiff's application to the board was denied. Plaintiff's complaint contained further allegations as follows:

> 30. By its actions in altering the by-laws to eliminate participation and membership on its board of directors by former employees, who knew or were likely to know of management and service deficiencies, Defendant Blue Ridge Electric Membership Corporation engaged in an unfair and deceptive act affecting commerce.
>
> . . .
>
> 33. By enacting a by[-]law to extinguish exposure and quell criticism of its management and service practices by former employees, who are most likely to have personal knowledge of such deficiencies, Defendant Blue Ridge Electric Membership Corporation caused injury to the plaintiff by depriving him of his right to participate on the board of directors, and further injured the people of Western North Carolina who are owners, members, and beneficiaries of Defendant from participation by and benefits of a knowledgeable and dissident voice raised in their interests.

Plaintiff prayed for "compensatory and punitive damages for the deprivation of his rights as a member of the defendant corporation, and for anxiety, humiliation, mental anguish, and emotional distress." He also sought treble damages pursuant to N.C. Gen. Stat. § 75-16 (2001) and attorney's fees.

On 26 June 2001, defendant moved to dismiss plaintiff's claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001) for failure to state

a claim upon which relief may be granted. The trial court granted defendant's motion to dismiss.

Plaintiff's sole assignment of error is that the trial court erred in granting defendant's motion to dismiss pursuant to Rule 12(b)(6). The issue presented in this case is whether a corporation's changing the qualifications for serving on its board of directors can be the subject of a claim for unfair and deceptive trade practices under N.C. Gen. Stat. Chapter 75.

On appeal from a grant of a motion to dismiss, this Court must determine "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 Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). An action may be dismissed for failure to state a claim if no law supports the claim, if sufficient facts to make out a good claim are absent, or if a fact is asserted that defeats the claim. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

To state a claim for relief for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, plaintiff must show (1) an unfair or deceptive act or practice by defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

N.C. Gen. Stat. § 75-1.1(b) defines "commerce" to include "all business activities, however denominated. . . ." Our Supreme Court has held that " '[b]usiness activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or *whatever other activities the business regularly engages in and for which it is organized.*" *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991) (emphasis added).

This Court has held that N.C. Gen. Stat. § 75-1.1 was not meant to encompass all business activities or all wrongdoings in a business setting but "was adopted to ensure that the original intent of the statute . . . was effectuated." *Threatt v. Hiers*, 76 N.C. App. 521, 523, 333 S.E.2d 772, 773 (1985), *disc. review denied*, 315 N.C. 397, 338 S.E.2d 887 (1986). The statute initially stated its purpose as follows:

> "[T]o provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between per-

> sons engaged in business and the consuming public within this State to the end that good faith and fair dealings *between buyers and sellers* at all level[s] of commerce be had in this State."

Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (*quoting* N.C. Gen. Stat. § 75-1.1 (1975)) (emphasis added).

Plaintiff contends defendant modified its by-laws to prevent him, a disgruntled former employee, from serving on the board. For purposes of our review of the grant of the motion to dismiss, we must assume plaintiff's contention is true. However, the conduct plaintiff alleges does not constitute "business activities" as defined by our Supreme Court in *HAJMM*, *supra*, and is not contemplated by N.C. Gen. Stat. § 75-1.1 according to the statute's original stated purpose. Defendant was organized to provide electricity to the members of the utility cooperative. Alteration of its by-laws by the board of directors is not a day-to-day, regular business activity. Plaintiff does not allege that the by-law was improperly adopted or that defendant was engaged in practices with respect to supplying electricity to its members that would constitute an unfair or deceptive trade practice. Matters of internal corporate management, such as the manner of selection and qualifications for directors, do not affect commerce as defined by Chapter 75 and our Supreme Court.

Because plaintiff's allegations, even if taken as true, do not establish an act by defendant "in or affecting commerce," we find that plaintiff failed to allege sufficient facts to state a claim under N.C. Gen. Stat. § 75-1.1. We hold the trial court properly dismissed plaintiff's claim under Rule 12(b)(6).

AFFIRM.

Judge McGEE concurs.

Judge Hudson dissents.

HUDSON, Judge, dissenting.

Because North Carolina follows principles of notice pleading, and because the plaintiff included allegations of all of the essential elements of a claim for unfair and deceptive trade practices, I believe that his complaint is sufficient to survive the motion to dismiss under Rule 12(b)(6). Thus, I respectfully dissent.

In particular, I disagree with the conclusion that the complaint does not allege improper conduct "affecting commerce" of the type intended to be covered by N.C. Gen. Stat. § 75-1.1. Among the allegations of the complaint are the following:

> 6. Prior to his termination, Plaintiff Wilson voiced and expressed concerns about the management and delivery of services to the people of Western North Carolina by Defendant Blue Ridge Electric Membership Corporation. These concerns included, but were not limited to, the failure of Defendant to do regular pole counts; and determination by the company of expansion of phone and cable companies on company properties to ensure that the company is collecting all charges due for joint use of poles; and service deficiencies.
>
> * * * * *
>
> 8. Plaintiff's concerns were based on his personal knowledge of the management and delivery of services to the people of Western North Carolina by Defendant Blue Ridge Electric Membership Corporation.

In Paragraph 30 of the complaint, plaintiff specifically alleges that the "Defendant Blue Ridge Electric Membership Corporation engaged in an unfair and deceptive act affecting commerce." In paragraphs 30 and 31 of the complaint, among others, the plaintiff alleges that the amendment to the defendant's by-laws kept individuals off the board of directors who "were likely to know of mismanagement and service deficiencies" and "who were likely to act to expose such deficiencies to the people of Western North Carolina." Further, in paragraphs 32 and 33, the plaintiff alleges that these actions "caused injury to the plaintiff" and resulted in further injury to "the people of Western North Carolina who are the owners, members, and beneficiaries of Defendant."

Here, the defendant's day-to-day business consisted of selling electric power to its members, described in the complaint as "everyone who purchases power." Thus to the extent that these allegations are of conduct that may affect the charges paid and service received by the consuming public, such conduct is exactly the type of activity that Chapter 75 was enacted to address. In my view, therefore, the complaint contains allegations of conduct affecting commerce as contemplated by N.C. Gen. Stat. § 75-1.1 that are sufficient to withstand scrutiny under Rule 12(b)(6). Accordingly, I respectfully dissent.

ESSEX GROUP, INC., PLAINTIFF v. EXPRESS WIRE SERVICES, INC., SCOTT RAMSEY AND WAYNE SEARCY, DEFENDANTS

No. COA02-724

(Filed 15 April 2003)

Discovery— sanctions for violation of discovery order— default judgment

The trial court did not abuse its discretion in a breach of fiduciary duty, unfair and deceptive trade practices, conversion, misappropriation of trade secrets, conspiracy, interference with prospective business advantage, and breach of contract case by imposing sanctions against defendants under N.C.G.S. § 1A-1, Rule 37 for discovery order violations and by entering a default judgment against defendants, because: (1) defendants admitted that they attempted to remove documents from their office so that plaintiff would not have those documents available to it; (2) defendants formally admitted that they have not been truthful during their earlier deposition testimony; and (3) it is no defense that defendants eventually produced the requested documents and allowed plaintiff to inspect the corporate defendant's premises.

Appeal by defendants from order entered 31 January 2002 by Judge Robert Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 February 2003.

Moore & Van Allen, P.L.L.C., by Jonathan D. Sasser and Reed J. Hollander, for plaintiff-appellee.

Helms, Henderson & Porter, P.A., by Christian R. Troy, for defendant-appellants.

EAGLES, Chief Judge.

Defendants Express Wire Services, Inc. ("EWS"), Scott Ramsey and Wayne Searcy appeal from the trial court's entry of default judgment as a sanction against them. Defendants' sole argument on appeal is that their ultimate compliance with the trial court's discovery order precludes the court from assigning sanctions under G.S. § 1A-1, Rule 37. We disagree and therefore affirm the trial court's order imposing sanctions.

Plaintiff Essex Group, Inc. ("Essex") is a corporation that has a place of business in Charlotte. Its primary business activity is the manufacture and sale of electrical wire products. Defendants Ramsey and Searcy were employed by plaintiff. Ramsey quit his job with plaintiff in March 2001 and opened defendant corporation EWS. EWS's primary business activity is the sale of emergency magnet wire, which made EWS a competitor of plaintiff. Before he began working for plaintiff, Searcy signed a document entitled "Intellectual Property Agreement" in which he agreed not to disseminate business information or trade secrets of plaintiff to third parties. Defendant Searcy left plaintiff corporation in May 2001 and began working for EWS.

Essex filed a complaint against EWS, Searcy and Ramsey on claims of breach of fiduciary duty, unfair and deceptive trade practices, conversion, misappropriation of trade secrets, conspiracy, interference with prospective business advantage and breach of contract. Essex claimed that defendants Searcy and Ramsey had used Essex's resources to set up their new business. In addition, Essex accused Searcy and Ramsey of absconding with a number of documents belonging to Essex that pertained to the Essex customer and supplier list.

Essex obtained an expedited discovery order allowing Essex to search defendant EWS's facilities. In addition, the discovery order requested the production of documents regarding the creation of EWS. Plaintiff's attorney sent a facsimile to defendants Searcy and Ramsey on 26 July 2001 informing them that the search was to take place on 27 July 2001. On the afternoon of 26 July 2001 defendant Searcy deleted multiple emails from his computer. At approximately 5:00 p.m. that same afternoon, plaintiff's private investigator observed defendant Ramsey leaving the EWS office with a pushcart on which several boxes were loaded. These boxes were described as brown, except for one black and white Gateway computer box. Defendant Ramsey took the boxes to a storage facility in Mooresville.

On 30 July 2001 Ramsey testified during his deposition that he had not removed any documents from the EWS office on the evening of 26 July 2001. Defendant Searcy testified on 31 July that he deleted several emails but stated he did not think he was forbidden from doing so.

On 31 July 2001, defendant Ramsey returned to the storage unit in Mooresville. Ramsey removed four brown boxes and the Gateway

box from the storage unit and loaded the boxes in his car. After being confronted by plaintiff's private investigator, Ramsey allowed the investigator to videotape the contents of the boxes. The boxes contained numerous files and notebooks clearly marked with the name "Essex Group, Inc." Both Ramsey and Searcy admitted that their deposition testimony regarding the removal of documents had been false. The documents requested by plaintiff and removed by defendants were delivered to plaintiff's counsel on 1 August 2001. The trial court's order required that the documents be delivered to plaintiff by 1 August 2001.

Upon plaintiff's motion, the trial court issued an order sanctioning defendants pursuant to G.S. §1A-1, Rule 37. The sanctions included striking defendants' answer, the entry of a default judgment against defendants, and an order to pay costs and attorney fees in the amount of $7,000. From this sanction order, defendants appeal.

We note that defendants are appealing from an order of sanctions against them. These sanctions include the striking of defendants' answer and the entry of default judgment against defendants. Orders of this type have been described as affecting a substantial right. *See Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001). Accordingly, the order instituting sanctions pursuant to Rule 37 is immediately appealable.

Defendants argue that the trial court abused its discretion in assigning sanctions to defendants after they complied with the request for production of documents and the request for entry onto defendants' premises. This Court may overturn a trial court's order of sanctions only in the event of an abuse of discretion. *See Clark v. Penland*, 146 N.C. App. 288, 552 S.E.2d 243 (2001); *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 464 S.E.2d 504 (1995); *Segrest v. Gillette*, 96 N.C. App. 435, 386 S.E.2d 88 (1989), *rev'd on other grounds*, 331 N.C. 97, 414 S.E.2d 334 (1992). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hursey*, 121 N.C. App. at 177, 464 S.E.2d at 505. Here, numerous facts cited by the trial court justify its imposition of sanctions on defendants. Defendants admitted that they attempted to remove documents from their office so that plaintiff would not have those documents available to them. Defendants have also formally admitted that they had not been truthful during their earlier deposition testimony.

It is no defense that defendants eventually produced the requested documents and allowed plaintiff to inspect its premises. Rule 37 sanctions are powers granted to the trial courts of our state to prevent or eliminate dilatory tactics on the part of unscrupulous attorneys or litigants. This Court has held that failure to answer interrogatories or turn over requested documents in a timely manner constitute proper grounds for a sanction. *See Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991); *Vick v. Davis*, 77 N.C. App. 359, 335 S.E.2d 197 (1985), *aff'd per curiam*, 317 N.C. 328, 345 S.E.2d 217 (1986); *Plumbing Co. v. Associates*, 37 N.C. App. 149, 245 S.E.2d 555, *disc. review denied*, 295 N.C. 648, 248 S.E.2d 250 (1978). Our Court has held that a litigant's answering of interrogatories after the trial court ordered the litigant to answer did not prevent the court from imposing sanctions upon the dilatory party. *See Segrest v. Gillette*, 96 N.C. App. 435, 442, 386 S.E.2d 88, 92 (1989). Defendants' actions here were at best dilatory and at worst dishonest. In either case, the trial court's decision to sanction defendants cannot be said to be so arbitrary that it was not the result of a reasoned decision.

Accordingly, the trial court's order imposing sanctions against defendants and entering default judgment against them is affirmed.

Affirmed.

Judges MARTIN and HUDSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

AMBROSE v. TIDEWATER CONSTR. No. 02-383	Ind. Comm. (967002)	Affirmed
BOYD v. HOWARD No. 02-534	Guilford (00CVS319)	Affirmed
CITY OF CONOVER v. WHITMIRE No. 02-603	Catawba (00CVD1401)	Reversed and remanded
COFFEY v. SAVERS LIFE INS. CO. No. 01-741-2	Forsyth (98CVS6848)	Reversed in part; affirmed in part
DAIL v. STECKLER No. 02-124	Wake (97CVS12204)	Reversed and remanded
DITSCHEINER v. JELLY BEANS, LLC No. 02-486	Wake (00CVS228)	Affirmed
GAINEY v. PGA/CREATIVE CORPORATE STAFFING No. 02-929	Ind. Comm. (915248)	Affirmed
HARRIS v. HARRIS No. 02-698	Nash (00CVD369)	Vacated and remanded
IN RE VAUGHN No. 02-861	Harnett (00J184) (00J185)	Affirmed
JEFFRIES v. ESTATE OF JEFFRIES No. 02-954	Durham (01CVD1871)	Affirmed in part; reversed in part
MANGUM v. JOHNSON No. 02-190	Harnett (98CVS1697)	Affirmed
MARTIN v. IDLEWILD HOUSE, INC. No. 02-717	Ind. Comm. (976548)	Affirmed
MERCK v. ANTHONY CRANE RENTAL No. 02-779	Ind. Comm. (967437)	Affirmed
NOLAN v. TOWN OF WEDDINGTON No. 02-523	Union (01CVS1761)	Affirmed
ROWE v. N.C. FARM BUREAU MUT. INS. CO. No. 02-539	Wayne (01CVS959)	Affirmed
SEVERT v. COX No. 02-409	Ashe (00CVS157)	No error

STATE v. ANDERSON No. 02-1066	Nash (99CRS7340) (99CRS7341)	Dismissed in part; remanded for resentencing
STATE v. BLAKE No. 02-1141	Rowan (99CRS5005) (99CRS5006)	No error
STATE v. EDWARDS No. 02-1266	Northampton (01CRS1028) (01CRS1361)	No error
STATE v. FAIRLEY No. 02-1001	Moore (98CRS10831) (00CRS52071)	Affirmed
STATE v. GRIER No. 02-600	Mecklenburg (98CRS39717)	No error
STATE v. HENRY No. 02-829	Wake (01CRS20017)	No error
STATE v. JARRELL No. 02-765	Guilford (00CRS23141) (00CRS23153)	No error
STATE v. JOHNSON No. 02-611	Rockingham (99CRS3378) (99CRS3788) (99CRS3789)	No error
STATE v. KNIGHT No. 02-943	Union (01CRS3808)	No error
STATE v. McNEILL No. 02-990	Wake (01CRS48809) (01CRS52444)	No error
STATE v. MEDLIN No. 02-1219	Union (00CRS52990)	No error
STATE v. O'NEAL No. 02-532	Davie (00CRS4808) (00CRS4809) (00CRS48010) (00CRS48011) (00CRS50629) (00CRS50631)	No error
STATE v. PARKER No. 02-846	Guilford (99CRS112877) (99CRS112878)	No error
STATE v. SPRUILL No. 02-702	Cabarrus (00CRS4728)	No error

STATE v. TART No. 02-675	Alamance (00CRS57204) (01CRS4115)	No error
STATE v. TORRES AND MORALES No. 02-946	Guilford (01CRS82537) (01CRS82538) (01CRS82539) (01CRS82546) (01CRS82547)	No error in part and vacated in part and remanded for resentencing
STATE v. WEBBER No. 02-665	Edgecombe (00CRS4775)	No error
STATE v. WILLIAMS No. 02-793	Forsyth (01CRS9998) (01CRS15454) (01CRS20284)	Affirmed; remanded for correction of clerical error
TROXELL v. BUCHANAN No. 02-643	Forsyth (01CVS4369)	Affirmed
WARD v. INSCOE No. 02-813	Vance (00CVS1099)	Vacated and remanded

PAUL E. WATKINS, D.D.S., PETITIONER v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT

No. COA02-759

(Filed 6 May 2003)

1. Dentists— negligence—rescheduling based on patient nonpayment

A de novo review revealed that the trial court did not err by reversing the State Board of Dental Examiners' final agency decision to suspend the dental license of an orthodontist based on the conclusion that the orthodontist's failure to treat a patient due to nonpayment amounted to negligence under N.C.G.S. § 90-41(a)(12), because: (1) an orthodontist's rescheduling practices are governed by N.C.G.S. § 90-41(a)(26) which speaks to unprofessional conduct and does not present a question of negligence under N.C.G.S.§ 90-41(a)(12); and (2) at the time the orthodontist rescheduled the patient due to nonpayment, she had terminated his services and was no longer a patient of record.

2. Dentists— breach of standard of care—failure to correct orthodontic problems in timely manner—failure to take facial photographs

A whole record review revealed that the trial court did not err by reversing the State Board of Dental Examiners' final agency decision to suspend the dental license of an orthodontist based on a finding that the orthodontist breached the standard of care for orthodontists regarding his failure to address or correct the orthodontic problems of two patients within a timely manner and his failure to take any intraoral and facial photographs of one of those patients, because: (1) the evidence regarding the delay for one of the patients did not show that any delay in treatment was the orthodontist's fault when the delay was the result of excessive appliance breakage due to either patient noncompliance or a faulty product, and there is no evidence the orthodontist failed to repair the patient's broken brackets as soon as his patient schedule permitted; (2) there was no evidence presented as to the applicable standard of care for orthodontists to support a finding that the orthodontist's treatment plan for the other patient was inappropriate; and (3) there is no evidence in the record to determine how the lack of intraoral and facial photographs would

inhibit an orthodontist's competence to properly diagnose a patient.

3. Dentists— standard of care—expertise of State Board of Dental Examiners

The trial court did not err by reversing the State Board of Dental Examiners' final agency decision to suspend the dental license of an orthodontist even though the Board contends that it was empowered under *Leahy v. N.C. Bd. of Nursing*, 346 N.C. 775 (1997), to determine the proper standard of care and breach thereof based on its own expertise if its experts' testimony was insufficient, because: (1) not only were none of the Board members orthodontists, but there is also no separate licensing requirement for orthodontists in this state; and (2) it cannot be said that the Board, whose members only practiced dentistry, had the expertise to determine the standard of care for orthodontists without any expert orthodontist testimony on the timely movement of teeth.

Judge HUNTER dissenting.

Appeal by respondent from order dated 5 April 2002 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 18 February 2003.

Rush-Lane & Lane, P.L.L.C., by Freddie Lane, Jr., for petitioner appellee.

Bailey & Dixon, L.L.P., by M. Denise Stanford, for respondent appellant.

BRYANT, Judge.

The North Carolina State Board of Dental Examiners (the Board) appeals a superior court order dated 5 April 2002 reversing the Board's final agency decision to suspend the dental license of orthodontist Paul E. Watkins, D.D.S. (Dr. Watkins).

Based on the formal complaints of three of Dr. Watkins' patients, the Board held an administrative hearing to determine whether Dr. Watkins had violated N.C. Gen. Stat. §§ 90-41(a)(6), (12), and (13). The record and evidence presented at this hearing revealed the following as to the individual patients:

Sabrina A. Wolfe

In her complaint dated 31 March 1999, Sabrina A. Wolfe (Wolfe) stated that she started seeing Dr. Watkins at his Greensboro practice in January 1997. Dr. Watkins placed braces on Wolfe's teeth, and according to Wolfe, she "received fair treatment" from his practice. "[A]round August or September of 1997," Wolfe "contacted the office . . . to tell [Dr. Watkins she] did not want to see [him] anymore because of financial reasons [and because she] wanted an office in High Point where [she] live[s]." At this time, Wolfe was told she still owed Dr. Watkins for his past services. In spite of her termination notice, Dr. Watkins' treatment record indicates that Wolfe came to the practice again on 8 October 1997 but was rescheduled "due to non-payment." On 26 November 1997, Wolfe presented herself to Dr. Watkins once more and was again not seen "due to non-payment."

Dr. N. Watt Cobb, Jr., the Board's expert witness on the Wolfe allegations, testified it was a breach of the standard of care for dentists, including orthodontists, to deny treatment to a patient of record who was delinquent in her payments without first giving that patient time to find another orthodontist. Based on this testimony, the Board found:

> 7. The standard of care for dentists licensed to practice dentistry in North Carolina at the time [Dr. Watkins] treated . . . Wolfe required that once orthodontic treatment is initiated, the dentist must continue to treat a patient with an outstanding balance until that patient has been formally dismissed by the practice and given a period of time to find another dentist to continue treatment.
>
> 8. [Dr. Watkins] violated the standard of care for dentists licensed to practice dentistry in North Carolina by failing to treat . . . Wolfe because she had an outstanding balance on her account.

Based on these findings, the Board concluded that Dr. Watkins' "failure to comply with the applicable standard of care in his treatment of . . . Wolfe as set forth in Finding of Fact No. 8 was a dereliction from professional duty constituting negligence in the practice of dentistry within the meaning of G.S. § 90-41(a)(12)."

John Matt Casto

On 22 April 1996, John Matt Casto (Casto), a minor, presented himself to Dr. Watkins for an orthodontic consultation. Dr. Watkins

diagnosed Casto as having a Class I malocclusion with severely crowded locked-out maxillary bicuspids and severely crowded mandibular anterior incisors. Dr. Watkins considered extracting two of Casto's adult teeth but, in the end, decided to pursue a conservative approach using orthodontic appliances and avoiding extraction "until absolutely necessary." On 22 October 1997, Dr. Watkins finally recommended extraction, which was subsequently performed by another dentist. During the course of his treatment, Casto experienced excessive appliance breakage leading to a delay in his progress. Dissatisfied with the lack of progress, Casto's mother sought the services of another orthodontist in the fall of 1998.

Dr. Christopher John Trentini, an orthodontist, testified as the Board's expert witness with regard to Casto. While Dr. Trentini disagreed with Dr. Watkins' choice of treatment plan and testified that Dr. Watkins' treatment of Casto was behind schedule, Dr. Trentini did not state how far behind Casto's treatment was or that the delay violated the standard of care for orthodontists. Dr. Trentini also did not testify that Dr. Watkins' treatment of Casto was in violation of the standard of care. During cross-examination, Dr. Trentini conceded that excessive appliance breakage would extend a patient's treatment time.

The Board found in pertinent part that:

> 12. [Dr. Watkins'] orthodontic treatment of . . . Casto was inappropriate in that the treatment plan and subsequent treatments rendered failed to address the orthodontic needs of the patient in a timely manner.
>
> 13. The standard of care for dentists licensed to practice dentistry in North Carolina at the time [Dr. Watkins] treated . . . Casto required an orthodontist to establish and follow a treatment plan which would address the patient's orthodontic needs in a timely manner.
>
> 14. [Dr. Watkins] violated the standard of care for dentists licensed to practice dentistry in North Carolina by failing to establish and follow a treatment plan that would address the patient's orthodontic needs in a timely manner.

Accordingly, the Board concluded Dr. Watkins' "failure to comply with the applicable standard of care in his treatment of . . . Casto . . . was a dereliction from professional duty constituting negligence in the practice of dentistry within the meaning of G.S. § 90-41(a)(12)."

Harry Conrad Naico

Harry Conrad Naico (Naico) sought orthodontic treatment from Dr. Watkins in December 1996 when Naico was twelve years old. Dr. Watkins diagnosed Naico as having a Class II malocclusion, a one hundred percent overbite, and a four to six millimeter overjet. Dr. Watkins recommended a treatment plan involving an upper biteplate with orthodontic appliances and therapeutic non-extraction with possible future extractions. Prior to initiating treatment, Dr. Watkins used as diagnostic tools a panorex radiograph, a cephalometric radiograph, trimmed study models, and a facial analysis but did not take any intraoral or facial photographs. According to Dr. Watkins, photographs are not necessary to properly diagnose a patient as they do not show anything that cannot be observed with the naked eye or that is not recorded by the facial analysis. In addition, photographs are not as useful as the three-dimensional trimmed study models or the radiographs which not only show the patients' teeth but also his jaw.

On 14 August 1997, Dr. Watkins placed Naico's orthodontic appliances. Since Naico did not progress as planned, Dr. Watkins considered possible extractions and surgery in May 1999. Dr. Watkins, however, did not pursue the possibility of surgery because "there are very few oral surgeons" in Greensboro and surgery would likely require travel to Chapel Hill. Thus, Dr. Watkins preferred to work out a plan that was reasonable for the patient unless surgery was needed "without a doubt." Since Naico's jaw was not yet fully developed, Dr. Watkins wanted to observe the development over the next year before reconsidering surgery. Dr. Watkins treated Naico for a period of approximately two years until Naico switched orthodontists.

Dr. James Dudley Kaley, also an orthodontist, testified as the Board's expert witness. According to Dr. Kaley, Naico's case was not an average case to treat but "an extremely difficult and involved one." Because it involved a skeletal problem, Dr. Kaley would have treated Naico through "a combination of braces and surgery." Surgery, however, would not be an option until after Naico's jaw had matured between the age of sixteen and twenty-one. Dr. Kaley considered surgery his "number one treatment choice." The second best would be a non-surgical treatment plan involving the use of a Herbst appliance along with braces to correct Naico's overbite. Dr. Kaley stated that failure to follow his treatment suggestions would violate the standard of care. Dr. Kaley further testified Dr. Watkins' treatment of Naico was inappropriate in that it failed to correct the patient's orthodontic problems in a timely manner, which Dr. Kaley's treatment

plans would have, and that this violated the standard of care. With respect to a non-surgical treatment plan, Dr. Kaley testified "it would probably take [him] a good two and a half years minimum."

Dr. Kaley also testified Dr. Watkins violated the standard of care by failing to take any intraoral and facial photographs prior to initiating Naico's treatment plan. Dr. Kaley expressed the opinion that such photographs are needed for proper diagnosis because he, at least, diagnoses patients in his office based on his records as opposed to when they sit in the chair in front of him. He offered no testimony as to the comparative value of photographs to the other diagnostic tools employed by Dr. Watkins. Dr. Kaley further stated had he been given photographs, he could have made a more accurate diagnosis of Naico when he evaluated him at the Board's request. When asked during cross-examination how he determined the standard of care for orthodontists with respect to intraoral photographs, Dr. Kaley replied: "my opinion [comes] from meeting many people, . . . that is the standard of care that everybody I know uses." Dr. Kaley did, however, concede that a leading treatise in the field of dentistry does not list intraoral photographs as among the minimal diagnostic records to be kept by dentists or orthodontists.

During cross-examination, Dr. Kaley acknowledged that different orthodontists will have differing opinions on the proper treatment of a patient. With respect to his two proposed treatment plans for Naico, Dr. Kaley explained: "I didn't say it was the only way. I said it was my way." He also testified that the standard of care is determined "[i]n retrospect," depending on "the way [the case] turned out."

The Board found as fact that:

> 17. [Dr. Watkins] failed to take, or have available, intraoral or facial photographs prior to initiating orthodontic treatment for . . . Naico.
>
> 18. The standard for dentists licensed to practice dentistry in North Carolina at the time [Dr. Watkins] treated . . . Naico required an orthodontist to take, or have available, intraoral and facial photographs prior to initiating orthodontic treatment.
>
> 19. [Dr. Watkins] violated the standard of care for dentists licensed to practice dentistry in North Carolina by failing to take, or have available, introral and facial photographs prior to initiating orthodontic treatment of . . . Naico.

20. [Dr. Watkins] placed . . . Naico's appliances on August 14, 1997. [Dr. Watkins] continued . . . Naico in orthodontics for the following two years with routine adjustments.

21. [Dr. Watkins'] orthodontic treatment for . . . Naico was inappropriate in that it failed to correct his orthodontic problems within a timely manner.

22. The standard of care for dentists licensed to practice dentistry in North Carolina at the time [Dr. Watkins] treated . . . Naico required an orthodontist to formulate an appropriate treatment plan to remedy the problems diagnosed in a timely manner.

23. [Dr. Watkins] violated the standard of care for dentists licensed to practice dentistry in North Carolina by failing to formulate an appropriate treatment plan to remedy the problems diagnosed in a timely manner.

The Board then concluded Dr. Watkins' "failure to comply with the applicable standard of care in his treatment of . . . Naico . . . was a dereliction from professional duty constituting negligence in the practice of dentistry within the meaning of G.S. § 90-41(a)(12)."

As a result of its conclusions, the Board suspended Dr. Watkins' dental license. Dr. Watkins appealed the suspension to the trial court, which, in an order dated 5 April 2002, reversed the Board's decision based on a lack of competent evidence as to all three patients.

The issues are whether: (I) Dr. Watkins' refusal to treat Wolfe without payment falls within the purview of N.C. Gen. Stat. § 90-41(a)(12); (II) the testimony of Drs. Trentini and Kaley was sufficient to establish the applicable standard of care and breach thereof; and (III) if not, the Board was empowered to decide on its own the standard of care for orthodontists and the type of conduct constituting a breach of that standard.

In reviewing a superior court order examining an agency decision, an appellate court must, depending on the issues raised on appeal, determine whether the agency decision

(1) violated constitutional provisions; (2) was in excess of the statutory authority or jurisdiction of the agency; (3) was made upon unlawful procedure; (4) was affected by other error of law; (5) was unsupported by substantial admissible evidence in view

of the entire record; or (6) was arbitrary, capricious, or an abuse of discretion.

Shackleford-Moten v. Lenoir Cty., 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citing N.C.G.S. § 150B-51(b) (2001)). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *In re Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the agency. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). The whole-record test, on the other hand, requires the reviewing court to merely determine " 'whether an administrative decision has a rational basis in the evidence.' " *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). The whole-record test thus consists of an examination of "all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994).

I

[1] In his brief to this Court and during oral arguments, Dr. Watkins advocated that an orthodontist's rescheduling practices are governed by N.C. Gen. Stat. § 90-41(a)(26), which speaks to unprofessional conduct, and do not present a question of negligence under section 90-41(a)(12) as concluded by the Board. Dr. Watkins thus contends the Board made an error of law, reviewable *de novo*.

Section 90-41(a)(12) allows the Board to revoke or suspend a dentist's licence if he "[h]as been negligent in the practice of dentistry." N.C.G.S. § 90-41(a)(12) (2001). Subsection (a)(26), on the other hand, applies if the dentist, or orthodontist in this case, "[h]as engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board."[1] N.C.G.S. § 90-41(a)(26) (2001). We agree with Dr. Watkins that rescheduling matters of the sort that occurred in Wolfe's case do not involve "the practice of dentistry." *See* N.C.G.S. § 90-41(a)(12). Instead, if questionable behavior arises in this context, it is more appropriately

1. Dr. Watkins further argues that the Board's rules and regulations are silent with respect to rescheduling and termination procedures and therefore failed to give him notice.

viewed as unprofessional conduct, which is defined as "[b]ehavior that is immoral, unethical, or dishonorable, either generally or when judged by the standards of the actor's profession." *Black's Law Dictionary* 292 (7th ed. 1999). We further note that even if section 90-41(a)(12) applied to the facts of this case as they pertain to Wolfe, there would be no violation of the standard testified to by Dr. Cobb, which illustrated the proper method of treating and discharging a patient of record. According to Wolfe's own complaint, she had terminated Dr. Watkins' services several months before the alleged incidents. Thus, at the time Dr. Watkins rescheduled her due to non-payment, she was no longer a patient of record. For these reasons, the Board erred in concluding Dr. Watkins' failure to treat Wolfe due to non-payment amounted to negligence under section 90-41(a)(12).

II

[2] "[P]rior to invoking disciplinary measures as authorized under G.S. § 90-41(a), the Board must first be satisfied that the care provided by the licensee was not in accordance with . . . a uniform statewide minimum level of competency among . . . licensees." *In re Dailey v. Board of Dental Exam'rs*, 309 N.C. 710, 723, 309 S.E.2d 219, 226 (1983). In this case, the Board found Dr. Watkins had breached the standard of care for orthodontists because his treatment of both Casto and Naico "was inappropriate in that it failed to [address or] correct [their] orthodontic problems within a timely manner." With respect to Naico, the Board also found that failure to take any intra-oral and facial photographs violated the standard of care.

Having reviewed the whole record, we note that Dr. Trentini's testimony only established that Dr. Watkins' treatment of Casto was behind schedule. There was no testimony that the delay in schedule was so great as to violate the "statewide minimum level of competency" required of Board licensees. *Id.* Furthermore, the evidence presented at the hearing did not show that any delay in treatment was Dr. Watkins' fault. Rather, the delay was the result of excessive appliance breakage due to either patient noncompliance or a faulty product, and there is no evidence Dr. Watkins failed to repair Casto's broken brackets as soon as his patient schedule permitted. Accordingly, there was no competent evidence to support the Board's finding that Dr. Watkins had breached the standard of care for orthodontists by failing to timely address Casto's orthodontic needs. *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118 (review of "all competent evidence" must show "the agency decision is supported by 'substantial evidence' ").

The evidence with respect to Naico's treatment also failed to support the Board's findings. Dr. Kaley testified to what he believed to be the applicable standard of care and concluded Dr. Watkins had breached this standard by pursuing the treatment plan that he had, thereby failing to correct Naico's orthodontic problems in a timely manner. A closer review of his testimony, however, reveals Dr. Kaley did not testify as to the *minimum level of competency* required of a licensee but merely gave his opinion on the top two treatment plans he would have chosen for Naico. Dr. Kaley even acknowledged during cross-examination that his choices did not represent the only acceptable treatment methods; they represented "[his] way." Thus, there was no evidence presented as to the applicable standard of care for orthodontists to support a finding that Dr. Watkins' treatment plan for Naico "was inappropriate in that it failed to correct his orthodontic problems within a timely manner." *See id.*

While Dr. Kaley also testified that Dr. Watkins breached the standard of care for orthodontists by failing to take intraoral and facial photographs, there is absolutely no evidence in the record to determine how the lack of such photographs would inhibit an orthodontists' competence to properly diagnose a patient. Dr. Watkins indicated he had used all the diagnostic tools listed in a leading treatise on orthodontic care and that those tools were superior to intraoral and facial photographs for purposes of proper diagnosis. Dr. Kaley simply testified photographs would have helped him better diagnose Naico when he evaluated him for the Board and that, generally, they help him diagnose patients only because he prefers to make his diagnosis in his office as opposed to while the patient is sitting in front of him. Dr. Kaley did not explain though what diagnostic value photographs have in contrast to the radiographs, trimmed study models, and facial analysis taken and reviewed by Dr. Watkins. As such, Dr. Kaley's testimony failed to establish that intraoral and facial photographs are required as part of the statewide minimum level of competency required of orthodontists. *See Dailey*, 309 N.C. at 723, 309 S.E.2d at 226.

III

[3] The Board argues that even if its experts' testimony was insufficient on the standard of care for orthodontists or what constitutes a breach thereof, the Board was empowered pursuant to *Leahy v. N.C. Bd. of Nursing*, 346 N.C. 775, 488 S.E.2d 245 (1997) to decide these issues based on its own expertise. Finding *Leahy* to be distinguishable in this case, we disagree.

In *Leahy* our Supreme Court held:

> Article 3A of the Administrative Procedure Act, chapter 150B of the North Carolina General Statutes, governs disciplinary hearings by professional licensing boards. N.C.G.S. § 150B-41(d) provides in part, "An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it." N.C.G.S. § 150B-41(d) (1995). The knowledge of the Board includes knowledge of the standard of care for nurses. The Board currently consists of nine registered nurses, four licensed practical nurses, one retired doctor, and one lay person. The Board is authorized to develop rules and regulations to govern medical acts by registered nurses. N.C.G.S. § 90-171.23(b)(14) (1993). It is empowered to administer, interpret, and enforce the Nursing Practice Act. N.C.G.S. § 90-171.23(b)(1), (2), (3), (7). The Board is required to adopt standards regarding qualifications of applicants for licensure and to establish criteria which must be met by an applicant in order to receive a license. N.C.G.S. § 90-171.30 (1993). To meet these requirements, the Board must know the standard of care for registered nurses in this state. There is no reason it should not be allowed to apply this standard if no evidence of it is introduced.

Id. at 780-81, 488 S.E.2d at 248.

The rationale for allowing the Board of Nursing in *Leahy* to determine the standard of care based on its own expertise is not transferrable to the case *sub judice*. The Board of Nursing in *Leahy* consisted almost entirely of nurses. *See id.* In this case, not only were none of the Board members orthodontists, but there is also no separate licensing requirement for orthodontists in this State. Thus, whereas all orthodontists in North Carolina are trained in dentistry by virtue of the dental licensing requirement, not all dentists are trained in orthodontics. Dentists care for and remove teeth; orthodontists focus on the movement of teeth with the help of appliances. *See Webster's Third New International Directory* 603, 1594 (1968). Accordingly, it cannot be said that the Board, whose members only practiced dentistry, had the expertise to determine the standard of care for orthodontists without any expert orthodontist testimony on the timely movement of teeth. In light of the Board's composition in this case and the insufficient testimony of orthodontists Drs. Trentini and Kaley on the proper standard of care and breach thereof, we therefore affirm the trial court's reversal of the Board's decision.

Affirmed.

Judge ELMORE concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority's opinion which affirms the trial court's decision to reverse the Board's suspension of Dr. Watkins' dental license.

I find the Board's ability to determine the standard of care for orthodontists to be critical when addressing the remaining issues discussed by the majority. With respect to this issue, the majority holds that the Board did not have the expertise to determine the standard of care for orthodontists or what constitutes a breach thereof. The majority reached its holding by distinguishing *Leahy v. N.C. Bd. of Nursing*, 346 N.C. 775, 488 S.E.2d 245 (1997), from the present case. However, this distinction is flawed due to the majority interpreting *Leahy* too narrowly.

In *Leahy*, our Supreme Court concluded that a North Carolina Board of Nursing that consisted of, among others, nine registered nurses, could properly revoke the license of another registered nurse in the absence of expert testimony defining the standard of care for a registered nurse because that board governs medical acts by registered nurses. Here, the majority holds that since the Board neither consisted of any orthodontists nor heard sufficient expert testimony from an orthodontist defining the applicable standard of care, the Board did not have the expertise to determine the standard of care for orthodontists. However, the majority fails to recognize that the *Leahy* Court also concluded as it did because there was "evidence in the record which the Board . . . use[d] its expertise to interpret, including its expertise as to whether the petitioner had violated the standard of care for registered nurses. From the record, [the *Leahy* Court was] able to determine the validity of the Board's action." *Id.* at 780, 488 S.E.2d at 248.

In the case *sub judice*, even though there were no orthodontists on the Board and, assuming *arguendo*, insufficient expert testimony establishing the standard of care for orthodontists, the Board (which consisted of all dentists) was entitled to use its experience, technical competence, and specialized knowledge to interpret the evidence

that was presented to it in order to determine the requisite standard of care. *See id. See also* N.C. Gen. Stat. § 150B-41(d) (2001). This evidence included, *inter alia*, patients' records, testimony from those patients, and testimony from experts in the field of orthodontics regarding the quality of care (or lack thereof) Dr. Watkins provided to those patients. Specifically, with respect to each patient, the evidence and my assessment of that evidence in light of *Leahy* is as follows:

Sabrina Wolfe

There was uncontroverted evidence that Dr. Watkins rescheduled two of Wolfe's appointments because of non-payment and before receiving notification that she had found another orthodontist to continue her treatment. Dr. Cobb testified that due to the irreversible nature of an orthodontic program, an orthodontist violates the standard of care when he refuses to see a patient that has an outstanding account balance. He further supported this testimony by referencing guidelines established by the American Association of Orthodontists which detailed how to properly dismiss a patient. He testified that those guidelines require that in the event "there's nonpayment of a fee, you have to give [the patient] the opportunity to find another orthodontist and you have to be agreeable to transfer the case, you have to provide emergency care during that period of time." The majority concludes that despite this evidence, rescheduling practices are "more appropriately viewed as unprofessional conduct" instead of a violation of the standard of care. Yet, as the reviewing court, we are only to determine whether the Board's decision had a rational basis in evidence. *See In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981). With that in mind, I note that "standard of care" is very generally defined as "the degree of care that a reasonable person should exercise." Black's Law Dictionary 1413 (7th ed. 1999). Even under this general definition, I believe that the evidence presented to the Board establishes that a reasonable orthodontist would not have refused treatment to Wolfe for non-payment after having initiated an irreversible orthodontic program. Additionally, the majority concludes that Wolfe was no longer a patient of record since Wolfe's complaint alleged that she had terminated Dr. Watkins' services prior to his refusal to treat her due to an outstanding account balance. However, the Board did not make that finding. The evidence actually established that even if Wolfe believed she had "terminated" Dr. Watkins' services, she continued to be in need of and request those services to address problems related to her orthodontic program because she had yet to find another orthodontist or be formally dis-

missed by Dr. Watkins. Thus, when the Board interpreted the evidence in light of its experience, technical competence, and specialized knowledge, the Board had a rational basis to conclude that Dr. Watkins' rescheduling practices violated the applicable standard of care thereby resulting in negligence.

John Matt Casto

Casto's patient records were offered into evidence and detailed the orthodontic treatment he had received while under Dr. Watkins' care for over two years. Additional evidence indicated that Dr. Watkins alleged his treatment of Casto was behind schedule due to the child's poor compliance with treatment instructions. Dr. Trentini testified that it was apparent Casto had not been practicing proper dental hygiene when the child first visited him after ending treatment with Dr. Watkins and that failure to do so could prolong treatment. Nevertheless, Dr. Trentini still opined that the child's progress was behind schedule and that he would not have treated Casto as Dr. Watkins did. When faced with conflicting evidence, the Board is responsible for determining the credibility of witnesses and resolving conflicts in their testimony. *In re Braun*, 352 N.C. 327, 332, 531 S.E.2d 213, 217 (2000). Therefore, the Board was entitled to use its experience and expertise to interpret the evidence and the patient records to ultimately conclude Dr. Watkins' treatment plan for Casto breached the standard of care by failing to timely address Casto's orthodontic needs.

Harry Conrad Naico

With respect to Naico, his original diagnostic records compiled by Dr. Watkins were also presented into evidence. Dr. Kaley observed these records and personally evaluated Naico. On direct examination, Dr. Kaley admitted that Naico's case was extremely difficult to correct and that the child may have been non-compliant with treatment instructions. Despite these problems however, he opined that Dr. Watkins violated the standard of care for orthodontists by failing to adequately diagnose and formulate an appropriate treatment plan to correct Naico's orthodontic condition in a timely manner. Dr. Kaley based his opinion on Dr. Watkins' (1) failure to have adequate treatment records, (2) poor quality models, and (3) not presenting surgery as an option to Naico at the outset to correct Naico's orthodontic problems. Further, Dr. Kaley testified that he did not believe the treatment plan Dr. Watkins had developed for Naico would have addressed the child's orthodontic needs regardless of time.

Additionally, Dr. Kaley testified Dr. Watkins' failure to take intraoral or facial photographs violated the standard of care for orthodontists. He testified that all other dentists he knew used intraoral photographs. He further testified that between 1996 and 1999, licensed dentists in North Carolina were required to take such photographs prior to initiating orthodontic treatment. On cross-examination, Dr. Kaley conceded that there was a learned treatise that did not indicate intraoral and facial photographs were necessary for minimal diagnostic records for an orthodontic patient. Nevertheless, as stated earlier, the Board and not this Court is responsible for resolving such a conflict. *See id.*

Accordingly, the Board's experience, technical competence, and specialized knowledge allowed that governing body to interpret the evidence presented regarding Dr. Watkins' treatment of Naico and determine that Dr. Watkins violated the standard of care by failing to (1) develop an appropriate treatment plan to timely address Naico's orthodontic needs, and (2) take the necessary photographs prior to initiating that plan.

Finally, despite the Board consisting of all dentists and no orthodontists, it still possessed the necessary expertise to determine the standard of care for orthodontists. Our Supreme Court has recognized that "[t]he North Carolina State Board of Dental Examiners, like all other professional licensing boards, was created to establish and enforce a uniform statewide minimum level of competency among its licensees." *In re Dailey v. Board of Dental Examiners*, 309 N.C. 710, 723, 309 S.E.2d 219, 226 (1983). Orthodontists, each of whom are trained in dentistry and have a dental license, also have their level of competency governed by this Board especially since there are no separate licensing requirements for orthodontists in this state. Therefore, under *Leahy* the Board was empowered to decide the standard of care for orthodontists and which type of conduct constitutes a breach of that standard.

In conclusion, I believe this Court is able to determine the validity of the Board's decision to suspend Dr. Watkins' dental license based upon the evidence in the record. Thus, for the aforementioned reasons, I would reverse the trial court's decision.

KELLY NOWELL SCOTT, PLAINTIFF-APPELLEE v. ROBERT EARL SCOTT, DEFENDANT-APPELLANT

No. COA02-508

(Filed 6 May 2003)

1. Child Support, Custody, and Visitation— modification of custody—substantial change in circumstances—child abuse

The trial court did not abuse its discretion in a child custody modification case by failing to find a substantial change in circumstances affecting the welfare of the parties' child based on the evidence showing the child did very well while he was with defendant father and by failing to make detailed findings regarding alleged child abuse arising out of an incident in which plaintiff mother spanked the child with a belt, because: (1) contrary to defendant's assertion, *Pritchard v. Pritchard*, 45 N.C. App. 189 (1980), does not mandate that a trial court must find a substantial change in circumstances, and this case is factually distinguishable when plaintiff and defendant resided in the same geographical area and the child continued to attend the same school and church; (2) the trial court found that defendant has a history of lacking the ability to control his temper when upset by his wife or children, and that defendant has verbally harassed plaintiff regarding custody matters; (3) there was evidence that the spanking did not inflict serious injury, defendant was aware of the spanking and did not attempt to seek medical attention for the child, and there was no evidence that the spanking left more than temporary red marks; and (4) even assuming arguendo that the spanking by plaintiff was abuse, the trial court specifically found that plaintiff's discipline of the child has been appropriate although the child has frequently challenged plaintiff's authority by physical and verbal intimidation.

2. Child Support, Custody, and Visitation— modification of custody—failure to hear testimony of child

Although defendant father contends the trial court erred in a child custody modification case by failing to hear testimony of the child and by allowing hearsay testimony to be admitted regarding what both parties believed the child would say, this assignment of error is overruled because: (1) the trial court never denied defendant the right to call the child as a witness but instead elected to hear from the child after hearing all other evi-

dence, and defendant failed to call the child to testify upon the close of all the evidence; and (2) defendant did not object to the hearsay testimony at trial, and he has not demonstrated on appeal how the admission of the hearsay testimony prejudiced him.

3. Appeal and Error— preservation of issues—motion in limine—failure to object at trial

Although defendant father contends the trial court erred in a child custody modification case by denying his motion in limine to exclude any evidence of events occurring prior to the 18 October 1999 order including evidence pertaining to instances of defendant's corporal punishment of the child prior to 23 September 1998, this assignment of error is overruled because: (1) defendant failed to object to the introduction of the evidence; and (2) 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.

4. Contempt— civil—child custody order

The trial court erred in a child custody modification case by holding defendant father in civil contempt of the parties' 18 October 1999 consent order, because: (1) defendant's actions preventing plaintiff mother from entering her vehicle and his abusive language in the presence of the children do not constitute a violation of the consent order provisions upon which plaintiff relies; and (2) the conditions in the order do not clearly specify what defendant can and cannot do in order to purge himself of the civil contempt.

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

Appeal by defendant from judgment entered 25 July 2001 by Judge Paul G. Gessner in Wake County District Court. Heard in the Court of Appeals 12 February 2003.

J. Michael Weeks for plaintiff-appellee.

The Sandlin Law Firm, by Deborah Sandlin and John P. McNeil, for defendant-appellant.

LEVINSON, Judge.

I. BACKGROUND

On 18 October 1999, the trial court incorporated the parties' separation agreement into a consent order (the "Consent Order") for child custody and support. On 10 May 2000, plaintiff filed motions seeking, *inter alia*, a show cause order for contempt. Defendant then filed a motion to modify custody of one of the parties' minor children (the "Child"). In conjunction with that motion, defendant also filed a motion *in limine* requesting the trial court to limit the evidence presented to only those events occurring after the 18 October 1999 court order. Subsequently, the matter was heard, and the trial court denied defendant's motion *in limine* and motion to modify custody, and found defendant in civil contempt. Defendant appeals. We affirm the trial court's denial of defendant's motions but reverse its finding of civil contempt.

Defendant's evidence tended to show: In March or April 2000, the Child began expressing a desire to live with defendant and his wife, and he came to live with them in the summer of 2000. In October of 2000, the parties entered into a parenting agreement whereby the Child lived with defendant from 1 November 2000 until 28 February 2001. Before coming to live with defendant, the Child had been suspended from school for fighting. He had also received poor marks on his report card. On 2 May 2000, the parties argued at a ballfield about plaintiff spanking the Child.

Plaintiff's evidence tended to show: The Child is healthy and has adapted well both socially and academically. Although he has had some behavioral problems, plaintiff has enjoyed the support of her immediate family in raising the Child. The Child has used his behavioral problems to gain favor with defendant. Additionally, defendant has, at times, been unable to control his temper, made intimidating phone calls to plaintiff, and verbally abused plaintiff at a baseball game where the Child was present.

II. CUSTODY MODIFICATION

A. Change in Circumstances

[1] Defendant first contends the trial court abused its discretion in failing to find a substantial change in circumstances affecting the welfare of the Child. He argues the evidence supports a finding contrary to that of the trial court.

In child custody cases, the trial court has broad discretion, and it will not be upset absent a clear showing of an abuse of that discretion. *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982); *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97-98 (2000). However, the trial court's findings of fact must be supported by substantial evidence, and its conclusions of law are reviewable *de novo*. *Browning*, 136 N.C. App. at 423, 524 S.E.2d at 98.

The party moving for modification of an existing custody order must show there has been a substantial change in circumstances affecting the welfare of the child. N.C.G.S. § 50-13.7 (2001); *see also Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (discussing salutary and adverse effects upon a child). "If a substantial change in circumstances is shown, [then] the trial court must consider whether modification of the custody order would be in the best interest of the child." *Kowalick v. Kowalick*, 129 N.C. App. 781, 785, 501 S.E.2d 671, 674 (1998). We review defendant's assignments of error in accordance with these standards.

The trial court found in pertinent part:

28. The child . . . is very intelligent and does very well in school.

29. From time to time, [the Child] has had behavior problems at home and in school, some of which have resulted in his being disciplined by in school detention and suspension from school.

30. The Defendant has a history of lacking the ability to control his temper when upset by his wife or children.

31. The Plaintiff had enjoyed the support of her immediate family in rearing her children.

32. The Plaintiff's discipline of [the Child] has been appropriate although he has frequently challenged her authority by physical and verbal intimidation.

33. [The Child] has artfully manipulated his parent's estrangement to gain favor for himself with the Defendant and [his wife].

34. After several intimidating telephone calls made by the Defendant to the Plaintiff on November 28 and 29, 2000, the Plaintiff through her attorney demanded that he not call her anymore.

35. All communication since that date has primarily been through intermediaries or in writing.

36. On May 2, 2000, the Defendant verbally abused the Plaintiff at a baseball game in the presence of the parties' children and refused to allow her to get into her car with the children until Tim Britton intervened.

37. [The Child] has expressed that he would prefer to live with the Defendant father, but this appears to be part of his continuous effort to empower himself in his relationship with the parties.

Defendant contends the trial court should have found a change in circumstances because the evidence shows that the Child "did very well while he was with his father." Specifically, he claims that while in his custody the Child was better able to control his temper, communicated better, and did not need to take his anger management drug, clonodine. Defendant also points to stress and other illnesses resulting from plaintiff's custody of the Child. He essentially argues the Child experienced a social, emotional, and psychological blossoming while in his custody.

In addition to the beneficial changes in the Child's circumstances while in his custody, defendant contends plaintiff abused the Child on two different occasions, spanking him with such force as to leave red marks. Defendant also contends plaintiff emotionally abused the Child by enrolling him in an alternative school designed to educate troubled children.

Defendant relies heavily on this Court's opinion in *Pritchard v. Pritchard*, 45 N.C. App. 189, 262 S.E.2d 836 (1980) (*overruled on other grounds by Pulliam*, 348 N.C. 616, 501 S.E.2d 898). In *Pritchard*, the mother sent the child overseas on several occasions to reside with the father. *Id.* at 190, 262 S.E.2d at 837. As in the present case, there was evidence that the child had adapted and was performing well in school while in the care of the father, who sought a modification of custody. *Id.* at 191, 262 S.E.2d at 837. This Court affirmed the trial court's ruling that there was a substantial change in circumstances. *Id.*

Contary to defendant's argument, *Pritchard* does not mandate, under its facts or the current facts, that a trial court *must* find a substantial change in circumstances. Rather, *Pritchard* held the trial

court did not abuse its discretion in finding a substantial change in circumstances. *Id.* at 195-96, 262 S.E.2d at 840.

Furthermore, this case is factually distinguishable from *Pritchard*. Here, the plaintiff and defendant resided in the same geographical area and the Child continued to attend the same school and church. Additionally, the trial court found that "[d]efendant has a history of lacking the ability to control his temper when upset by his wife or children," and that defendant has verbally harassed plaintiff regarding custody matters.

Next, defendant argues the trial court erred in failing to make detailed findings regarding child abuse because there was "evidence presented at trial [that] conclusively shows" plaintiff "spanked [the Child] with such force as to leave red markings and welts across his back and buttocks." *See Dixon v. Dixon*, 67 N.C. App. 73, 312 S.E.2d 669 (1984) (holding trial court is obligated to resolve any evidence of child abuse in its findings of facts). In *Dixon*, there was evidence that the defendant abused the child by, among other things, jabbing him with a diaper pin. *Id.* at 78, 312 S.E.2d at 672. Multiple witnesses, including two former babysitters, defendant's own parents, and the Department of Social Services, substantiated the plaintiff's claims of child abuse. *Id.*

Here, the trial court heard testimony concerning an incident in which plaintiff spanked the Child with a belt. Defendant's evidence tended to show the spanking left red marks on the Child; however, there is also evidence that the spanking did not inflict serious injury. Defendant, when called by plaintiff to her house just after the spanking, took pictures of the Child's body. Although he was manifestly aware of the spanking, he made no attempt to seek medical attention for the Child, and there was no evidence that the spanking left more than temporary red marks. We are unpersuaded the evidence at trial "conclusively" showed abuse. *See* N.C.G.S. § 7B-101 (2001); *see also In re Mickle*, 84 N.C. App. 559, 353 S.E.2d 232 (1987) (holding father had not abused his daughter where on one occasion he whipped her with a belt and on another with a switch, in each instance leaving temporary marks and bruises on her buttocks and thighs).

Even assuming *arguendo* the spanking by plaintiff was abuse, the record reflects the trial court considered the relevant evidence and made findings of fact on this issue. *See Dixon*, 67 N.C. App. at 78, 312 S.E.2d at 673. The trial court specifically found "the Plaintiff's disci-

pline of [the Child] has been appropriate although he has frequently challenged her authority by physical and verbal intimidation."

Defendant presented his evidence to the trial court for consideration, and it, when sitting as the fact finder, is the sole judge of the credibility and weight to be given to the evidence. *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986). The trial court's findings are supported by competent record evidence. They are, therefore, binding on appellate review. *King v. Demo*, 40 N.C. App. 661, 668, 253 S.E.2d 616, 621 (1979). It is not the role of this Court to substitute its judgment for that of the trial court. Accordingly, we hold the trial court did not abuse its discretion in finding there had not been a substantial change in circumstances. Defendant's argument is overruled.

B. The Child's Testimony

[2] Still arguing the trial court erred in failing to find a substantial change in circumstances, defendant next assigns as error the trial court's failure to hear testimony of the Child. The Child was subpoenaed to testify, and defendant attempted to call him as his first witness. The trial court declined to hear the Child's testimony at that time but stated:

> Well, I will be as perfectly flexible as I can on that. And in the event that you elect to offer the child, I will hear from you all at the time, but my personal preference is to do everything, hear all the evidence from everybody involved. And then if you feel [it] necessary, then we can do it [in chambers]. And I can do it after school is out so he doesn't have to miss any school, or whatever you all want to do is fine with me.
>
> I can hold off and bring him in—I mean, if you feel it's necessary to put the child on—I mean, you can elect one way or the other depending on how the evidence goes through the course of the hearing, and you may decide not to do it. But in the event—if you do decide[] to do it, I will do it in chambers after hours, school hours, after all the adults have testified.

After defendant's first witness was excused, counsel made a second attempt to call the Child; however, the trial court again stopped defendant and restated that it would hear from the Child at the end of all other evidence. The trial court added, "[a]nd I don't like to generally [sic] talk to the kids until I have heard from all the adults. That's

what I said earlier. Let's get all the adults done and then tomorrow if you want to talk to him, I will talk to him."

Throughout the remainder of the trial, both parties allowed witnesses to testify as to matters the Child had said without objection. Presumably, both parties believed the Child would testify and therefore allowed the hearsay testimony to be admitted without objection. *See Best v. Best*, 81 N.C. App. 337, 344 S.E.2d 363 (1986) (*overruled on other grounds by Petersen v. Rogers* 337 N.C. 392, 445 S.E.2d 901 (1994)). Upon the close of all the evidence, defendant did not call the Child to testify. Specifically, the following exchange took place between Ms. Sandlin, defendant's counsel, and the trial court at the end of defendant's presentation of evidence:

The Court: Further evidence?

Ms. Sandlin: No further evidence, Your Honor.

(Defendant rests.)

Defendant now argues the trial court erred because it denied him the right to call the Child "without first making an independent inquiry into his" competency to testify. However, this argument is without merit. The trial court never denied defendant the right to call the Child as a witness. Rather, it elected to hear from the Child after hearing all other evidence. It is a long standing rule in North Carolina that the order of the presentation of witnesses is within the sound discretion of the trial court. *North Carolina State Bar v. Du Mont*, 52 N.C. App. 1, 23, 277 S.E.2d 827, 840 (1981); *Sheppard v. Sheppard*, 38 N.C. App. 712, 715, 248 S.E.2d 871, 874 (1978).

Furthermore, defendant's argument that the trial court erred in allowing the hearsay evidence also fails. Even over proper objection, the mere admission of incompetent hearsay testimony by the trial court does not mandate reversal. *In the Matter of X. Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000). "Rather, the appellant must also show that the incompetent evidence caused some prejudice." *Best*, 81 N.C. App. at 341, 344 S.E.2d at 366. In the instant case, defendant did not object to the hearsay testimony at trial and he has not demonstrated on appeal how the admission of the hearsay testimony prejudiced him.[1] This assignment of error is overruled.

1. It appears from the record that defendant testified and the trial court recognized that "[the Child] has expressed that he would prefer to live with the Defendant father. . . ."

III. MOTION *IN LIMINE*

[3] Third, defendant contends the trial court erred in denying his motion *in limine* to exclude any evidence of events occurring prior to the 18 October 1999 order. Specifically, defendant objects to the trial court's consideration of evidence pertaining to instances of his corporal punishment of the Child, all of which occurred prior to 23 September 1998.

During trial, defendant failed to object to the introduction of the evidence now assigned as error. " '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, 845-46, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)). Thus, defendant's failure to object at trial negates his right to appellate review on this issue.

IV. CONTEMPT

[4] Finally, defendant argues the trial court erred in holding him in civil contempt of the 18 October 1999 Consent Order for behavior occurring 2 May 2000. He argues, *inter alia*, (1) the Consent Order was vague, (2) the trial court failed to make necessary findings, including willful disobedience, and (3) his actions were justified and taken in good faith, negating any arguably contemptuous actions on his part.

The Motion for Show Cause Order for Contempt states:

7. The Defendant interfered with the Plaintiff's custody of [the children] by following the Plaintiff to her car as she attempted to leave the ball game and accusing her in the presence of [the Child] that all of [the Child's] problems were her responsibility.

8. When Plaintiff attempted to leave the game with her sons in the car, the Defendant further interfered with her custody of the children by opening the car door and telling his [other] son . . . to leave [the Child] alone and quit telling on him.

9. The Defendant then directed his hostility toward the Plaintiff in the presence of the children and prevented her from driving away from the ball game causing both of his sons and the Plaintiff to become very upset.

Based on these allegations, plaintiff presumably relies on one or more of the following provisions in the Consent Order:

> Husband and Wife recognize and appreciate the need for their Children to continue to have a loving and harmonious relationship with both of them. With this philosophy as the foundation for the provisions in this Agreement for the custody of the Children, Husband and Wife enter into this Agreement with the same spirit of co-operation regarding the care of their Children as has been their practice to date, but with the understanding that the provisions in this Agreement for custody and visitation are necessary in the event Husband and Wife, for whatever reason, can no longer co-operate on those matters involving their Children.
>
> A. Custody of Children.
>
> The Children shall be in the exclusive care, custody, and control of the Wife subject to Husband's right of visitation as set forth in this Agreement.
>
> B. Husband's Visitations.
>
> The Husband shall have the exclusive right to visit with the Children according to the following. . . .
>
> . . . .
>
> I. Parents' Communications About and With Children.
>
> The Parties shall confer with each other on all important matters pertaining to the Children's health, welfare and education with a view to arriving at a harmonious policy to promote the best interest of the Children. Neither party shall do anything to estrange either one or both of the Children from the other party, and both parties will endeavor to raise the Children with love and affection for each party. The parties agree to confer with each other about gifts for the Children on birthdays and Christmas. Neither party will give the Children a gift, provide entertainment or provide for any privilege with a value of greater than $30.00 per child without the consent of the other party.

Not unlike other custody arrangements, this Consent Order includes a plethora of other conditions dealing with pick-up and

drop-off of the children, holiday visitation, and travel out-of-state.[2] Plaintiff essentially alleges, and the trial court found, that defendant "interfered with her custody" of the children by (1) verbally abusing her in the presence of the children, and (2) obstructing her entry into her car where the children were seated until a third party assisted.[3] Plaintiff contends this behavior, if supported by the evidence, amounts to civil contempt.

" 'In contempt proceedings[,] the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment.' " *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996) (quoting *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978)). Furthermore, the credibility of the witnesses is within the trial court's purview. *Id.* at 527, 471 S.E.2d at 420.

Concerning defendant's argument that the Consent Order was vague, we have strained to identify the provision(s) under which defendant was held in contempt. Indeed, this is not self-evident, and nothing in the Motion for Show Cause Order for Contempt, Order to Appear and Show Cause, or the final order finding defendant in contempt clarifies this matter.

Defendant relies on *Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999), to support his contention that the Consent Order was vague and therefore unenforceable through contempt. Defendant's reliance on *Cox*, however, is misplaced. The Consent Order here, which sets forth various custody and visitation provisions, is not at all vague. It manifestly vests custody in plaintiff, while awarding visitation rights to defendant.

With respect to contempt, the custody provisions upon which plaintiff presumably relies do not, in and of themselves, place any affirmative duty on defendant. Nor do they specifically prohibit him from taking any particular actions. Rather, the provisions, in large measure, declare and help define the plaintiff's custody rights.[4]

2. The custody and visitation provisions neither prohibit the parents from being in each other's presence during exchanges or any other times, nor precludes them from any particular locations, such as the ballfield where the events giving rise to the motion for contempt occurred.

3. Appellee does not argue that merely because the Consent Order granted "*exclusive* care, custody and control" to plaintiff on 2 May 2000, this gives rise to a valid motion and order of civil contempt on the facts of this case. (emphasis added).

4. The dissent accurately points out the Consent Order prohibits the parties from doing anything to "estrange either one or both of them from the other . . . ." The trial

Assuming, *arguendo*, that a pattern of similar conduct like that alleged herein can constitute "interference" and an actionable violation of an award of custody, this is not what is present here.[5] Finally, we note the plaintiff has pointed to no authority, and we have found none, that would allow the contempt order of the trial court to withstand defendant's challenges. Accordingly, we hold that defendant's actions preventing plaintiff from entering her vehicle and his abusive language in the presence of the children do not constitute a violation of the Consent Order provisions upon which plaintiff relies.

Additionally, defendant's vagueness argument has merit with respect to the trial court's *disposition*, wherein it ordered, in relevant part:

> (F) The Defendant is in civil contempt of this Court for his actions and conduct toward the Plaintiff and the children on May 2, 2000;
>
> (G) The Defendant shall be imprisoned in the Wake County Jail for civil contempt of this Court for thirty (30) days from the date of the filing of this Order; provided, however, the Defendant may postpone his imprisonment indefinitely by (1) enrolling in a Controlled Anger Program approved by this Court on or before August 1, 2001 and thereafter successfully completing the Program; *(2) by not interfering with the Plaintiff's custody of the minor children and* (3) by not threatening, abusing, harassing or *interfering with the Plaintiff or the Plaintiff's custody of the minor children*[.]

(emphasis added).

The purpose of civil contempt is to coerce the defendant to comply with a court order, not to punish him. *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984). "A court order holding a person in civil contempt must specify how the person may purge himself or herself of the contempt." *Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65; *see* N.C.G.S. § 5A-22(a) (2001). A defendant's failure to comply

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court, however, clearly rests its decision on "interference" with plaintiff's "custody." There are no findings that the actions of defendant "estranged" the children from their mother. Of course, under appropriate circumstances and with a proper showing, actions that estrange the children from the other parent might support an order of contempt.

5. The trial court found "Defendant has a history of lacking the ability to control his temper when upset by his wife or children." Any events that occurred prior to the entry of the Consent Order cannot support contempt.

with a court order cannot be punished by contempt proceedings unless the disobedience is willful. *Ross v. Voiers*, 127 N.C. App. 415, 418, 490 S.E.2d 244, 246 (1997). Then, following from this concept, for civil contempt to be applicable, the defendant must have the present ability to comply with the court order. *See Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65. Moreover, our Courts have required the trial court to make a specific finding as to the defendant's ability to comply during the period in which he was in default. *Id.*; *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

Assuming, *arguendo*, that ordering defendant into an approved "Controlled Anger Program" comports with the ability of civil contemners to purge themselves, *Bethea*, 70 N.C. App. at 570, 320 S.E.2d at 693, and is related to coercing compliance with the previous order of the court, *see Cox*, 133 N.C. App. 221, 515 S.E.2d 61, the two requirements of the court's disposition order concerning *interference* are impermissibly vague. Like the order in *Cox*, these conditions do "not clearly specify what the defendant can and cannot do . . . in order to purge [himself] of the civil contempt." *Id.* at 226, 515 S.E.2d at 65.[6]

Though behavior like that exhibited by defendant cannot be condoned, we nevertheless hold it cannot sustain a finding of civil contempt on the facts of this case. We need not address appellant's remaining arguments concerning the order of civil contempt.

The trial court's order denying defendant's motion for modification of custody is affirmed. The order of civil contempt is reversed.

Affirmed in part, reversed in part, and remanded.

Judge WYNN concurs.

Judge TIMMONS-GOODSON concurs in part, dissenting in part.

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

I agree with the majority that the trial court properly denied defendant's motions *in limine* and to modify custody. I disagree,

6. In her dissent, my colleague acknowledges the term "interfere with" is "open to interpretation" but would nevertheless hold this does not make the order impermissibly vague. On the contrary, it is wholly unclear what conduct "interfere with Plaintiff's custody" and/or "interfere with Plaintiff" does and does not include.

however, with the majority's conclusion that defendant's behavior did not constitute contempt as found by the trial court, and that the disposition by the trial court was impermissibly vague. I therefore dissent to the majority opinion in part.

The majority concludes that the custody provisions contained in the consent order between the parties place no affirmative duty on defendant. I disagree. The consent order places "exclusive care, custody, and control" of the children with plaintiff. The consent order further mandates that "neither party shall do anything to estrange either one or both of the children from the other party, and both parties will endeavor to raise the children with love and affection for each party." The failure of either party to abide by the terms of the consent order was expressly subject to the contempt powers of the court.

As noted by the majority, this Court's role on appeal of a contempt order is limited to a review of the evidence and findings "only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978). The evidence before the trial court tended to show, and the trial court so found, that on 2 May 2000, defendant "verbally abused the Plaintiff at a baseball game in the presence of the parties' children and refused to allow her to get into her car with the children until [a third individual] intervened." I conclude that this evidence adequately supports the trial court's conclusion that defendant violated the terms of the consent order.

I further disagree with the majority's conclusion that the trial court's disposition was impermissibly vague. The trial court declared that, in order to purge himself of the contempt order, defendant could enroll in and complete an anger management class. The trial court further ordered defendant not to threaten, abuse, harass or interfere with the plaintiff or her custody of the children. Although the term "interfere with" is admittedly somewhat open to interpretation, the remaining conditions are perfectly plain, and the order as a whole is not so impermissibly vague as to require reversal. *Compare Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65 (reversing as impermissibly vague an order of contempt requiring the defendant not to "punish either of the minor children in any manner that is stressful, abusive, or detrimental to that child"). I would therefore affirm the order of the trial court in its entirety.

OLIVER WRIGHT LEARY, PLAINTIFF v. N.C. FOREST PRODUCTS, INC., CANAL WOOD CORPORATION, MOSES LASITTER, JOSEPH WETHERINGTON, CHRISTOPHER L. WETHERINGTON, TAMMY WETHERINGTON, MAMIE E. LEARY, T. BARBARA LEARY, MAMIE RUTH LEARY CLAGGETT, ELMER LEE LEARY, SR., PATTIE LEARY, LINWOOD RICHARD LEARY, SR., SANDRA LEARY GRISSOM, LAURA M. LEARY ELLIOTT, ALLEN R. ELLIOTT, SHIRLEY LEARY STATEN, HAROLD J.R. LEARY, RICHARD SMITH, ELMER LEE LEARY, JR., PATRICK L. LEARY, KENNETH LEARY, ARLENE P. SMITH, AND THE LAW FIRM OF LEE, HANCOCK, LASITTER & KING, DEFENDANTS

No. COA02-599

(Filed 6 May 2003)

1. Enforcement of Judgments— execution sale—collateral attack on confirmation—faulty notice of sale

A judgment debtor could not file a separate lawsuit to collaterally attack an order confirming an execution sale based on errors in the conduct of the sale, and the action was correctly dismissed for failure to state a claim upon which relief could be granted. Jurisdiction was not disputed and continued even if plaintiff did not receive notice of the sale; therefore, the order confirming the sale was not void and plaintiff could not attack it in a separate lawsuit.

2. Fraud— allegation—not sufficiently specific

A judgment debtor was not allowed to attack an execution sale as fraudulent in an independent action where his conclusory allegations did not supply the necessary particularity.

3. Attorneys— malpractice—third party

A claim of legal malpractice based upon non-client third-party liability arising from an execution sale was correctly dismissed for failure to state a claim upon which relief could be granted. The complaint contained no allegation that the law firm's representation of its client induced any action by plaintiff in reliance on the law firm's conduct.

Judge BRYANT concurring in part and dissenting in part.

Appeal by plaintiff from order filed 30 July 2001 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 21 January 2003.

Oliver W. Leary, plaintiff-appellant pro se.

Lee, Hancock and Lasitter, P.A., by Moses D. Lasitter, for defendants-appellees N.C. Forest Products, Inc., Moses Lasitter, Joseph Wetherington, Christopher L. Wetherington, Tammy Wetherington, and Lee, Hancock, Lasitter & King.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for defendant-appellee Canal Wood Corporation.

Gregory K. James, P.A., by David C. Sutton, for defendants-appellees T. Barbara Leary, Mamie Ruth Leary Claggett, Elmer Lee Leary, Sr. and wife, Pattie Leary, Linwood Richard Leary, Sr., Sandra Leary Grissom, Laura M. Leary Elliott, Allen R. Elliott, Shirley Leary Staten, Harold J.R. Leary, Elmer Leary, Jr., Patrick L. Leary, Kenneth Leary, Richard Smith and wife Arlene P. Smith and Mamie E. Leary.

GEER, Judge.

Oliver Wright Leary appeals an order filed 30 July 2001 dismissing his complaint for failure to state a claim upon which relief can be granted. This appeal primarily involves the question whether a judgment debtor may file a separate lawsuit to collaterally attack an order confirming an execution sale based on errors in the conduct of that sale. We hold that he cannot. Any challenge of the judgment debtor to the confirmation order should have been by appeal from the order or by a motion to set aside the order filed in the original lawsuit.

On 4 November 1991, defendant N.C. Forest Products, Inc. ("N.C. Forest") obtained a judgment in case number 89 CVD 1966 against Oliver Wright Leary, the plaintiff in this case. Mr. Leary apparently did not appeal and does not otherwise challenge the validity of that judgment. On 14 May 1992, in order to satisfy that judgment, the Pitt County sheriff held a sale of Mr. Leary's 1/13 interest in two tracts of land pursuant to a writ of execution issued on 23 January 1992. At that sale, there were no bidders. The sheriff filed a Report regarding the sale on 15 May 1992.

On 30 April 1993, the deputy clerk of court issued a second writ of execution to the sheriff, stating that $24,275.00 was due and commanding the sheriff to satisfy the judgment out of the personal property of the defendant or, if sufficient personal property could not be found, then out of real property belonging to the defendant. The writ of execution noted that "debtor has waived exemptions."

In a Report of Sale of Real Property filed 14 June 1993, the sheriff stated that "after due and legal notice," Mr. Leary's 1/13 interest was sold at public auction on 14 June 1993 to Christopher L. Wetherington for $100.00. According to plaintiff's complaint in this case, Mr. Wetherington was the Assistant Secretary for the judgment creditor N.C. Forest. On 21 July 1993, the assistant clerk of court filed an order directing that the sale be confirmed and that the sheriff deliver to the purchaser a good and sufficient deed.

On 6 July 1993, the sheriff executed a deed conveying Mr. Leary's 1/13 interest to Mr. Wetherington. The deed recited that the sheriff had sold the property at public auction "after having first given notice of the time and place of such sale, and advertised the same according to law."

On 22 April 1996, Mr. Wetherington and his wife executed a quitclaim deed of the 1/13 interest to N.C. Forest. A year later, on 17 June 1997, N.C. Forest in turn executed a quitclaim deed to defendants Patrick L. Leary, Elmer L. Leary, Jr., and Kenneth L. Leary. On 26 November 1998, the Leary defendants[1] then executed a timber deed granting Canal Wood Corporation ("Canal") the timber rights on the property for 2½ years.

Mr. Leary filed this action four years later on 10 October 2000 in Pitt County Superior Court against N.C. Forest, Canal, Joseph Wetherington, Christopher L. Wetherington, Tammy Wetherington, the Leary defendants, the law firm of Lee, Hancock, Lasitter and King (the "law firm"), and Moses Lasitter.

The complaint alleges (1) a claim against N.C. Forest and arguably the Wetheringtons based on "a fraudulent sale in the Sheriff's manner of handling" the execution sale; (2) trespass against Canal for removing timber without plaintiff's consent; (3) malpractice against Moses Lasitter and the law firm for non-client third-party liability; and (4) "promissory" and "equitable" fraud against the Leary defendants for executing the timber deed. With the exception of the malpractice claim, each cause of action is derivative of plaintiff's claim that the execution sale was invalid.

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1. "The Leary defendants" include plaintiff's mother and siblings: Mamie E. Leary, T. Barbara Leary, Mamie Ruth Leary Claggett, Elmer Lee Leary, Sr., Pattie Leary, Linwood Richard Leary, Sr., Sandra Leary Grissom, Laura M. Leary Elliott, Allen R. Elliott, Shirley Leary Staten, Harold J.R. Leary, Richard Smith, Elmer Lee Leary, Jr., Patrick L. Leary, Kenneth Leary, and Arlene P. Smith.

With respect to his claim against N.C. Forest and the Wetheringtons, plaintiff Leary alleged:

> 39. [A]ll interests and rights to [plaintiff's property] conveyed by [the sheriff] . . . was in violation of "due process" of law.
>
> 40. Defendant, N.C. Forest Products, Inc.'s request presented to [the sheriff] to sale [sic] the property . . . was a fraudulent sale as a result of its grossly low sale price, Hundred Dollars ($100.00), an agent of the "Judgment Creditor" [N.C. Forest Products, Inc.] purchased at the "Sale," the amount of the judgment debt TWENTY FOUR THOUSAND TWO HUNDRED AND SEVENTY-FIVE DOLLARS and NO/100 ($24,275.00) was not bid[] at the "Sale", and "Notice" requirements set forth in G.S. 1-339.54 of the North Carolina General Statutes were not followed.
>
> 41. The plaintiff, Oliver Wright Leary, owns a one-thirteenth (1/13th) undivided remainderman's interest in fee of the property sold . . . by [the sheriff].
>
> 42. Plaintiff alleges [sic] N.C. Forest Products, Inc. "defrauded" [plaintiff] of his one-thirteenth (1/13th) interest . . . by its conduct of "Sale" as fraudulent action as a result of the grossly inadequate sale price, an agent of N.C. Forest Products, Inc[.], son and son's wife purchased at the sale, Christopher Wetherington is the Assistant Secretary for N.C. Forest Products, Inc., and "Notice" requirements set forth in N.C.G.S. 1-339.54 [were] not followed by N.C. Forest Products, Inc.

As to the malpractice claim, plaintiff stated attorney Moses Lasitter and the law firm

> without justification and . . . knowingly committed a fraudulent act by not following the prerequisite procedural steps in their advi[c]e to their client N.C. Forest Products, Inc., requesting a sheriff sale of plaintiff's one-thirteenth . . . property interest and the manner of the sale, therefore, causing injury to [plaintiff].

In his prayer for relief, plaintiff seeks to have the superior court set aside the sheriff's sale; to recover from the Leary defendants and Canal the fair market value of timber and trees removed from the land pursuant to the timber deed and to have that amount trebled as to the Leary defendants and doubled as to Canal; and to recover compensatory and punitive damages from N.C. Forest, the Wetheringtons, and the law firm. In support of his claims, plaintiff attached to the

complaint various documents filed in 89 CVD 1966 and copies of the pertinent deeds. On 6 November 2000, plaintiff also submitted an affidavit by the assistant clerk of court of Pitt County stating that the court file in 89 CVD 1966 had been searched and contained no indication that Mr. Leary had been served with notices "of the attached 'Report of Sale of Real Property' dated May 15, 1992 and June 14, 1993. . . ."

Defendants each moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that: (1) plaintiff was barred from attacking the confirmation order in an independent action; (2) the applicable statutes of limitations had run; (3) the doctrine of laches barred plaintiff's claims; and (4) Canal was a bona fide purchaser for value without notice. The trial court granted defendants' motions by its order filed 30 July 2001.

When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, " '[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). This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

I

[1] Defendants argue that the superior court action was properly dismissed because it represents a collateral attack on the clerk of court's order of confirmation. We agree.

The confirmation order was entered in case 89 CVD 1966. Plaintiff has not argued and nothing in the record suggests that he was not properly served in 89 CVD 1966 or that the district court in any other manner lacked jurisdiction. Further, plaintiff has not challenged the validity of the judgment or the writ of execution, which he incorpo-

rated by reference in his complaint. Because of these undisputed facts, the clerk had authority under N.C. Gen. Stat. § 1-339.67 to confirm any execution sale conducted to satisfy the judgment.

Plaintiff contends that the confirmation order was void because he did not receive notice of the actual judicial sale as specified in N.C. Gen. Stat. § 1-339.54.[2] If, however, a court has jurisdiction over the parties and the subject matter and has authority to enter the type of order at issue, then an order is not void. *Barton v. Sutton*, 152 N.C. App. 706, 708-09, 568 S.E.2d 264, 265-66 (2002) (default judgment not void as to insurance company that did not receive statutorily-required notice because court had personal and subject matter jurisdiction and authority to enter a default judgment); *Hamilton v. Freeman*, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001) ("Where a court has authority to hear and determine the questions in dispute and has control over the parties to the controversy, a judgment issued by the court is not void, even if contrary to law."), *disc. review denied*, 355 N.C. 285, 560 S.E.2d 802, 560 S.E.2d 803 (2002).

Because it is undisputed that the district court had personal and subject matter jurisdiction in 89 CVD 1966 and the clerk had statutory authority to issue confirmation orders, the order in this case was not void. Even if plaintiff failed to receive notice of the execution sale, that fact did not divest the court of jurisdiction. As stated in 47 Am. Jur. 2d *Judicial Sales* § 45, "[T]he validity of a judicial sale rests on the jurisdiction of the court to entertain the action or proceeding in which the sale is ordered or decreed." Because the district court had jurisdiction over the underlying action, jurisdiction existed for purposes of the execution sale and the confirmation order.

Since the confirmation order was not void, plaintiff could not attack it in a separate lawsuit. In *Edwards v. Brown's Cabinets and Millwork, Inc.*, 63 N.C. App. 524, 528, 305 S.E.2d 765, 768 (1983) (quoting N.C. Gen. Stat. § 1-440.1), this Court considered the analogous question of a collateral attack on an attachment of property, which the Court described as " 'a preliminary execution against property.' " In *Edwards*, the plaintiff had, in an independent action, attacked the attachment of property for satisfaction of a judgment against her daughter, but, like plaintiff in this case, did not challenge

2. Although Mr. Leary attempted to prove his allegation with an affidavit from the assistant clerk of court, that affidavit merely states that the file does not show that Mr. Leary received copies of the sheriff's reports of the outcomes of the two sales filed on 15 May 1992 and 14 June 1993. The affidavit makes no reference to whether or not Mr. Leary received notice in advance of the sale.

the first court's jurisdiction or the judgment rendered in that court. This Court held that if a trial court has jurisdiction to render a judgment, then orders resulting from ancillary proceedings may not be collaterally attacked:

> A void judgment may be attacked directly or collaterally by any party adversely affected thereby. However, the court in [the original proceeding] had personal jurisdiction and the judgment therein is valid notwithstanding the validity of the attachment. Where the defect complained of is contrary to the course and practice of the court but is non-jurisdictional, the judgment is irregular and is voidable, but not void. Such a judgment is binding on the parties until corrected or vacated in the proper manner.

Id. at 529-30, 305 S.E.2d at 769 (citations omitted). According to *Edwards*, the proper method of attack for a non-jurisdictional procedural defect in an ancillary proceeding is "a motion in the cause." *Id.* at 530, 305 S.E.2d at 769. This rule applies equally to procedural defects in execution sales such as plaintiff alleges in this case.

Indeed, the North Carolina Supreme Court has repeatedly held that challenges to judicial sales for inadequate notice cannot be made collaterally. In *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977), property was sold without proper notice of the execution sale to the defendant's estate. The Supreme Court held that such a claim "was properly brought before the Superior Court in a motion in the cause, not an independent action." *Id.* at 701, 235 S.E.2d at 172. Likewise, the Court held in *Williams v. Charles F. Dunn & Sons Co.*, 163 N.C. 206, 212, 79 S.E. 512, 514 (1913), that when a judgment creditor purchases at an execution sale to which the judgment debtor has received inadequate notice, "the sale may be set aside at the instance of the defendant in the execution by a direct proceeding." The Court stressed that "an execution sale cannot be collaterally avoided because real estate was sold without first levying upon personalty, nor because of irregularities *or deficiencies in the advertisements*, nor for defects in the levy . . . ." *Id.* (emphasis added). The Court clarified that "deficiencies in the advertisements" referred both to the general advertisement of the sale and to the notice to the defendant of the sale. *Id. See also Walston v. W.H. Applewhite & Co.*, 237 N.C. 419, 424, 75 S.E.2d 138, 142 (1953) (sale may be set aside for inadequate notice only through a direct proceeding); *Bank of Pinehurst v. Gardner*, 218 N.C. 584, 585-86, 11 S.E.2d 872, 872-73 (1940) (when

judgment debtor did not receive notice of a second judicial sale, he properly filed a motion in the cause for resale of the property).

The dissent cites *Inland Greens HOA, Inc. v. Dallas Harris Real Estate-Construction, Inc.*, 127 N.C. App. 610, 492 S.E.2d 359 (1997) and *Board of Comm'rs of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E.2d 144 (1951) as supporting a collateral attack when there has been a lack of notice. In each case, however, the lack of notice occurred because the individual or entity seeking relief from the judgment was not actually a party to the underlying action—in contrast to Mr. Leary who was the judgment debtor. *Inland Greens*, 127 N.C. App. at 612, 492 S.E.2d at 361; *Bumpass*, 233 N.C. at 195, 63 S.E.2d at 147. Moreover, in neither case did the party make a collateral attack; instead they proceeded by filing a motion in the underlying proceeding, precisely as plaintiff should have done in this case. *See Bumpass*, 233 N.C. at 192, 63 S.E.2d at 145-46 (unserved property owner made a special appearance before the clerk and moved to vacate the order confirming the sale); *Inland Greens*, 127 N.C. App. at 613, 492 S.E.2d at 361 (dismissed party filed Rule 60(b) motion).

[2] Plaintiff has also alleged that the sale was fraudulent. Some decisions have suggested that a judgment acquired by fraud may be challenged collaterally. *See, e.g., Abernethy Land & Finance Co. v. First Sec. Trust Co.*, 213 N.C. 369, 372, 196 S.E. 340, 342 (1938) ("When the ground alleged for setting aside a judgment, [sale] . . . is not based upon fraud the proper remedy is likewise by motion in the cause."). *But see Brown v. Miller*, 63 N.C. App. 694, 697, 306 S.E.2d 502, 504 (1983) (plaintiff could not bring independent action collaterally attacking judicial sale on the grounds of fraud; party was required to make a motion to the clerk in the underlying action or appeal from the clerk's order).

Under Rule 9(b) of the Rules of Civil Procedure, "[i]n all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." Mr. Leary's conclusory allegations do not supply the necessary particularity. *See Harrold v. Dowd*, 149 N.C. App. 777, 782-83, 561 S.E.2d 914, 918 (2002) (under Rule 9(b), plaintiff must, at a minimum, allege time, place, and content of the fraudulent representation, the identity of the person making the representation, and what was obtained as a result of the fraud).

In short, the district court had personal and subject matter jurisdiction when it entered the judgment that was the basis of the execu-

tion sale. Under longstanding Supreme Court precedent, Mr. Leary, as a properly-served defendant, was required to make any challenge to that sale—even if based on inadequate notice—through a motion to the clerk to set aside her confirmation of the sale. Mr. Leary is not permitted to attack that order of confirmation in an independent action.

Defendants also assert that plaintiff's claims are barred by the applicable statutes of limitations and the doctrine of laches. Canal further contends that plaintiff is barred from suing it for trespass because it is a bona fide purchaser for value. Because we hold that plaintiff's claims—with the exception of the malpractice claim—all represent an improper collateral attack on the clerk's order, we need not reach those issues.

II

[3] Plaintiff argues that he sufficiently stated a malpractice claim for non-client third-party liability. We disagree.

In North Carolina, a professional malpractice claim may be based on (1) privity of contract or (2) third-party beneficiary contract liability. *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313 (1980). In cases such as this one, in which the plaintiff alleges neither privity nor that he was a third party beneficiary, this Court has also allowed a claim for negligence if the defendant, by entering into a contract with another party, has " 'place[d] himself in such a relation toward [plaintiff] that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that [plaintiff] will not be injured. ' " *Id.* at 406, 263 S.E.2d at 317 (quoting *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 271, 257 S.E.2d 50, 58 (1979)).

Whether a non-client third party may recover for an attorney's malpractice under this alternative tort theory depends on several factors:

> (1) the extent to which the transaction was intended to affect the [third party]; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the [attorney's] conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

United Leasing, 45 N.C. App. at 406-07, 263 S.E.2d at 318.

As to the first factor, our courts have generally focused on whether the attorney's (or other professional's) conduct, based on a contractual agreement with the attorney's client, was intended or likely to cause a third party to act in reliance on the deficient service performed by the attorney for his client. *See Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl*, 119 N.C. App. 608, 613, 459 S.E.2d 801, 805 (1995) (attorney owed third party duty of care where he furnished a title certificate to the non-client plaintiff for the purpose of inducing the plaintiff to issue a title policy for the benefit of his client), *aff'd in part*, 342 N.C. 887, 467 S.E.2d 241 (1996); *United Leasing*, 45 N.C. App. at 407, 263 S.E.2d at 318 (where the defendant-attorney's letter to the non-client plaintiff indicating there was no lien on the property "was directly intended to affect [the] plaintiff" by "inducing [the] plaintiff to lease the [property]"). *See also Commonwealth Land Title Ins. Co. v. Walker and Romm*, 883 F. Supp. 25, 28 (E.D.N.C.) (duty of care existed where the defendant knew the third-party plaintiff was likely to rely on his certification when it issued its title insurance policies and the plaintiff's reliance on the defendant's representation and the resulting harm to the plaintiff were foreseeable), *aff'd per curiam*, 43 F.3d 1465 (4th Cir. 1994).

In this case, plaintiff alleged Moses Lasitter and the law firm were liable to him for "not following the prerequisite procedural steps in their advi[c]e to their client N.C. Forest Products, Inc." with respect to the sheriff's sale of plaintiff's property interest, thereby causing plaintiff injury. There is no allegation in the complaint that the law firm's representation of its client induced any action on the part of plaintiff in reliance on the law firm's conduct in connection with the execution sale. In the absence of such an allegation, plaintiff has failed to state a claim upon which relief can be granted, and the trial court properly dismissed his claim against the law firm. *RCDI Constr., Inc. v. Spaceplan/Architecture*, 148 F. Supp. 2d 607, 621 (W.D.N.C. 2001) (because there was neither intended nor actual reliance by the third-party plaintiffs on the defendants' conduct, the defendants owed no duty of care to the plaintiffs and thus could not be held liable for any negligence in the rendering of their service), *aff'd per curiam*, 29 Fed. Appx. 120, 2002 U.S. App. LEXIS 640 (4th Cir. 2002).

Affirmed.

Judge WYNN concurs.

Judge BRYANT concurs in part and dissents in part.

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

I fully concur in issue II of the majority opinion upholding the trial court's dismissal of plaintiff's non-client third-party malpractice claim; however, I dissent as to the majority's holding regarding plaintiff's ability to collaterally attack an order that he claims was void for lack of notice.

Defendants initially argue in their briefs to this Court that plaintiff's complaint must fail in its entirety because plaintiff's claims turn on the procedures involved in the sheriff's sale and the setting aside of the clerk's confirmation order and that this order cannot be collaterally attacked. In support of their position, defendants point to *Questor Corp. v. DuBose*, 46 N.C. App. 612, 614, 265 S.E.2d 501, 503 (1980), in which this Court held the plaintiffs could not collaterally attack an execution sale and the clerk's subsequent judgment of confirmation because the only avenue available to the plaintiffs was by either motion in the cause or direct appeal. For the reasons set out below, I believe *Questor* is distinguishable and does not control this case.

A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is found to be invalid. *Watson v. Watson*, 49 N.C. App. 58, 61, 270 S.E.2d 542, 544 (1980). "A void judgment may be attacked directly or collaterally by any party adversely affected thereby." *Edwards v. Brown's Cabinets*, 63 N.C. App. 524, 529, 305 S.E.2d 765, 769 (1983). Hence, a "collateral attack in an independent or subsequent action is a permissible means of seeking relief from a judgment or order which is void on its face for lack of jurisdiction." *Watson v. Ben Griffin Realty and Auction*, 128 N.C. App. 61, 63, 493 S.E.2d 331, 333 (1997); *see Stroupe v. Stroupe*, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981). If the judgment, however, is merely irregular, i.e. voidable, it can only be attacked by a direct appeal or motion in the cause. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987); *Edwards*, 63 N.C. App. at 529-30, 305 S.E.2d at 769 ("[w]here the defect complained of is contrary to the course and practice of the court but is non-jurisdictional, the judgment is irregular and is voidable, but not void[, and s]uch a judgment is binding on the parties until corrected or vacated . . . by a motion in the cause").

The plaintiffs in *Questor* sought to have the execution sale set aside because the defendants "did not pay their bid in cash." *Questor*, 46 N.C. App. at 614, 265 S.E.2d at 503. This alleged defect is not jurisdictional in nature. *See Edwards*, 63 N.C. App. at 529-30, 305 S.E.2d at 769. As the *Questor* confirmation order was therefore voidable at best, this Court properly concluded the plaintiffs were barred from collaterally attacking it. On the other hand, plaintiff in the case *sub judice* based his complaint in part on the absence of any notice to him of the sheriff's sale. Plaintiff states in his complaint that he never received such notice, and the record contains an affidavit by the Clerk of Superior Court indicating a lack of notice to plaintiff. "[O]ur [c]ourts have held that '[n]otice and an opportunity to be heard are prerequisites of jurisdiction . . . , and jurisdiction is a prerequisite of a valid judgment.' " *Inland Greens HOA v. Dallas Harris Real Estate-Constr.*, 127 N.C. App. 610, 613, 492 S.E.2d 359, 361 (1997) (quoting *Commissioners of Roxboro v. Bumpass*, 233 N.C. 190, 195, 63 S.E.2d 144, 147 (1951)). Consequently, as the clerk's confirmation order would be void absent notice to plaintiff, plaintiff was entitled to attack the order either directly, via appeal or motion in the cause, or, as he chose, indirectly, via collateral attack. *See Stroupe*, 301 N.C. at 661, 273 S.E.2d at 438; *Edwards*, 63 N.C. App. at 529-30, 305 S.E.2d at 769.

The majority opinion argues that because the district court had both personal and subject matter jurisdiction to enter the initial judgment in favor of N.C. Forest in 89 CVD 1966 and the clerk of the superior court possesses the general statutory authority to enter a confirmation of sale, the confirmation order in this case cannot be collaterally attacked as void. This argument ignores that due process requires the issuance of a notice of sale to a judgment debtor before his property can be offered for sale. *See* N.C.G.S. § 1-339.54 (2001). Without this procedural step, the clerk did not have the authority in this case to issue a confirmation order consummating the sale. *See* N.C.G.S. § 1-339.67 (2001). I would further note that the factual bases of the cases cited by the majority are distinguishable, *see Henderson County v. Osteen*, 292 N.C. 692, 702-03, 235 S.E.2d 166, 173 (1977) (where the debtor did have notice, and the court consequently acquired jurisdiction, but the debtor subsequently died and the administrator of the estate did not receive additional notice of the tax sale); *Edwards*, 63 N.C. App. at 527-28, 305 S.E.2d at 768 (where the reason for attacking the judgment was on voidable grounds), and the holdings in *Williams v. Dunn*, 163 N.C. 206, 212, 79 S.E. 512, 514 (1913), *Bank v. Gardner*, 218 N.C. 584, 586, 11 S.E.2d 872, 872 (1940),

and *Walston v. Applewhite & Co.*, 237 N.C. 419, 424, 75 S.E.2d 138, 142 (1953) are based on an unsubstantiated statement that the notice requirement in section 1-339.54 is merely directory and not mandatory. Such a premise, however, is contrary to the express language of the statute. *See* N.C.G.S. § 1-339.54 (mandating notice to judgment debtor).

Thus, to the extent the trial court's order dismissing plaintiff's action was based on plaintiff's engagement of a collateral attack on the confirmation order, it should be reversed.

STATE OF NORTH CAROLINA v. DAVID JEROME McCOLLUM

No. COA02-797

(Filed 6 May 2003)

1. **Homicide— second-degree murder—failure to submit lesser-included offense of involuntary manslaughter**

The trial court did not commit plain error in a first-degree murder case in which defendant was convicted of second-degree murder by failing to submit the lesser-included offense of involuntary manslaughter ex mero motu, because: (1) the failure to instruct did not have a probable impact on the jury's finding that defendant was guilty of second-degree murder; and (2) any error is harmless in light of the jury's rejection of voluntary manslaughter and conviction of defendant for second-degree murder since a finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter.

2. **Criminal Law— motion for mistrial—curative instruction**

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial when the jury heard testimony that in a later unrelated case a gun was seized which may have been used at the incident for which defendant was on trial, because: (1) contrary to defendant's arguments, no evidence was presented that defendant had committed another murder in addition to the charge at issue; and (2) the trial court sustained defendant's objections, struck the testimony, gave a curative instruction, and there has been no showing that the jury failed to follow the instructions of the trial court to disregard the testimony.

3. Criminal Law— prosecutor's argument—improper statements

Although defendant contends the trial court abused its discretion in a first-degree murder case by failing to intervene ex mero motu when the State allegedly misstated evidence during closing arguments that defendant walked angrily and stated he had something to take care of, this assignment of error is overruled because: (1) although defendant objected to other statements by the State during closing arguments, defendant failed to object to the language now assigned as error; and (2) the alleged improper statements were not so gross or excessive to compel a holding that the trial court abused its discretion in not correcting them or that defendant is entitled to a new trial.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 26 July 2001 by Judge Jack A. Thompson in Robeson County Superior Court. Heard in the Court of Appeals 25 March 2003.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant.

TYSON, Judge.

David Jerome McCollum ("defendant") appeals from his conviction and sentence for second-degree murder. We find no error.

I. Background

On 27 December 1999, defendant visited the residence of his girlfriend, Kenyatta McNeill ("Kenyatta"). Vander Leach ("Leach") and Bryan Howell were also visiting at the residence and playing video games with Jarode, Kenyatta's and Leach's two-year-old son. Kenyatta's cousin, Phillip McNeill ("Phillip"), and Leach's friend, Tommy Davis, arrived at Kenyatta's house late that afternoon. At approximately 8:00 p.m., Kenyatta went upstairs and fell asleep in her room, leaving the others downstairs. Evidence was presented that Leach and the other men consumed alcohol and marijuana that night.

Defendant arrived at Kenyatta's house later in the evening, went upstairs to Kenyatta's room, and awakened her. Kenyatta would not

accompany defendant to his house. She testified that defendant "got mad. We argued. He thought maybe it was something going on because of who was there." After conversing with defendant for a couple of minutes, Kenyatta laid back down. She testified that she "told him not to go down there and start no trouble" and that she "heard [defendant] cock the gun when he went downstairs." Kenyatta overheard a conversation downstairs followed by a gun shot. She attempted to go downstairs, but Phillip initially stopped her. When Kenyatta arrived downstairs, she observed that Leach had been shot and was lying on the floor. Leach told her, "Jerome McCollum shot me."

Phillip testified that he was going up the stairs when he encountered defendant heading downstairs. Phillip heard defendant ask "Is you playing me?" Leach responded "I can't come see my kid?" Phillip heard a gunshot followed by a second gunshot a few seconds later. Phillip returned downstairs, saw defendant leave, and observed Leach lying on the floor suffering from a gunshot wound.

Lumberton Police Lieutenant Jerome Morton arrived at the scene and spoke with Leach, while they waited for the ambulance to arrive. Leach told Lieutenant Morton that "David McCollum" had shot him. Leach was taken to the hospital and was pronounced dead approximately an hour later.

Lumberton Police Detective Peter Locklear retrieved defendant from the Robeson County Sheriff's Department after defendant surrendered himself. Defendant waived his *Miranda* rights and gave Detective Locklear a sworn statement:

> On December the 27th, 1999, around 10:00 p.m. I, David McCollum, went to 400 Holly Street in Lumberton. After I got to the apartment at 400, I knocked on the door and a black male let me in. I went to the apartment to see Kenyatta. Once I was in . . . the apartment, I asked to see Kenyatta and Phillip told me that she was upstairs.
>
> I went upstairs to see—I went upstairs to where Kenyatta was at and asked her if she was going to stay with me that night; and she said yes.
>
> I told Kenyatta that I would be back later to get her. I left and went back downstairs, and went in the kitchen and got some water to drink, and I played with Kenyatta's baby.

I started back through the living room to leave when Vander Leach said something smart to me. I asked him what he had said. And when—and we then started fighting. Vander was trying to get up out of a chair and I pushed him back down. I pulled my gun out of my coat pocket and I tried to hit him [Vander] with it, but I missed him and hit the chair. Vander and me were fighting, and we were in the living room and the gun went off. We rumbled to the kitchen and Vander fell to the floor.

After Vander fell, I left the apartment and went to my residence. I turned myself in on 1/3/2000.

Gene Mitchell testified as a witness for defendant. Mitchell stated that, in November 1999, he was walking with Leach's brother when a "guy started shooting at us." The next morning Leach and defendant went to Mitchell's house. Leach took a swing at Mitchell and the two wrestled. Mitchell admitted that the day before Leach was killed, Leach apologized for the fight.

On rebuttal, Kenyatta testified that in November 1999 she had gone shopping with defendant to purchase a winter coat for her son. Upon returning to her house, they noticed Leach in the yard next door with two of his friends. Defendant "went straight over to the yard, pulled a gun out, started shooting." Defendant did not testify at trial.

The trial court submitted first-degree murder, second-degree murder, voluntary manslaughter and not guilty to the jury, who returned a verdict of second degree murder. Defendant was sentenced to a presumptive sentence of 220 months minimum and 273 months maximum.

II. Issues

Defendant contends the trial court erred by (1) failing to charge the jury and to submit the lesser-included offense of involuntary manslaughter, (2) denying his motion for mistrial, and (3) failing to intervene when the State misstated evidence during closing arguments.

III. Instruction on Involuntary Manslaughter

[1] Defendant asserts that the trial court committed reversible error in failing to instruct the jury on the lesser included offense of involuntary manslaughter and to submit that possible verdict to the jury *ex mero moto*. We disagree.

A. Plain Error

During the jury charge conference, defendant did not request an instruction on involuntary manslaughter and failed to object to the jury instructions as given. Defendant asked for an instruction on accident which was denied and he does not appeal the denial of that instruction. If a party fails to object to the jury instructions, our review is limited to plain error.

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

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)).

> Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of a human being *with malice* but without premeditation and deliberation. Voluntary manslaughter is the unlawful killing of a human being *without malice* and without premeditation and deliberation. Involuntary manslaughter is the unlawful killing of a human being *without malice*, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.

State v. Wilkerson, 295 N.C. 559, 577-78, 247 S.E.2d 905, 915 (1978) (quoting *State v. Wrenn*, 279 N.C. 676, 681-82, 185 S.E.2d 129, 132 (1971)) (citations omitted) (emphasis supplied). The difference between second-degree murder and manslaughter is the presence of malice in the former and its absence in the later. *Id.* Malice can by implied from the circumstances "when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 (1925). In such a case, the homicide "cannot be

involuntary manslaughter," even if the assailant did not intend to kill the victim. *Id.*

State v. Wallace, 309 N.C. 141, 305 S.E.2d 548 (1983), held that the trial court's failure to submit involuntary manslaughter was prejudicial error warranting a new trial. *Wallace* is distinguishable from the present case. The Court in *Wallace* did not conduct its review under plain error because Wallace requested but was denied an instruction on involuntary manslaughter. 309 N.C. at 145, 305 S.E.2d at 551. The *Wallace* Court also found error in submitting voluntary manslaughter and self-defense to the jury. *Id.* Here, we review under plain error because defendant failed to request an instruction on involuntary manslaughter. Further, there was no error in submitting voluntary manslaughter or self-defense in the present case as compared with *Wallace.*

Defendant came to the home of his girlfriend, who resided with her two-year-old child, with a loaded weapon. Defendant's statement admits that he pulled his loaded weapon on Leach while Leach was seated. Defendant and Leach struggled in the presence of multiple people with defendant holding his loaded gun and attempting to use it as a weapon to strike Leach. In light of overwhelming evidence of defendant's guilt, the trial court's failure to instruct on the lesser included offense of involuntary manslaughter did not have " 'a probable impact on the jury's finding that the defendant was guilty.' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. The trial court did not commit plain error in failing to instruct on involuntary manslaughter.

B. Finding of Malice

An independent basis for overruling this assignment of error is that any error in failing to instruct on involuntary manslaughter is harmless in light of the jury's rejection of voluntary manslaughter and conviction of defendant for second-degree murder.

In *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990), our Supreme Court held that when the trial court submitted first-degree murder and second-degree murder to the jury who returned a verdict of first-degree murder, any error in denying a request to charge on involuntary manslaughter was harmless. 326 N.C. at 655, 392 S.E.2d at 369. The Supreme Court reasoned:

> To reach its verdict of first-degree murder on the theory of premeditation and deliberation, the jury was required to find a specific intent to kill, formed with premeditation and deliberation,

> which would preclude a finding that the killing occurred as a result of criminal negligence, just as it would preclude a finding that it occurred by accident.

Id. Although *Hardison* involved a conviction for first-degree murder and the jury's rejection of second-degree murder, our Supreme Court's rationale applies here.

The trial court submitted possible verdicts of first-degree murder, second-degree murder, voluntary manslaughter, or not guilty. When the jury convicted defendant of second-degree murder and rejected voluntary manslaughter, it necessarily found that defendant acted with malice. A finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter. *Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 915. Any asserted error in failing to instruct on involuntary manslaughter was harmless and does not rise to the level of plain error. This assignment of error is overruled.

IV. Mistrial

[2] Defendant contends the trial court erred by denying defendant's motion for a mistrial after the State placed inadmissible and highly prejudicial information before the jury.

Lumberton Police Officer James Jordan testified that "in a separate case, there was mention of a gun that was used in a murder earlier in the year." Officer Jordan seized a semiautomatic nine millimeter pistol during the investigation of another case and turned it over to the investigating officer in the present case. The trial court heard arguments of counsel outside the presence of the jury and ruled that the gun was not relevant and inadmissible.

On motion of defendant, the trial court instructed the jury:

> Ladies and gentlemen, I have allowed a motion to strike all of the testimony of this witness. In the trial of this case, you will disregard any testimony this witness has made at this point and not consider it in your deliberations.

The trial court also redacted the lab reports to omit any reference to the gun or tests performed on the gun. Defendant moved for a mistrial and stated "the jury has heard some of this information. They have questions in their minds. They—they've basically been tainted. That he cannot receive a fair trial now that they've heard this information, you can't unring this bell." The trial court replied, "Okay.

I've given the instruction that you requested; so, I'm denying your motion for mistrial."

"The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2001). "Whether a motion for mistrial should be granted . . . rests in the sound discretion of the trial judge, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982) (citing *State v. Dollar*, 292 N.C. 344, 233 S.E.2d 521 (1977); *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978)).

> On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect, just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect . . . . Therefore, unless his ruling is so clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

State v. Newton, 82 N.C. App. 555, 559, 347 S.E.2d 81, 84 (1986) *disc. rev. denied*, 318 N.C. 699, 351 S.E.2d 756 (1987) (quoting *State v. Sorrells*, 33 N.C. App. 374, 377, 235 S.E.2d 70, 72, *cert. denied*, 293 N.C. 257, 237 S.E.2d 539 (1977)).

Contrary to defendant's arguments, no evidence was presented that defendant had committed another murder in addition to the charge at trial. Instead, the testimony was that in a later, unrelated case, a gun was seized which may have been used at the incident for which defendant was on trial. There was no testimony about a second murder.

The trial court sustained defendant's objections, struck the testimony, and gave a curative instruction. "[J]urors are presumed to heed a trial judge's instructions." *State v. Rogers*, 355 N.C. 420, 453, 562 S.E.2d 859, 880 (2002) (citing *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 (2002)). Defendant made no showing that the jury failed to follow the instructions of the trial court and did not disregard the testimony of Officer Jordan as ordered. This assignment of error is overruled.

V. State's Closing Arguments

[3] Defendant argues that the trial court erred by failing to intervene *ex mero motu* when the State made a prejudicial misstatement of the evidence in its closing argument. We disagree.

Control of the arguments of counsel rests in the discretion of the trial court. This Court "ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citing *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976)).

During closing arguments, the prosecution stated:

> [Defendant] went upstairs; Kenyatta turned him down. Consistent with the way she testified, as to the fact that their relationship really had—that the closest part of it had ended. And for reasons, in addition, that she was tired from her recent trip. She didn't intend to go with him. Well, he had something he was going to do about that. And walked angrily downstairs. *I say angrily because he made some comment to her about what he had to do, something he had to take care of.* And Phillip recalls him coming down the stairs with some urgency, some speed, as he said. In fact, ignoring Phillip completely.

(Emphasis added). Although defendant objected to other statements by the State during closing arguments, defendant failed to object to the language italicized above assigned as error. Presuming the statements were improper, we hold that they were "not so gross or excessive to compel us to hold that the trial judge abused his discretion in not correcting them or that defendant is entitled to a new trial." *Id.* This assignment of error is overruled.

VI. Conclusion

The jury convicted defendant of second-degree murder after instructions on voluntary manslaughter were submitted. Any asserted error by the trial court in failing to submit involuntary manslaughter does not rise to the level of plain error and is harmless error. The trial court did not abuse its discretion in denying defendant's motion for mistrial and in failing to intervene *ex mero motu* during the State's closing argument.

No error.

Judge STEELMAN concurs.

Judge WYNN concurs in part, dissents in part.

WYNN, Judge dissenting.

Because I believe the majority's holding under Section III abolishes the review of an erroneous failure to instruct on a lesser-included offense in every instance in which the jury has found a defendant guilty of a greater offense, I dissent.

The majority relies upon *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990), in part, in holding that any error in failing to instruct on the lesser-included offense of involuntary manslaughter "was harmless in view of the jury's verdict finding malice to support second-degree murder." However, the majority's reliance upon *State v. Hardison* cannot be reconciled with our Supreme Court's decision in *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983). As in the subject case, the trial court in *Wallace* submitted three possible verdicts—first-degree murder, second-degree murder and voluntary manslaughter. In holding that the failure to also submit involuntary manslaughter to the jury constituted prejudicial error warranting a new trial, our Supreme Court stated:

> [An] error in failing to instruct on involuntary manslaughter . . . is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the court's charge.
>
> This is also true when the jury returns a verdict convicting the defendant of the highest offense charged, even though the conviction could have been of an intermediate offense.

309 N.C. at 146-47; 305 S.E.2d at 552; *see also State v. Buck*, 310 N.C. 602, 313 S.E.2d 550 (1984) (where the failure to instruct on involuntary manslaughter warranted a new trial even though second degree murder, voluntary manslaughter and not guilty of reason of both self-defense and accident charges were given).

Thus, even under a plain error analysis, *Wallace* controls by holding that a conviction of a greater offense does not cure the failure to

instruct on a lesser-included offense, if warranted by the evidence, unless the conviction was for first-degree murder based upon premeditation and deliberation. *See* 309 N.C. at 146-47; 305 S.E.2d at 552. Indeed, it is "reversible error for the trial court not to submit to the jury such lesser included offenses to the crime charged as are supported by the evidence." *State v. Lytton*, 319 N.C. 422, 426-27, 355 S.E.2d 485, 487 (1987).

Moreover, the majority states that the evidence in this case showed that, "Defendant and Leach struggled in the presence of multiple people with defendant holding his loaded gun and attempting to use it as a weapon to strike Leach." Based upon this characterization of the evidence, an involuntary manslaughter instruction is warranted. *See State v. Tidwell*, 112 N.C. App. 770, 775-76, 436 S.E.2d 922, 926 (1993) (citing several Supreme Court cases in which the Court has consistently held that where there is evidence that the victim was unintentionally killed with a deadly weapon during a physical struggle with the defendant, the trial court should charge the jury on the offense of involuntary manslaughter).

The majority also states "[m]alice can be implied from the circumstances 'when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.' " Although this statement is true, as our Supreme Court explained in *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978), "both [involuntary manslaughter and second-degree murder] can involve an act of 'culpable negligence' that proximately causes death. Culpable negligence, standing alone, will support at most involuntary manslaughter. When, however, . . ., an act of culpable negligence also imports danger to another [and] is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life it will support a conviction for second degree murder." In this case, the jury was not given the option of deciding whether defendant's conduct, although reckless and wanton, constituted involuntary manslaughter.

Likewise, the trial court's instruction on voluntary manslaughter, does not cure the failure to instruct on involuntary manslaughter because the elements and circumstances constituting voluntary manslaughter differ from those constituting involuntary manslaughter. *Compare State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981) (defining voluntary manslaughter as "the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation.") *and State v. Barts*, 316 N.C. 666, 343 S.E.2d 828

(1986) (explaining that voluntary manslaughter occurs when one kills intentionally but does so in heat of passion suddenly aroused by adequate provocation or in exercise of self-defense where excessive force is utilized or defendant is the aggressor") *with State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983) (defining involuntary manslaughter as the unlawful and unintentional killing of another human being, without malice, which proximately results from . . . an act or omission constituting culpable negligence") *and State v. Wrenn*, 279 N.C. 676, 683, 185 S.E.2d 129, 133 (1971) (indicating the wanton or reckless use of firearms in the absence of intent to discharge the weapon proximately causing the death of a human being may constitute involuntary manslaughter).

I also reject the notion that the jury's conviction of defendant of second-degree murder cures the trial court's failure to instruct on involuntary manslaughter.

The majority cites *State v. Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 915, as standing for the proposition that "a finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter." However, that part of the *Wilkerson* decision simply defined malice and explained that unlike second-degree murder, malice is not an element of manslaughter. Unlike first-degree murder based upon premeditation and deliberation where the jury must find the defendant acted with a specific intent to kill, second-degree murder and voluntary manslaughter are general intent crimes where the jury must only find the defendant intended to do the act which resulted in the death of another. *See State v. Coble*, 351 N.C. 448, 449-50, 527 S.E.2d 45, 46-47 (2000). In these types of homicide cases, the jury is not specifically finding the presence or absence of malice. Indeed, the intentional use of a deadly weapon gives rise to a presumption of malice and it is only through mitigation that one is convicted of voluntary manslaughter. *See State v. Knight*, 87 N.C. App. 125, 129, 360 S.E.2d 125, 128 (1987) (discussing that absent heat of passion or evidence of self-defense, the intentional infliction of a wound raises a mandatory presumption of unlawfulness and malice). Involuntary manslaughter is also a general intent crime which involves a killing without malice. But unlike voluntary manslaughter and second-degree murder, the killing in involuntary manslaughter is unintentional.

As our Supreme Court stated in *Wallace*, "the erroneous failure to submit the question of defendant's guilt of lesser degrees of the same crime is not cured . . . when the jury returns a verdict convicting the

defendant of the highest offense charged, even though the conviction could have been of an intermediate offense." 309 N.C. at 146-47; 305 S.E.2d at 552. Indeed, "if the jury did not believe that the shooting was a nonnegligent accident, then under the evidence and instructions it was left with no alternative other than a verdict of murder in the second degree." *Id.*; *see also State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977) (where in an assault with a deadly weapon case, the failure to submit guilty of simple assault to the jury was not cured by a jury finding that a stick was a deadly weapon since it could not be known whether the jury would have convicted defendant of the lesser offense if the jury had been permitted to do so).

Furthermore, the majority eviscerates the existing law in North Carolina that evidence must be viewed in the light most favorable to the defendant in determining whether an instruction on a lesser-included offense should have been given. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994). Under the new rule now made by the majority, a defendant would not be entitled to an involuntary manslaughter instruction once the evidence showed that malice could be implied from the circumstances of the killing. However, under *Barlowe*, in determining whether the trial court committed reversible error in failing to submit a lesser-included offense of involuntary manslaughter, this Court should focus on whether the jury could find that the killing was committed *without* malice, not whether the jury could find that the killing was committed *with* malice. In essence, the majority's rule would now preclude any lesser-included offense instructions if the evidence merely shows that there was sufficient evidence of the greater offense. I believe that is error. *See State v. Leazer*, 353 N.C. 234, 539 S.E.2d 922 (2000); *State v. Golden*, 143 N.C. App. 426, 546 S.E. 2d 163 (2001) (holding that the test for submission of lesser-included offenses is the presence or absence of any evidence in the record which might convince a rational finder of fact to convict defendant of less grievous offense); *see also State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 40 (2000) (explaining that only "if the state's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense *and* there is no evidence to negate those elements other than defendant's denial that he committed the offense, [then] the defendant is not entitled to an instruction on the lesser offense").

In sum, every greater offense by definition contains an element that is not included in a lesser-included offense. Under the majority's rationale today, a jury's finding of guilty of a greater offense would

render harmless the erroneous failure of a trial court to instruct on a lesser-included offense because the jury found that the evidence was sufficient to support the additional element not included in the lesser offense. That conclusion, in my opinion, is error; I dissent.

STATE OF NORTH CAROLINA v. THOMAS WAYNE BATCHELOR

No. COA02-484

(Filed 6 May 2003)

1. **Discovery— defendant's statements to informant—not timely disclosed**

The prosecutor's failure to timely disclose the substance of defendant's statements to a confidential informant did not compel suppression of the evidence where the substance of the statements was disclosed prior to trial. However, the trial court retained the discretion to issue a sanction for the State's failure to comply with the discovery rules. N.C.G.S. § 15A-903(a)(2).

2. **Discovery— no unfair surprise—confidential informant's statement admitted**

The purpose of discovery was achieved, and the trial court did not abuse its discretion by denying a motion in limine to suppress the testimony of a confidential informant about statements made to her by defendant although the substance of the statements were not timely disclosed to defendant, where the court held a voir dire, made findings supported by the evidence, and concluded that defendant was not unfairly surprised.

3. **Drugs— transporting cocaine—sufficiency of evidence**

There was sufficient evidence of an agreement between defendant and another person to transport cocaine and the trial court correctly denied defendant's motion to dismiss a charge of conspiracy to traffick in cocaine by transportation.

4. **Constitutional Law— right to remain silent—detective's answer—not plain error**

Admission of a detective's testimony that defendant had not wanted to waive his rights and was not questioned was not plain error where the evidence against defendant was substantial, the

prosecutor did not comment directly on defendant's failure to testify, and defendant was not cross-examined about his invocation of his constitutional right to remain silent.

5. Appeal and Error— invited error—right to remain silent invoked—cross-examination

Any error was invited where defense counsel cross-examined a detective about defendant's invocation of his right to remain silent.

6. Evidence— defendant's failure to testify—curative instruction—not required ex mero motu

The trial court was not required to provide a curative instruction without a request from defendant where a witness remarked on defendant's failure to testify during her cross-examination and the court sustained the objection and struck the testimony.

7. Evidence— charges against coconspirator—admission not plain error

Testimony that a cocaine defendant's alleged coconspirator was charged with trafficking should not have been admitted, but the error did not rise to the level of plain error because it is unlikely that the jury inferred defendant's guilt from evidence that his codefendant had been charged with similar crimes.

8. Criminal Law— deliberations—court's inquiry into jury division

The trial judge did not coerce the jury in a cocaine prosecution by asking the numerical division of the jurors and encouraging them to try to reach a unanimous verdict. The inquiry was made at the end of the day, is a natural break in deliberations, and the judge stated clearly that he did not want to know the direction in which the jury was leaning.

9. Criminal Law— unanimous verdict—instructions

A trial judge's instructions on reaching a unanimous verdict were not coercive where the instructions achieved a proper balance between reminding the jurors of their duty and encouraging them not to surrender their own convictions; the court never indicated that the jurors would be forced to deliberate until they could agree or that their inability to reach a verdict would result in a waste of time; and the court's instructions closely followed N.C.G.S. § 15A-1235.

Appeal by defendant from judgments entered 4 October 2001 by Judge J. B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 February 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lorrin Freeman, for the State.

George B. Currin for defendant-appellant.

HUNTER, Judge.

Thomas Wayne Batchelor ("defendant") appeals from convictions of conspiracy to traffic in cocaine by transportation, trafficking in cocaine by transportation, and maintaining a vehicle which is used for unlawfully keeping or selling controlled substances. For the reasons set forth herein, we find no prejudicial error.

The State's evidence tended to show that Melissa Watts ("Ms. Watts"), a confidential informant ("CI") hoping to receive a more lenient sentence for her guilty plea to trafficking in ecstasy, provided information to the Raleigh Police Department that led to defendant's arrest on 1 June 2001. The day prior to defendant's arrest, Ms. Watts contacted Detective Donald Bowes ("Detective Bowes") and informed him that defendant had agreed to sell her two ounces of cocaine. The exchange was scheduled to occur around 3:00 p.m. on 1 June 2001 at the Burger King located in Beacon Plaza Shopping Center off of New Bern Avenue. Upon receiving this information from Ms. Watts, Detective Bowes met with his supervisor and arranged for several detectives and uniformed officers with marked vehicles to participate in the apprehension of defendant. On 1 June 2001, defendant called Ms. Watts shortly after he had left the location where he had obtained the cocaine and notified her that he was on his way and was driving a silver Mercury Sable. Ms. Watts then relayed this information to Detective Bowes. Subsequently, Ms. Watts rode in a police van with Sergeant Hurst and Officer Carswell to the shopping center where the transaction was scheduled to occur. When defendant arrived in the general vicinity, he called Ms. Watts on her cell phone. Ms. Watts observed defendant's vehicle and pointed it out to the detectives. Ms. Watts identified defendant as the driver of the vehicle and observed another passenger in the vehicle. Soon thereafter, Officer D. L. Bond ("Officer Bond"), a uniformed drug enforcement officer with the Raleigh Police Department, followed the identified vehicle and eventually performed a traffic stop. The stop and subse-

quent arrest were predicated in part upon defendant's driving a motor vehicle with a fictitious license plate tag.

The officers performed pat-down searches of defendant and Mr. Harris but found nothing. Mr. Harris was placed in Officer Bond's police vehicle and defendant was placed in another patrol car. Defendant and Mr. Harris were then transported to the police station for a more thorough search and questioning. Shortly after arriving at the police station, Officer Bond conducted a thorough search of his patrol car and discovered two plastic bags filled with a white powdery substance, later determined to be powder cocaine. The bags were found under the seats in the area where Mr. Harris had been sitting. The total weight of the cocaine found was 81.2 grams. Defendant presented no evidence.

Defendant was charged in true bills of indictment with conspiracy to traffic in cocaine by transportation, trafficking in cocaine by possession, trafficking in cocaine by transportation, and maintaining a vehicle for the purpose of keeping or selling controlled substances. A jury found defendant not guilty of trafficking in cocaine by possession but guilty of all other charges. Defendant was sentenced to thirty-five to forty-two months imprisonment and ordered to pay a fine of $50,000.00 for the conspiracy to traffic in cocaine conviction. For the crimes of trafficking in cocaine by transportation and misdemeanor maintaining a vehicle, the trial court sentenced defendant to thirty-five to forty-two months imprisonment, such sentence to run at the expiration of the term of imprisonment imposed for the conspiracy conviction. Defendant appeals.

I.

[1] Defendant initially contends the trial court erred in allowing Ms. Watts, the CI, to testify for the State because the prosecutor did not provide defense counsel with the substance of the oral statements defendant made to Ms. Watts by noon on the Wednesday preceding trial, as required under N.C. Gen. Stat. § 15A-903(a)(2) (2001). We disagree.

N.C. Gen. Stat. § 15A-903(a)(2) requires the prosecutor

> [t]o divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the exist-

> ence of which is known to the prosecutor or becomes known to him prior to or during the course of trial . . . . If the statement was made to a person other than a law-enforcement officer and if the statement is then known to the State, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial. If disclosure of the substance of defendant's oral statement to an informant whose identity is or was a prosecution secret is withheld, the informant must not testify for the prosecution at trial.

In the instant case, there was a clear violation of this statute since the prosecutor did not provide defense counsel with the substance of defendant's statements to Ms. Watts until the Friday prior to the week defendant's case was calendared for trial and the substance of these statements were never provided "in written or recorded form." *See id.* What sanctions, if any, to impose for a prosecutor's noncompliance with discovery rules is a question addressed to the sound discretion of the trial court. *State v. East*, 345 N.C. 535, 481 S.E.2d 652 (1997). We are also mindful that "the purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990).

Defendant asserts that it was mandatory rather than permissive for the trial court to exclude Ms. Watts' testimony from trial due to the prosecutor's violation of discovery rules. In support of this contention, defendant relies on the last sentence of N.C. Gen. Stat. § 15A-903(a)(2) which reads, "[i]f disclosure of the substance of defendant's oral statement to an informant whose identity is or was a prosecution secret is withheld, the informant must not testify for the prosecution at trial." Defendant argues that the trial court did not have discretion in determining what, if any sanctions to issue since this provision provides a mandatory remedy for the State's failure to disclose a defendant's oral statements made to a CI. Defendant has not cited, nor have we found, any cases in which our Courts have addressed the specific issue before us of whether the provision upon which defendant relies requires the trial court to suppress the CI's testimony at trial when the State has failed to divulge the substance of defendant's statements within the time deadlines prescribed by the statute, but nevertheless divulged such information prior to trial. Therefore, this is an issue of first impression. We conclude that since defendant was provided with the substance of his statements made to

Ms. Watts prior to trial, the trial court is not required to suppress the informant's testimony but maintains discretion to determine what sanction, if any, to issue for the State's failure to comply with the discovery rules.

[2] We further conclude that the trial court did not abuse its discretion in denying defendant's motion *in limine* to prevent Ms. Watts from testifying. The record shows that the trial court held an extensive hearing on whether Ms. Watts' testimony was admissible. A preview of the evidence on *voir dire* was given in which both parties had the opportunity to examine Ms. Watts and her attorney, Hart Miles, and the trial court heard legal arguments from both sides. The court found that the State presented to defendant voluntary discovery evidenced by a letter dated 16 August 2001 before the trial in October 2001. The discovery letter notified defendant that he made "a relevant oral statement discoverable under N.C.G.S. 15A-903(a)." The provided discovery included a felony investigation report

> which indicated that the officers received information from a confidential informant (CI), that [defendant] was supposed to deliver some cocaine to an unknown person in Raleigh, North Carolina at Burger King; that the officers set up surveillance at this location and observed the suspect in the vehicle described by the CI and that there was another individual in the car with him. . . .

Further, the court found that Mr. Miles told defense counsel on the Monday prior to the week that the trial was calendared, that he was representing the CI in this case and that on Tuesday prior to the week that the trial was calendared, he told defense counsel that the CI would be testifying in this case. The prosecutor informed defense counsel on Friday prior to the week of trial that Ms. Watts would be testifying and the substance of Ms. Watts' testimony. The trial court additionally found that if defendant had requested a continuance prior to the impaneling of the jury on the grounds of unfair surprise concerning the substance of statements made by defendant to the CI, the court would have continued the case. These findings are all supported by the evidence. We conclude based on these findings that defendant was not unfairly surprised by the introduction of Ms. Watts' testimony. Therefore, the purpose of discovery under our statutes was accomplished. *See Payne*, 327 N.C. at 202, 394 S.E.2d at 162. Accordingly, we conclude the trial court did not abuse its discretion in admitting Ms. Watts' testimony.

II.

[3] Defendant next argues the trial court erred in denying defendant's motion to dismiss the charge of conspiracy to traffic in cocaine by transportation based on the insufficiency of the evidence. Defendant specifically contends the State presented insufficient evidence showing that defendant had entered into an agreement with Mr. Harris to transport twenty-eight grams or more of cocaine.

When reviewing a motion to dismiss, the trial court must determine "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 evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State. *State v. Smith*, 121 N.C. App. 41, 44, 464 S.E.2d 471, 473 (1995).

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). A conspiracy may be established by showing a mutual, implied understanding; the State need not prove an express agreement. *Id.* Moreover, "an agreement or understanding for the purposes of conspiracy may be inferred from the conduct of the parties." *State v. Merrill*, 138 N.C. App. 215, 220, 530 S.E.2d 608, 612 (2000). "In fact, proof of a conspiracy 'may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.' " *State v. Harris*, 145 N.C. App. 570, 579, 551 S.E.2d 499, 505 (2001) (quoting *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933)), *appeal dismissed and disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002).

In the case *sub judice*, Ms. Watts testified that she and defendant had arranged to meet so that defendant could sell her two ounces of cocaine. On the day the sale was to occur, defendant contacted Ms. Watts by phone to inform her that he had the cocaine and was on his way to meet her. When defendant arrived at the designated location, Mr. Harris was in the car with him. Defendant and Mr. Harris were eventually stopped by Officer Bond. At that point, Mr. Harris was patted down and placed in the back seat of Officer Bond's patrol vehicle.

After being transported to the police department, defendant was thoroughly searched and no controlled substances were recovered. However, two plastic bags of cocaine were later discovered in Officer Bond's patrol car which was used to transport Mr. Harris to the police department. The cocaine was found in the area of the patrol car in which Mr. Harris had been sitting. Officer Bond testified that he had done a thorough search of his patrol vehicle at the beginning of his shift and had not found any cocaine during the search, that he maintained the vehicle locked when it was unaccompanied, and that Mr. Harris was the only person who was placed in the back seat of his patrol car on the day in question. When viewing this evidence in the light most favorable to the State, we conclude that a reasonable trier of fact could infer that defendant and Mr. Harris had an agreement or understanding to unlawfully transport more than twenty-eight grams of cocaine for the purpose of selling it to Ms. Watts. *See* N.C. Gen. Stat. § 90-95(h)(3) (2001). We therefore conclude the trial court did not err in denying defendant's motion to dismiss the charge of conspiracy to traffic in cocaine by transportation.

III.

[4] Defendant also asserts that the trial court erred in admitting Detective Bowes' testimony regarding defendant's exercise of his Fifth Amendment right to remain silent. The prosecutor asked defendant, "[a]nd did [defendant] make a statement downtown?" To which Detective Bowes responded, "I advised [defendant] of his rights. He did not want to waive his rights. So other than pertinent information needed for the arrest warrant, he was not questioned." Defendant contends that it was incumbent upon the trial court to intervene *ex mero motu* to prevent the jury from considering this testimony. We will review this assignment for plain error since defendant failed to object to the admission of this testimony. *See* N.C.R. App. P. 10(c)(4); *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997).

Defendant correctly asserts that a defendant's exercise of his constitutionally protected right to remain silent may not be used against him by the State at trial. *State v. Ladd*, 308 N.C. 272, 302 S.E.2d 164 (1983). However, even when a defendant objects, he is not entitled to a new trial due to this error if the State shows that the error was harmless beyond a reasonable doubt. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997); N.C. Gen. Stat. § 15A-1443(b) (2001).

> Where, as in this case, a defendant has failed to object, the defendant has the burden of showing that the error constituted

> plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.

Bishop, 346 N.C. at 385, 488 S.E.2d at 779. Assuming *arguendo* that the trial court erred in admitting Detective Bowes' testimony, we conclude defendant has failed to show plain error. The evidence against defendant was substantial. In addition, there is no evidence in the record that the prosecutor directly commented on defendant's failure to testify or that defendant was cross-examined about his invocation of his constitutional right to remain silent. Any violation of defendant's rights was *de minimus*, and defendant has not satisfied his heavy burden of demonstrating plain error.

[5] Defendant also assigns error to the admission of Detective Bowes' testimony on cross-examination by defense counsel concerning defendant's invocation of his right to remain silent. The challenged testimony was elicited by the defense counsel and defense counsel did not object or make a motion to strike. Therefore, defendant invited any error. Defendant cannot now complain of this invited error. *See State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188 (1993).

IV.

[6] Defendant next argues the trial court erred in failing to provide a curative instruction to the jury in response to Ms. Watts' testimony regarding defendant's failure to testify. Ms. Watts testified on defense counsel's cross-examination that she was meeting defendant because he was bringing her two ounces of cocaine. Ms. Watts then stated, "[i]f [defendant] doesn't agree with what I'm saying, why doesn't [defendant] come defend himself." Defense counsel objected and moved to strike this testimony. The trial court sustained the objection and granted the motion to strike. On appeal, defendant asserts that the trial court, acting on its own, without a request from defense counsel at trial, should have provided a curative instruction to the jury that Ms. Watts' testimony was improper and should be disregarded and that defendant's decision not to testify could in no way be considered by the jury as evidence of his guilt.

It is well settled that "[a]dverse comments on a defendant's failure to testify at trial are impermissible under North Carolina law, Constitution of North Carolina, Article I, Section 23, N.C.G.S. § 8-54, and under the Fifth and Fourteenth Amendments to the Constitution of the United States[.]" *State v. Castor*, 285 N.C. 286, 291, 204 S.E.2d

848, 852-53 (1974). Defendant relies on *State v. Soloman*, 40 N.C. App. 600, 253 S.E.2d 270 (1979), to support his contention that the court erred in failing to provide a curative instruction. However, defendant's reliance is misplaced because this case is distinguishable. *Soloman* involved a prosecuting attorney's comments on the defendant's failure to testify. In this situation,

> [w]hen there is an objection to such prohibited statements . . . it is "the duty of the court not only to sustain objection to the prosecuting attorney's improper and erroneous argument but also to instruct the jury that the argument was improper with prompt and explicit instructions to disregard it. [If] no proper curative instruction [is] given, the prejudicial effect of the argument requires a new trial."

Id. at 603, 253 S.E.2d at 273 (quoting *State v. Monk*, 286 N.C. 509, 518, 212 S.E.2d 125, 132 (1975)). In this case, a witness, not the prosecuting attorney, commented on defendant's failure to testify. We have failed to find any authority to support defendant's argument that when a *witness* makes remarks regarding the defendant's failure to testify, that, in addition to sustaining an objection and granting a motion to strike, the trial court is required to provide a curative instruction without a request from the defendant. Therefore, this assignment of error is overruled.

V.

[7] Defendant next contends the trial court erred in allowing the prosecutor to elicit testimony from Detective Bowes that the alleged co-conspirator, Mr. Harris, had been charged with trafficking in cocaine by transportation and trafficking in cocaine by possession. Detective Bowes stated that he did not recall whether Mr. Harris was charged with conspiracy as well. Defendant concedes that he failed to object to this testimony. Therefore, we review for plain error.

The "clear rule" is that evidence of convictions, guilty pleas, and pleas of nolo contendere of non-testifying co-defendants is inadmissible unless introduced for a legitimate purpose, i.e., used for a purpose other than evidence of the guilt of the defendant on trial. *State v. Rothwell*, 308 N.C. 782, 303 S.E.2d 798 (1983). This Court has previously determined that this rule applies equally to evidence that co-defendants were charged and tried. *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985). This Court reasoned that:

> The policies underlying the rule, (1) that an individual defendant's guilt must be determined solely on the basis of the evidence presented *against that defendant* and (2) that the introduction of evidence of charges against co-defendants deprives a defendant of the right to cross examination and confrontation, . . . apply equally to evidence that they were charged and evidence that they were tried.

Id. at 37, 337 S.E.2d at 76. Although in this case, there was only evidence that a co-defendant was charged with similar crimes as defendant but no evidence that the co-defendant was tried, we nevertheless find *Gary* controlling. Therefore, we conclude the trial court erred in admitting evidence that Mr. Harris was charged with similar offenses as defendant. However, this error did not amount to plain error.

Defendant has not satisfied his heavy burden of showing, "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. Detective Bowes testified that the charges were still pending against Mr. Harris and thus, there was no testimony that Mr. Harris had been found guilty, pleaded guilty, or pleaded nolo contendere to the charges. It is unlikely that the jury inferred defendant's guilt from the evidence that his co-defendant had been charged with similar offenses. Therefore, defendant is not entitled to a new trial based on this error.

VI.

[8] Defendant next contends the trial court erred by asking the jury its numerical division on the issue of guilt and in subsequently providing instructions to the jury, encouraging them to go back and try to reach a unanimous verdict on all charges. We review for plain error due to defendant's failure to object to the trial court's inquiry and instruction.

After the jury had deliberated for approximately four hours and fifteen minutes, the trial judge asked for a numerical split on the issue of guilt without an indication of which direction, guilty or not guilty, the jury was leaning. Defendant argues that such inquiry is *per se* reversible error since it violated his Constitutional rights to trial by jury and due process of law. In support of his contention, defendant relies on *Brasfield v. United States*, 272 U.S. 448, 71 L. Ed. 345 (1926), in which the United States Supreme Court held that the trial court's inquiry regarding the jury's numerical division was reversible error.

However, as defendant concedes, both the North Carolina Supreme Court and this Court have held that the rule in *Brasfield* is not binding upon our State Courts because the ruling in *Brasfield* was based on its supervisory power over the federal courts and not on a defendant's Constitutional rights. *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984); *State v. Yarborough*, 64 N.C. App. 500, 307 S.E.2d 794 (1983). This Court has also held "that such an inquiry is not inherently coercive or violative of the North Carolina Constitution's Article I, § 24 guarantee of the right to a trial by jury." *Id.* at 502, 307 S.E.2d at 795.

Since there is no federal or state constitutional basis requiring the adoption of a *per se* rule, this Court must review the totality of the circumstances in order to determine whether the trial judge's inquiry was coercive or in any way affected the jury's decision. *See id.* In this case, the inquiry was made at the end of a day, a natural break in the jury's deliberations, and the judge clearly stated that he did not want to know which direction, guilty or not guilty, the jury was leaning. Therefore, we find no coercion and no error in the trial judge's inquiry.

[9] Defendant also assigns plain error to the trial court's instructions regarding the jury's duty to deliberate with a view toward reaching a unanimous agreement because defendant asserts that these instructions were coercive. The trial court provided the following instructions pursuant to N.C. Gen. Stat. § 15A-1235(c) (2001):

> All right. Ladies and gentlemen, I'm going to give you some additional instructions this morning and ask that you go back and try to reach a unanimous verdict in the other three charges.
>
> As I have already told you, in order to return a verdict, all twelve jurors must agree to a verdict of guilty or not guilty. And this is the law and each and every one of you told me that you could follow it and apply the law. But this is the law of North Carolina that I want to give you.
>
> Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with his or her fellow jurors. In the course of deliberation, a juror should not hesitate to reexamine his or her own views and change his or her own opinion if convinced it is

erroneous. And no juror should surrender his or her honest convictions as to the weight or the affect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict.

So having given you those instructions and that is the law of North Carolina, I'm going to hand the verdict sheets back to the foreman and ask that you go back and continue with deliberation with a view towards reaching a unanimous verdict either guilty or not guilty on the other three charges. . . .

The trial court has discretion in determining whether to give an instruction pursuant to N.C. Gen. Stat. 15A-1235(c). *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997). "[I]n deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985). This Court must consider the totality of the circumstances in determining whether these instructions were coercive. *See State v. Dexter*, 151 N.C. App. 430, 566 S.E.2d 493, *aff'd*, 356 N.C. 604, 572 S.E.2d 782 (2002).

We conclude the trial court's instructions achieved a proper balance between reminding the jurors of their duty to deliberate fully and encouraging them not to surrender their own convictions after full reflection. The court never indicated to the jurors that they would be forced to deliberate until they could agree or that their inability to reach a verdict would result in a waste of time or resources. The trial court's instructions closely followed the language of N.C. Gen. Stat. § 15A-1235 and did not contain any element of coercion that would warrant a new trial. Therefore, defendant's argument lacks merit.

Defendant offers no argument in support of his remaining assignments of error. Accordingly, they are deemed abandoned. N.C.R. App. P. 28(a), 28(b)(6).

No prejudicial error.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. PHILLIP NANCE

No. COA02-750

(Filed 6 May 2003)

1. **Evidence— prior assault by homicide victim—exclusion not prejudicial**

The exclusion of evidence was not prejudicial error in a homicide prosecution where defendant claimed that the victim (Smith) was shot in a struggle for a gun during an argument, and the witness (Welch) would have testified that he was shot in a struggle over a gun when he lived with the victim. The same evidence was admitted elsewhere, and this testimony would not have been favorable for defendant because Welch would have admitted that he was the aggressor in his argument with Smith. Moreover, the trial court did not abuse its discretion in determining that alleged prior inconsistent testimony by Welch was questionable and that Welch's testimony would tend to confuse the issues and the jury.

2. **Criminal Law— prosecutor's argument—homicide victim's violent nature—excluded evidence**

A prosecutor did not improperly refer to excluded evidence in a homicide prosecution where the prosecutor did not single out the excluded testimony but referred generally to the lack of evidence of the victim's alleged violent nature. Moreover, the court sustained defendant's objection.

3. **Criminal Law— prosecutor's argument—defendant's interview with investigators—partially played at trial**

The prosecutor's argument in a homicide prosecution did not deny defendant due process where the prosecutor argued that the jury had not heard the entire recording of defendant's interview with investigators. The jurors had been informed that portions of the tape were not admissible, and a curative instruction was given.

4. **Criminal Law— prosecutor's argument—defendant's manhood**

A prosecutor's argument that questioned defendant's manhood and referred to defendant hitting his girlfriend and molesting her daughter was not improper where the court sustained defendant's objection and gave a curative instruction.

5. Criminal Law— prosecutor's argument—characterization of defense

A prosecutor's argument that defense counsel was trying to cloud minds like "The Shadow" was not so prejudicial as to require a new trial.

6. Criminal Law— prosecutor's argument—defendant's statement misread

A prosecutor's alleged misreading of defendant's statement was not error where the trial court sustained defendant's objection and required the prosecutor to read the entire statement in context.

7. Criminal Law— prosecutor's argument—reasonable inference from facts

A prosecutor's argument that a homicide victim told her daughter to run because she thought defendant would hurt the child was supported by the evidence. The daughter testified that her mother had told her to leave the house, and the State may argue reasonable inferences from the facts.

8. Criminal Law— prosecutor's argument—characterization of defendant—not grossly improper

There was no prejudicial error in a homicide prosecution where the prosecutor called defendant a woman beater, a liar, and a murderer in his closing argument. Calling defendant a liar was quite improper, but not so prejudicial as to be a denial of due process. Calling him a murderer or woman beater did not require a new trial, given the evidence and the charge.

9. Criminal Law— prosecutor's argument—theatrics—not reflected in record

There was no error in a homicide prosecution where defendant contended that the prosecutor engaged in improper theatrics during closing arguments, but the record did not reflect the physical conduct about which defendant complained.

10. Criminal Law— instructions—missing evidence—no bad faith—no special instruction

The denial of a homicide defendant's request for a special instruction on an investigator's missing notes was not error. There was an insufficient showing of bad faith by officers, and

defendant did not show that the missing notes and report would have contained any exculpatory evidence.

Appeal by defendant from judgment entered 19 April 2001 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 March 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Dennis P. Myers, for the State.

Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., by Henderson Hill, Karl Adkins, and C. Margaret Errington, for defendant-appellant.

MARTIN, Judge.

Defendant was indicted for the murder of Sharon Renee Smith and was tried capitally. He appeals from a judgment entered upon his conviction of voluntary manslaughter.

The State's evidence tended to show that defendant and Sharon Renee Smith were boyfriend and girlfriend and resided together. Smith's thirteen-year-old daughter, Mahogany Welch, who lived in the house with Smith and defendant, testified that she was awakened around 11:30 a.m. on 17 March 1998 when defendant got into bed with her and began fondling her in a sexual manner. When Welch reached for something with which to hit defendant, he left.

Welch did not see defendant again until the afternoon when he and Smith arrived home with groceries at approximately 4:00 p.m. Welch told her mother what defendant had done that morning. Welch testified that Smith began to cry, and retrieved some black trash bags from the closet. Smith then went to the bedroom and began to pack defendant's clothes in the trash bags. Welch overheard defendant and Smith arguing in the bedroom and saw defendant choking Smith with his left hand while he hit her on the face and head with his right hand. Smith called out to Welch to "go call [her] Uncle Fred." Welch testified that as she stepped out the front door to do so, she heard a single gunshot. Welch ran back into the house and observed defendant coming out of the bedroom with a gun in his right hand. Welch then left the house.

Defendant contacted 911, and authorities and medics arrived on the scene shortly thereafter. Defendant directed authorities to the bedroom where Smith's body was partially propped against the door.

Smith was pronounced dead at the scene. The medical examiner testified Smith was shot at close range from a gun that was directly in front of her and pointed slightly downward and died as a result of a gunshot wound to the chest. Defendant told one investigator on the scene that he had thrown the gun into a field; he told another investigator that he had thrown the gun into some woods. A bloody handgun was recovered from under a chair in the living room of the house.

In an interview with investigators following the incident, defendant stated he had inadvertently pulled the trigger of the gun, shooting Smith, because Smith was pulling his arm in an attempt to reach the gun. A portion of defendant's interview was tape recorded, and the State introduced portions of the recording into evidence. Joyce Smith, Renee Smith's sister-in-law, testified that defendant had physically abused Smith previously, and that Smith feared defendant.

Defendant testified on his own behalf, maintaining he had a good relationship with Smith, and that he had never touched Welch inappropriately. Defendant corroborated Welch's testimony that Smith confronted him with Welch's accusations and that he had denied them. Defendant testified Smith became upset and began to pack his clothes into plastic trash bags. He testified that while Smith was in the bedroom packing defendant's clothes, she reached under the mattress where defendant kept his gun. Defendant grabbed the gun first and placed it in the waistband of his pants. He began to pack his own belongings. Defendant testified that as he bent down to pick up some clothes, Smith came at him, reaching for the gun. Defendant pushed Smith onto the bed, pinned her down, and instructed her to calm down. After a few minutes, defendant let Smith get off the bed. Defendant testified Smith came at him again in an attempt to get the gun. Defendant removed the gun from his pants to prevent it from discharging. As the two struggled for possession of the gun, it discharged, shooting Smith. Defendant testified he saw Welch as he was leaving the bedroom and instructed her to get help. He testified that he then placed the gun under a chair cushion in the living room and left the house to get help.

Defendant also presented testimony from his mother that Smith had told her she had shot the father of her children, Richard Welch, in the leg during an argument, had tried to brand another boyfriend with a hot fireplace poker, and had physically beaten another boyfriend when she discovered him in bed with another woman.

In his brief, defendant addresses three of the seven assignments of error contained in the record on appeal. The remaining four assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(a). He raises three issues, pertaining to (1) the exclusion of Richard Welch's testimony concerning a prior shooting; (2) the prosecutor's conduct during closing arguments; and (3) the trial court's refusal to instruct the jury on missing evidence. We find no error.

I.

[1] Defendant first maintains the trial court erred in excluding testimony by Richard Welch concerning the incident in which Smith shot him. Defense counsel sought to admit the evidence under G.S. § 8C-1, Rule 404(b) to show Smith's intent, propensity for violence, and that she was the aggressor in the affray with defendant. The State objected to admission of the testimony. On *voir dire*, Welch testified that while he lived with Smith, the two had an argument over his involvement with another woman and that he began to beat Smith during the argument. He testified that Smith retrieved a gun and told him not to hit her anymore. Welch testified that Smith then retreated to a bedroom where he followed her and struggled with her in an attempt to take the gun away from her. During the struggle, the gun discharged, shooting him in the leg. Richard Welch acknowledged the shooting was his fault.

The trial court concluded the testimony was not relevant to Smith's aggressiveness or propensity for violence because Richard Welch's testimony clearly established that he had been the aggressor in the incident and that Smith had acted only in self-defense. The trial court noted that to the extent the testimony did show any propensity for violence, defendant had already been permitted to testify he was aware Smith had shot Richard Welch during an argument.

To be admissible under Rule 404(b), evidence of a prior crime or incident must be sufficiently similar to the incident at issue. *State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988). Even if evidence is sufficiently similar to be admissible under Rule 404(b), it is nevertheless subject to the relevancy requirements and balancing test of Rule 403. *State v. Thibodeaux*, 352 N.C. 570, 532 S.E.2d 797 (2000) (citation omitted), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001). The determination of relevancy and ultimate determination of admissibility are both within the trial court's sound discretion. *Id.*

The trial court did not abuse its discretion in prohibiting Welch's testimony, given that Welch's *voir dire* testimony clearly established

that he had been the aggressor in the incident and that Smith had acted in self-defense. Defendant argues that if Welch had been permitted to testify, his testimony could have been impeached by evidence of prior statements in which Welch had apparently stated that Smith was the aggressor in the incident. However, the trial court determined, following a *voir dire* hearing on Welch's prior inconsistent statements, that the trustworthiness of those statements was questionable, and that Welch's prior statements had not been given under oath, as his *voir dire* testimony had been. The trial court concluded the interests of justice would not be served by admission of Welch's testimony, and in fact, would tend to confuse the issues and the jury. We discern no manifest abuse of discretion in this determination.

In any event, defendant has not carried his burden of establishing that the exclusion of Welch's testimony prejudiced the result of his trial. Evidence was admitted through the testimony of both defendant and his mother that Smith had shot Welch, and Welch's testimony, if admitted, and regardless of any impeachment evidence, would not have been favorable to defendant in light of Welch's testimony that he was the aggressor. *See* N.C. Gen. Stat. § 15A-1443(a) (2003) (defendant must carry burden of proving outcome of trial would have been different but for trial court's alleged error). This assignment of error is therefore overruled.

II.

In his second argument, defendant asserts he was deprived of a fair trial by the prosecutor's closing argument. He contends the prosecutor improperly referred to matters outside the record, appealed to the jury's passion and prejudice, inserted his personal opinion into the argument, and engaged in name-calling and other "improper theatrics."

In *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), our Supreme Court recognized the need to "strike a balance between giving appropriate latitude to attorneys to argue heated cases and the need to enforce the proper boundaries of closing argument and maintain professionalism." *Id.* at 135, 558 S.E.2d at 108. In assessing those boundaries, the Supreme Court listed four requirements for a closing argument: that it "(1) be devoid of counsel's personal opinion; (2) avoid[s] name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evi-

dence properly admitted at trial." *Id.* Such requirements must be viewed in light of the well-established principle that prosecutors are afforded wide latitude in presenting closing arguments to the jury. *See State v. Prevatte*, 356 N.C. 178, 570 S.E.2d 440 (2002). However, as the *Jones* court noted, " 'wide latitude' has its limits." *Jones*, 355 N.C. at 129, 558 S.E.2d at 105.

In the present case, defense counsel interposed a timely objection to each of the prosecutor's actions of which he now complains; thus, we review the court's rulings for abuse of discretion. *See id.* at 131, 558 S.E.2d at 106. A prosecutor's improper remark during closing arguments does not justify a new trial unless it is so grave that it prejudiced the result of the trial. *State v. Westbrooks*, 345 N.C. 43, 478 S.E.2d 483 (1996). Such prejudice is established only where the defendant can show " 'the prosecutor's comments . . . "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' " *State v. Morston*, 336 N.C. 381, 405, 445 S.E.2d 1, 14 (1994) (citations omitted).

A. Matters outside the record

[2] Defendant first argues the prosecutor improperly referred to matters outside the record by drawing the jury's attention to defendant's lack of objective evidence as to Smith's violent nature; he argues the prosecutor was referring to the absence of Richard Welch's testimony, which the trial court had ruled inadmissible. However, a fair reading of the transcript reveals the prosecutor did not single out Welch's testimony, but simply spoke generally about the lack of objective evidence as to Smith's allegedly violent nature. Our Supreme Court has rejected an identical argument based on similar facts. *See State v. Call*, 349 N.C. 382, 421-22, 508 S.E.2d 496, 520 (1998) (noting "[t]his Court has repeatedly held that a prosecutor may properly comment on a defendant's failure to produce witnesses or evidence that contradicts or refutes evidence presented by the State."). Moreover, the trial court promptly sustained defendant's objection.

[3] Defendant also argues the prosecutor's argument that the jury had not heard the entire recording of defendant's taped interview with investigators unfairly encouraged the jury to speculate about the contents of the omitted portion of the tape. However, the jury had already been informed by the trial court at defendant's request that certain parts of the tape would not be admitted into evidence. In addition, the trial court instructed the jurors that they were not to speculate about the contents of the omitted portions of

the tape, and all jurors affirmatively indicated they would comply with the court's instruction. Therefore, the prosecutor's argument could not have been so extreme and prejudicial as to amount to a denial of due process.

B. Appeals to passion or prejudice

[4] Defendant also contends the prosecutor, in three instances during the argument, improperly attempted to appeal to the jury's passion and prejudice. The prosecutor asked the jury, "[w]hat part of being a man involves hitting a woman . . . and molesting a 13 year old?" The trial court sustained defendant's objection, instructed the jury not to consider the statements, reminded the jury that evidence of alleged molestation had been offered solely to establish the circumstances surrounding the altercation between defendant and Smith, polled the jurors as to whether they understood that fact, and noted for the record that all jurors understood. A jury is presumed to follow a court's curative instructions. *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002).

[5] Defendant also argues the prosecutor improperly attacked the defense's theory and defense counsel by referring to "The Shadow," a fictional crime fighter who "had the power to cloud men's minds," by stating "that's what the defense is attempting to do in this case." However, after reviewing the argument, we do not believe it so prejudicial as to require a new trial. *See, e.g., State v. Grooms*, 353 N.C. 50, 83, 540 S.E.2d 713, 733 (2000) (prosecutor's statements that defense had taken focus away from defendant and created "as much smoke and fog" as possible not sufficiently prejudicial), *cert denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001); *State v. Harris*, 338 N.C. 211, 230, 449 S.E.2d 462, 472 (1994) (prosecutor's reference to defense strategy as "ingenuity of counsel" not sufficiently prejudicial).

[6] Defendant further argues the prosecutor appealed to the jury's passion and prejudice by purposefully misreading defendant's statement to investigators to insinuate that defendant had desired to hurt Mahogany Welch. Even though the prosecutor did not initially read defendant's statement in its entirety, the trial court sustained defendant's objection and instructed the prosecutor to read the entire statement in context, curing any prejudice.

C. Statements based on opinion

[7] Defendant also challenges the prosecutor's statement to the jury that Smith had instructed Mahogany Welch to run from the house dur-

ing the argument with defendant because she thought defendant would hurt Mahogany. Defendant argues the statement amounted to nothing more that the prosecutor's personal opinion because there was no evidence to support the prosecutor's statement.

In closing arguments, the State may argue any fact in evidence and also any reasonable inferences to be drawn from the facts. *State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Mahogany's testimony established that Smith did instruct her to leave the house to call her uncle while Smith and defendant were arguing. We believe a reasonable inference could be drawn that Smith instructed Welch to leave the house and call her uncle not only for the purpose of bringing help, but because Smith did not want Welch in the house during a violent conflict for fear of her safety.

D. Name-calling

[8] The prosecutor referred to defendant as "a woman beater, a liar, and a murderer." The trial court promptly sustained defendant's objection. In *Harris*, 338 N.C. at 229, 449 S.E.2d at 471, the Supreme Court rejected the defendant's contention that the prosecutor improperly characterized him as a "cold-blooded murderer" during closing argument, as defendant was, in fact, on trial for first degree murder, and the evidence showed the murder was calculated and unprovoked. Likewise, in this case, given that defendant was charged with Smith's murder and the State's evidence tended to show he had shot and killed Smith during an argument and had physically abused her on other occasions, it was not so grossly improper for the prosecutor to refer to defendant as a murderer or a woman beater as to amount to a denial of due process or require a new trial. *See id.* (not improper for prosecutor to refer to defendant as a "doper" in light of evidence of defendant's history of drug abuse; term was accurate description of defendant based on the evidence).

The prosecutor's characterization of defendant as a "liar," however, was quite improper, *see, e.g.*, *State v. Scott*, 343 N.C. 313, 471 S.E.2d 605 (1996), and we reitierate the concerns recently expressed by our Supreme Court as to such improprieties:

> [W]e are disturbed that some counsel have failed to heed our repeated warnings that such arguments are improper, even if not always grossly so. One measure of the professionalism that we expect from litigants in North Carolina courts is the avoidance of

> all known improprieties. Our prior holdings, where the conviction was not reversed on the basis of a prosecutor's improper argument only because of the demanding standard of review, should not be construed as an invitation to trial counsel to try the same thing again. We admonish counsel to refrain from [engaging in such improprieties].

State v. Rogers, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002) (citations omitted). The Supreme Court likewise expressed such concerns in *Jones*, observing that if counsel were to comply with the seemingly simple requirements for professionalism in closing arguments, "then the issue of alleging improper arguments on appeal would prove an exception instead of the rule. Regrettably, such has not been the case; in fact, it appears to this Court that some attorneys intentionally 'push the envelope' with their jury arguments in the belief that there will be no consequences for doing so." *Jones*, 355 N.C. at 127, 558 S.E.2d at 104; *see also*, *State v. Haselden*, 357 N.C. 1, —, 577 S.E.2d 594, — (2003) (Edmunds, J., dissenting) (expressing disapproval of court's failure to enforce standards for closing arguments more strictly, stating "[a]lthough we have noted that professionalism includes the avoidance by practitioners of all known improprieties . . . it is difficult to fault an advocate who realizes that he or she can land a telling, possibly decisive, blow at the modest cost of a verbal hand slapping from this Court.").

Given the evidence in the present case, however, defendant has not carried the burden of establishing that the impropriety resulted in prejudice such that his conviction was a denial of due process. *See Scott*, 343 N.C. at 344, 471 S.E.2d at 623 (prosecutor's repeated comments that defendant lied not grossly improper); *State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903 (characterization of defendant as a liar improper, but defendant unable to show requisite prejudice), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). Even so, we re-emphasize to counsel the professional standards for closing arguments set forth in G.S. § 15A-1230(a), and Rule 12 of the General Rules of Practice for the Superior and District Courts, governing courtroom decorum and providing, *inter alia*, that counsel shall at all times "conduct themselves with dignity and propriety." *See* Gen. R. Pract. Super. and Dist. Ct. 12.

[9] Finally, defendant argues the prosecutor engaged in "improper theatrics" because he "rushed at the defendant," leaned over the table into defendant's "personal space" and "glared" at defendant while

making the characterizations described above. The prosecutor acknowledged walking in front of defense counsel's table and pointing at defendant but denied leaning over the table or otherwise invading defendant's personal space. The record reflects only the prosecutor's language and the court's sustaining defense counsel's objection, and does not note any physical conduct of which defendant complains. In the absence of any such affirmative showing in the record or any admonishment by the trial court, which was in a better position than this Court to determine whether counsel engaged in any improper physical conduct, we must defer to the sound discretion of the trial court. These assignments of error are overruled.

III.

[10] Immediately following the shooting, defendant agreed to speak with Investigator Rice and Sergeant Athey at the police station. Defendant spoke with Rice and Athey for a period of time prior to being recorded. Investigator Rice testified that he took notes during the unrecorded portion of the interview and destroyed those notes after incorporating them into a supplemental report. The supplemental report was unaccounted for at trial. Sergeant Athey did not take notes during the initial portion of the interview, but prepared a report, which was used at trial, covering defendant's entire interview, including the unrecorded portions. Defendant requested that the jury be instructed that because investigators were unable to produce Investigator Rice's notes and supplemental report from the initial unrecorded portion of the interview, the jury could infer the missing evidence would have corroborated defendant's trial testimony. The trial court refused the request and defendant assigns error.

In *State v. Hunt*, 345 N.C. 720, 483 S.E.2d 417 (1997), the Supreme Court noted that destruction of evidence does not amount to the denial of a fair trial unless the defendant can establish (1) the police destroyed the evidence in bad faith; and (2) "the missing evidence possessed an exculpatory value that was apparent before it was lost." *Id.* at 725, 483 S.E.2d at 421.

In this case, defendant based his claim of bad faith solely on the facts that investigators did not tape the interview in its entirety, could not produce Investigator Rice's notes and supplemental report of the unrecorded portions of the interview, and could not explain how the report had been lost. However, defendant had the opportunity to cross-examine both investigators about the unrecorded portions of the interview. Sergeant Athey testified it was not standard procedure

to initially tape record a suspect because it tends to inhibit initial communication, and Investigator Rice testified he destroyed his notes simply because he had incorporated them into the supplemental report. We hold this evidence insufficient to establish that the notes and report were lost or destroyed in bad faith, particularly in light of the availability of Sergeant Athey's report covering the same interview. As in *Hunt*, "[n]othing in the record suggests that any law enforcement officer willfully destroyed the missing evidence." *Id.* at 725, 483 S.E.2d at 420.

Moreover, although defendant argues that any notes and report of the initial untaped portion of the interview would have been critical to the case because it would have shown defendant's state of mind and demeanor directly after the shooting, defendant has failed to show that Investigator Rice's missing notes and report would have contained any exculpatory evidence. Accordingly, the trial court did not err in refusing to grant defendant's request for a special instruction.

No error.

Judges HUDSON and ELMORE concur.

CONNIE M. PACHECO, PLAINTIFF v. ROGERS AND BREECE, INC., DEFENDANT

No. COA02-231

(Filed 6 May 2003)

1. Emotional Distress— negligent infliction—exhumation of remains

The trial court correctly granted summary judgment for defendant funeral home on plaintiff's claim for negligent infliction of emotional distress arising from the exhumation and transfer of her deceased husband's remains to Puerto Rico. Plaintiff failed to present sufficient evidence of severe emotional distress.

2. Fiduciary Relationship— exhumation and transfer of remains—no contact with plaintiff

The trial court did not err by granting summary judgment for defendant funeral home on plaintiff's claim for breach of fidu-

ciary duty rising from the exhumation and transfer of her husband's remains to Puerto Rico. There was no fiduciary relationship between the parties at the time of the acts giving rise to the suit because plaintiff had not had any direct contact with defendant for at least seven years, and defendant had fully performed its part of the original contract.

Appeal by plaintiff from order entered 6 November 2001 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 22 January 2003.

Kelly & West, by J. David Lewis, for plaintiff appellant.

Pinto Coates Kyre & Brown, P.L.L.C., by Paul D. Coates and John I. Malone, Jr., for defendant appellee.

H. Dolph Berry, for defendant appellee.

LEVINSON, Judge.

Plaintiff (Connie M. Pacheco) appeals from an order granting summary judgment in favor of defendant (Rogers and Breece, Inc.). For the reasons stated herein, we affirm the trial court.

This case arises from the 1998 exhumation of the body of Jose M. Pacheco from his grave at Hair Chapel Cemetery, in the Linden community of Cumberland County. The evidence before the trial court at the time it granted defendant's motion for summary judgment showed the following: Plaintiff and Mr. Pacheco, a member of the United States Army Special Forces, were married in 1986. When Mr. Pacheco suffered fatal injuries in a 1990 automobile accident, plaintiff contracted with defendant to provide funeral services, and purchased a joint headstone and burial plot at Hair Chapel Cemetery in Linden, North Carolina. After the burial contract was fulfilled, plaintiff and defendant had no further contact. Shortly after the funeral, plaintiff was contacted by the U.S. Army to retrieve the deceased's personal belongings, but she did not respond. In 1997 or 1998, defendant was contacted by Sergeant Maximinos Ramos of the United States Army. Ramos spoke with Mr. Robert Wilson Breece, Jr., vice president of defendant funeral home, and explained that he represented Jose Pacheco's family. Ramos informed Breece that Mr. Pacheco's mother, Antonia Pacheco, desired to have Mr. Pacheco's body disinterred and reburied in Puerto Rico, because Mr. Pacheco and Antonia were of Puerto Rican descent. Ramos also told Breece that he had attempted

unsuccessfully to contact plaintiff regarding the requested disinterment. Breece informed Ramos that before he would exhume Mr. Pacheco's body, Ramos would have to "contact all the family and have permission from them, and have a signed disinterment order, or a court order and everything signed by a judge."

Antonia Pacheco petitioned for and obtained from the Cumberland County Superior Court an order of exhumation on 3 February 1998. The trial court's Order of Exhumation stated in pertinent part that:

> . . . it appearing that this action is for an Order of Exhumation of the remains of [Mr. Pacheco] to move same from Linden, Cumberland County, North Carolina to Yauco, Puerto Rico; and it further appears that there is no opposition from the next-of-kin.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED & DECREED: 1. That the Order of Exhumation of the remains of [Mr. Pacheco] is hereby granted for the specific purpose of moving the remains to a grave in Yauco, Puerto Rico.

Upon receiving the Order, defendant exhumed decedent's remains on 1 July 1998, and arranged for their transportation to Puerto Rico. Defendant did not attempt to contact plaintiff before the disinterment. In September 1998, plaintiff learned that Mr. Pacheco's body had been exhumed and removed from Cumberland County.

On 5 February 2001, plaintiff filed a complaint in Cumberland County Superior Court against defendant, seeking damages for negligent infliction of emotional distress and breach of fiduciary duty. Defendant moved for summary judgment in October 2001, and on 6 November 2001, the trial court granted summary judgment in favor of defendant. From this order plaintiff appeals.

Standard of Review

Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001); *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *affirmed per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear*

Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citation omitted). However, "[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied and appeal dismissed*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001). Thus, "[a]s a general rule, upon a motion for summary judgment, supported by affidavits, 'an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.' " *Spinks v. Taylor and Richardson v. Taylor Co.*, 303 N.C. 256, 263-64, 278 S.E.2d 501, 505 (1981) (affirming entry of summary judgment against plaintiff who "failed to submit affidavits showing a genuine issue of material fact and elected to rest upon her unverified complaint", but reversing summary judgment entered against party who filed a verified complaint) (quoting N.C.G.S. § 1A-1, Rule 56(e)). "To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992). In this regard, a verified complaint "may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972).

In addition, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and whether (2) either party is entitled to judgment as a matter of law. *Von Viczay*, 140 N.C. App. at 738, 538 S.E.2d at 630.

I.

[1] We first consider the trial court's dismissal of plaintiff's claim for negligent infliction of emotional distress (NIED). The parties have directed most of their arguments to the issue of what standard of

care, if any, is required of a funeral home, and whether, assuming a duty of care existed, defendants negligently breached such duty. However, we find it unnecessary to resolve these issues, as an alternative ground sustains the trial court's grant of summary judgment. *See Nifong v. C. C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 ("[i]f the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision"), *affirmed*, 344 N.C. 730, 477 S.E.2d 150 (1996). We turn, therefore, to consideration of the elements of a NIED claim. In *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990), the North Carolina Supreme Court held:

> [T]o state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress. . . . In this context, the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Id. at 304, 395 S.E.2d at 97. Thus, a plaintiff does not have a remedy for garden variety anxiety or concern, but only for *severe* distress. *Id.* The North Carolina Supreme Court has discussed the legal meaning of the term "severe emotional distress":

> [A claim for emotional distress] applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. . . . It is only where it is extreme that the liability arises. . . . The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. . . . It is for the court to determine whether on the evidence severe emotional distress can be found[.]

Waddle v. Sparks, 331 N.C. 73, 84-85, 414 S.E.2d 22, 27-28 (1992) (quoting Restatement (Second) of Torts § 46 cmt.j (1965)) (claim dismissed where "[t]here is no forecast of any medical documentation of

plaintiff's alleged 'severe emotional distress' nor any other forecast of evidence of 'severe and disabling' psychological problems within the meaning of the test laid down in *Johnson v. Ruark*").

Proof of "severe emotional distress" does not necessarily require medical evidence or testimony. *Coffman v. Roberson*, 153 N.C. App. 618, 628, 571 S.E.2d 255, 261 (evidence sufficient where "[plaintiff], her friends, her family, and her pastor testified to the severe emotional distress she suffered and continues to suffer"), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003). However, appellate decisions have consistently upheld dismissal of NIED and similar claims where a plaintiff fails to produce any real evidence of severe emotional distress. *See, e.g., Estate of Hendrickson v. Genesis Health Venture, Inc.*, 151 N.C. App. 139, 157, 565 S.E.2d 254, 265 (reversing trial court's denial of directed verdict motion where "there was evidence that plaintiffs were emotionally distressed . . . [but] plaintiffs failed to present evidence, even viewed in the light most favorable to them, that such distress was severe"), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 503 (2002); *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 281, 542 S.E.2d 346, 356 (summary judgment proper where "two years after the accident . . . [plaintiff] had not sought any medical treatment or received any diagnosis for any condition that could support a claim for severe emotional distress as that term is defined by law"), *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001); *Johnson v. Scott*, 137 N.C. App. 534, 539, 528 S.E.2d 402, 405 (2000) (summary judgment proper where plaintiff's evidence of "difficulty sleeping," nightmares and periodic loss of appetite following her father's death failed to "me[e]t the requisite level of 'severe' emotional distress").

In the instant case, defendant asserts, *inter alia*, that plaintiff failed to demonstrate that she suffered severe emotional distress. We agree. Plaintiff's unverified complaint included a bare assertion that she suffered severe emotional distress as a result of defendant's negligence. Further, in response to defendant's summary judgment motion, plaintiff failed to submit *any* evidence in support of her unverified allegation of severe emotional distress. Plaintiff did not file any affidavits, take depositions, submit any medical documentation, or verify her complaint. Instead, plaintiff simply asserts in her brief that defendant "knew that its actions had been greatly upsetting emotionally to Plaintiff." The record does not support this statement. Plaintiff references a statement from Breece's deposition, "I know the wife is very concerned, but she has a balance on the—but she has a balance on the funeral bill." Preliminarily, defendant's awareness

that plaintiff was "very concerned" does not indicate that plaintiff suffered "severe emotional distress." Further, this statement was a written notation associated with an insufficient funds check plaintiff had submitted in payment for Mr. Pacheco's funeral, which had occurred more than five years before the exhumation, and which had no connection to plaintiff's claim for NIED. Plaintiff also points to another statement in Breece's deposition, wherein he relates that plaintiff's mother had come to the funeral home and told him that "it was very upsetting and everything to the family. And I guess she was referring to her daughter, Connie Pacheco." This statement from plaintiff's mother regarding "the family," which stated only that the situation was "very upsetting," completely fails to establish that plaintiff suffered "severe emotional distress" as the term is defined with regard to a claim for NIED.

Plaintiff also attempts to avoid her complete failure of proof on this issue by contending that she is not required to produce any evidence of emotional distress, because "some issues are simply too obvious to dispute, and are inferred by the court as a matter of law." Even assuming, *arguendo*, that some issues are "too obvious to dispute," the legal presence of severe emotional distress is not among these. *Waddle v. Sparks*, 331 N.C. at 84, 414 S.E.2d at 28 ("[i]t is for the court to determine whether on the evidence severe emotional distress can be found"). In support of her position, plaintiff relies solely on a 1914 case noting that "[t]here *was evidence of mental suffering*, but it would have been inferred as a matter of law upon the circumstances of this case." *Byers v. Express Co.*, 165 N.C. 542, 545, 81 S.E. 741, 742 (1914), *rev'd on other grounds*, 240 U.S. 612, 60 L. Ed. 825 (1916) (emphasis added). We do not find *Byers* persuasive authority in this case. First, the opinion clearly holds that there "was evidence of mental suffering," and thus the remainder of the sentence is, arguably, *dicta*. Second, *Byers* is a 1914 case, and plaintiff's position has since been rejected by the North Carolina Supreme Court in *Holloway v. Wachovia Bank and Trust Co.*, N.A., 339 N.C. 338, 356, 452 S.E.2d 233, 243-44 (1994):

> [P]laintiffs assert, 'Proof that the defendant behaved outrageously vis-a-vis plaintiff may be self-evident to support a finding that plaintiff suffered severe emotional distress.' In support plaintiffs cite from the Restatement of Torts, 'Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence that the distress has existed.'. . . The Restatement, however, provides only

that outrageous conduct may be some evidence of severe emotional distress, not that outrageous conduct can substitute for severe emotional distress.

When a plaintiff fails to produce any evidence of an essential element of her claim, the trial court's grant of summary judgment is proper. *See Guthrie v. Conroy*, 152 N.C. App. 15, 567 S.E.2d 403 (2002) ("because plaintiff failed to present evidence of this essential element of her claim, the trial court did not err in granting summary judgment for defendant"). In the instant case, plaintiff failed to present sufficient evidence of severe emotional distress to withstand defendant's motion for summary judgment. Therefore, entry of summary judgment was appropriate.

II.

[2] We next consider the trial court's summary judgment order on plaintiff's claim for breach of fiduciary duty.

A claim for breach of fiduciary duty presupposes the existence of a fiduciary relationship between the parties. *Curl v. Key*, 311 N.C. 259, 316 S.E.2d 272 (1984); *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971). A fiduciary relationship, broadly defined, is characterized by " 'a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' " *Dalton v. Camp*, 353 N.C. 647, 651-52, 548 S.E.2d 704, 707-08 (2001) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (quoting 25 C.J. *Fiduciary* § 9, at 1119 (1921)). Determination of whether a particular set of facts establishes the existence of a fiduciary relationship may present a question of law for the court. *See Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367, 533 S.E.2d 827, 832 (concluding "as a matter of law" that evidence presented did not establish the existence of a fiduciary relationship), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000); *In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 799 (1999) (noting that "trial court found, and we agree, that as a matter of law a fiduciary relationship did not exist between [the parties]").

We agree with plaintiff that a personal service contract to provide funeral arrangements might, in appropriate factual circumstances,

give rise to a fiduciary relationship. However, at the time of the exhumation of Mr. Pacheco's body, defendant had not had any direct contact with plaintiff for at least seven years. Defendant had fully performed his part of the original contract between plaintiff and defendant. Indeed, the evidence tended to show that, by failing to pay her bill in full, plaintiff had not fully performed her side of the contract. On these facts, we cannot conclude that a fiduciary relationship existed between plaintiff and defendant at the time the acts giving rise to the instant suit were committed. Accordingly, the trial court did not err in granting summary judgment in favor of defendant on plaintiff's claim for breach of fiduciary duty.

For the reasons discussed above, the order of the trial court granting summary judgment for defendant is

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

PHIL S. TAYLOR, EMPLOYEE, PLAINTIFF v. BRIDGESTONE/FIRESTONE, EMPLOYER, GALLAGHER BASSETT SERVICES, CARRIER, DEFENDANTS

No. COA02-470

(Filed 6 May 2003)

Workers' Compensation— future medical treatment—Parsons presumption

The trial court erred in a workers' compensation case by finding that plaintiff employee has failed to prove by the greater weight of the evidence that there is a substantial risk for the necessity of future medical treatment as a result of his compensable injury by accident, because: (1) the findings do not delineate between the two separate inquiries of whether plaintiff can show he is at substantial risk of needing future medical treatment, known as the Parsons presumption, and whether defendants can prove any anticipated future medical treatment will not be reasonably related to the original compensable injury; and (2) it appears the Commission erroneously placed the burden of proof for both inquiries on plaintiff instead of requiring defend-

ants to prove that future medical treatment is not related to the original injury.

Judge HUNTER dissenting.

Appeal by plaintiff from opinion and award filed 18 January 2002[1] by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 February 2003.

Edwards & Ricci, P.A., by Brian M. Ricci, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David A. Rhoades and Jaye E. Bingham, for defendant appellee.

BRYANT, Judge.

Phil S. Taylor (plaintiff) appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 18 January 2002 in favor of Bridgestone/Firestone, Inc. (Bridgestone) and Gallagher Bassett Services, Inc. (collectively, defendants).

The Commission made the following findings of fact, to which plaintiff assigns no error:[2]

> 1. . . . [P]laintiff . . . [has] been employed as a first-stage tire builder for [Bridgestone] . . . . While working for [Bridgestone], on or about [1 March 1997], plaintiff sustained a compensable injury by accident, namely a right rotator cuff tear, arising out of and in the course of his employment.
>
> . . . .
>
> 4. On [3 September 1997] and [13 October 1997], plaintiff was examined by Tally E. Lassiter, Jr., M.D. [(Dr. Lassiter)], an orthopaedist, who recommended surgery to repair plaintiff's right torn rotator cuff. Consequently, plaintiff's rotator cuff was surgi-

1. We note that although the opinion and award of both the Deputy Commission and the Full Commission of the North Carolina Industrial Commission refer to defendant-employer as simply Bridgestone/Firestone and its carrier as simply Gallagher Bassett Services, the majority of Industrial Commission forms and orders entered in this case refer to defendant-employer as Bridgestone/Firestone, Inc. and its carrier as Gallagher Bassett Services, Inc.

2. Accordingly, these findings are deemed supported by competent evidence and are binding on appeal. *See Watson v. Employment Sec. Comm'n*, 111 N.C. App. 410, 412, 432 S.E.2d 399, 400 (1993).

cally repaired on [4 November 1997]. Thereafter, plaintiff underwent physical therapy during his recuperation and returned to work on or about [20 March 1998]. On [4 May 1998], Dr. Lassiter gave plaintiff indefinite light-duty restrictions of no carrying or lifting greater than twenty to forty (20-40) pounds and no activities above shoulder level.

5. Thereafter, plaintiff did not return to Dr. Lassiter until [14 June 1999], which was over a year from his last visit. Plaintiff complained of right shoulder pain. Dr. Lassiter indicated that plaintiff had nearly full range of motion of both shoulders, good strength and no instability. . . . Dr. Lassiter diagnosed right shoulder strain, recommended physical therapy, prescribed Celebrex and continued plaintiff's light-duty restrictions.

6. On [6 October 2000], four months after the [deposition] of Dr. Lassiter [in this matter], plaintiff returned to Dr. Lassiter with continued complaints for which Dr. Lassiter prescribed Vioxx, continued light-duty restrictions and requested that plaintiff return for follow up in six weeks.

7. On [17 March 1998], the parties entered into a partial settlement agreement whereby defendants accepted compensability of plaintiff's claim as of 20 March 1998. . . .

8. An I.C. Form 18M was forwarded to the Commission on behalf of plaintiff on [7 December 1999], which was filed within the two year time period as specified in N.C. Gen. Stat. [§] 97-25.1(i). By way of correspondence dated [23 December 1999,] defendants denied plaintiff's request for future medical treatment.

9. Plaintiff continues to have right shoulder pain and difficulty related to his injury of [1 March 1997], his age and current job duties. Plaintiff testified that his right shoulder bothers him every day and that he has learned to live with pain in order to continue to meet the duties of his employment. Between plaintiff's return to work in March 1998 and Dr. Lassiter's deposition on [20 September 2000], a period of two and one-half years, plaintiff only sought treatment with Dr. Lassiter on two occasions, [4 May 1998] and [14 June 1999].

The Commission also found as fact, to which plaintiff did assign error:

> 10. The Form 18M filed by plaintiff includes Dr. Lassiter's statement that there is a substantial risk that plaintiff will require additional medical care resulting from his compensable injury. However, the greater weight of the evidence, including Dr. Lassiter's deposition testimony, indicates that there is not [] a substantial risk that plaintiff will require future medical treatment as a result of his injury. Although Dr. Lassiter testified that plaintiff's age and job duties could cause plaintiff to have additional shoulder problems requiring additional treatment, Dr. Lassiter did not have an adequate understanding of plaintiff's job duties. Furthermore, the greater weight of the evidence indicates that the likelihood of the risk of future medical treatment falls short of the standard that the risk be substantial and related to the injury itself and not additional difficulties arising from age or activities. . . .

Based on these findings, the Commission concluded: "Plaintiff has failed to prove by the greater weight of the evidence that there is a substantial risk for the necessity of future medical treatment as a result of his compensable injury by accident."

The evidence before the Commission came from the deposition testimony of plaintiff, Bishop Tucker (Tucker), a Bridgestone safety engineer, and Dr. Lassiter, plaintiff's treating physician. Tucker testified that the job duties of a first-stage tire builder, like plaintiff, required cutting rubber with a heated knife on a tire assembly machine located about waist high and then placing the cut rubber tire "carcasses," which weighed ten to fifteen pounds each, on three different racks located at shoulder, waist, and floor level. In an eight-hour shift, plaintiff produced between 175 to 200 tires.

Dr. Lassiter testified, based on his understanding of plaintiff's job duties, that in his opinion plaintiff had a "substantial risk" of needing future medical treatment. Moreover, plaintiff's original injury made it more likely that plaintiff would need future medical treatment. On cross-examination, Dr. Lassiter stated his understanding of plaintiff's job was that it involved bringing tires up and down from more or less ground level, or knee level, to shoulder level. He was not aware that the knife used to cut the rubber was heated, which makes cutting less stressful, and that if the weight of the tires plaintiff was lifting was within the prescribed weight restrictions, it would probably not cause undue harm. Dr. Lassiter was also confronted with other facts from Tucker's account of plaintiff's job description. Even after being con-

fronted with the facts of plaintiff's job description, Dr. Lassiter maintained that plaintiff's risk of future medical treatment was "substantial to [physical therapy], anti-inflammatories, injections it may be a risk, but not to surgery." Dr. Lassiter further testified that the cause of this risk was plaintiff's age and job duties, opining that, if plaintiff had a sedentary job involving mostly desk work, he would not have a substantial chance of needing future medical treatment. Dr. Lassiter also thought that, having had surgery, "[i]f defendant had another job where he was lifting a moderate amount of weight repetitively at his age," he would have a substantial risk of needing future medical treatment. On re-direct examination, Dr. Lassiter was asked "because [plaintiff] had surgery and is doing the job that he's doing now, that gives him the substantial risk of needing additional treatment?" Dr. Lassiter responded, "I would have to fall back and say he has a moderate risk of having to have more treatment and problems with that shoulder . . . . There's not much way around it, unless you make him completely sedentary, in my opinion."

The dispositive issue is whether the Commission improperly combined the inquiries into whether plaintiff had a substantial risk of future medical treatment and whether that risk was directly related to his original compensable injury.

Plaintiff's sole argument on appeal is the Commission's finding of fact that the greater weight of the evidence "indicates that there is not [] a substantial risk that plaintiff will require future medical treatment as a result of his injury" is not supported by competent evidence, and, in turn, does not support the Commission's conclusion of law. Appellate review of the Commission's decisions is generally limited to whether "competent evidence supports the findings of fact and whether the findings support the Commission's legal conclusions." *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541, 485 S.E.2d 867, 868 (1997). Where, however, the Commission's findings are based on " 'an erroneous view of the law or a misapplication of law, they are not conclusive on appeal.' " *Id.* (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)).

"Subsequent to the establishment of a compensable injury under the North Carolina Workers' Compensation Act, an employee may seek compensation under N.C. Gen. Stat. § 97-25 for additional medical treatment when such treatment 'lessens the period of disability, effects a cure or gives relief.' " *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (quoting

Parsons, 126 N.C. App. at 541-42, 485 S.E.2d at 869). In deciding whether to enter an award allowing a plaintiff's claim to remain open for future medical treatment, the Commission must determine whether there is a substantial risk of the necessity of future medical compensation. *See* N.C.G.S. § 97-25.1 (2001). "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." *Reinninger*, 136 N.C. App. at 259, 523 S.E.2d at 723; *see Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 184, 565 S.E.2d 209, 217-18 (2002); *Parsons*, 126 N.C. App. at 542-43, 485 S.E.2d at 869. Therefore, construing section 97-25.1 together with *Reinninger* and *Parsons*, once it is determined that the plaintiff has shown there is a substantial risk of the necessity of future medical treatment, "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." *Reinninger*, 136 N.C. App. at 259, 253 S.E.2d at 723. This presumption, sometimes called the *Parsons* presumption, helps to ensure that an employee is not required to reprove causation each time he seeks treatment for an injury already determined to be compensable. *See Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869.

In ruling on a Form 18M seeking to keep open the possibility of future medical compensation under section 97-25.1, the Commission must therefore make a two-part inquiry: (1) whether the plaintiff can show he is at "substantial risk" of needing future medical treatment and (2) whether the defendants can prove any anticipated future medical treatment will not be reasonably related to the original compensable injury. The shifting burdens of proof make it essential for the Commission to delineate that it is giving the plaintiff the benefit of the rebuttable presumption on the issue of whether the treatment is directly related to the original injury. *See Reinninger*, 136 N.C. App. at 260, 253 S.E.2d at 724 (case remanded where Commission's findings indicated a failure to give plaintiff the benefit of the presumption that medical treatment now sought was causally related to the compensable injury and better practice was for Commission to clearly delineate the presumption in its findings).

In this case, the findings of fact do not delineate between the two separate inquiries, and the Commission appears to have placed

the burden of proof for both inquiries on plaintiff.[3] The Commission found "the greater weight of the evidence . . . indicates that there is not a substantial risk that plaintiff will require future medical treatment as a result of his injury" and "the greater weight of the evidence indicates that the likelihood of the risk of future medical treatment falls short of the standard that the risk be substantial and related to the injury itself and not additional difficulties arising from age or activities."[4] The Commission then concluded "[p]laintiff failed to prove . . . that there is a substantial risk for the necessity of future medical treatment as a result of his compensable injury by accident."

As the Commission combined the inquiries, we are unable to discern whether the Commission based its conclusion of law on a finding that: (1) there was no substantial risk of plaintiff needing future medical treatment or (2) any future treatment was the result of plaintiff's age and job duties and could not be related to the original injury.[5] As a result, the Commission's conclusion appears to improperly place the burden of proof on plaintiff to show that future medical treatment is related to the original injury. *See id.* As noted in *Reinninger*, "[t]he better practice in these section 97-25 hearings is for the Commission to clearly delineate in its opinion and award that it is giving [p]laintiff the benefit of the *Parsons* presumption." *Id.* Therefore, we vacate the opinion and award of the Commission and remand this case for rehearing and findings of fact as to whether: (1) there is a substantial risk of the necessity of future medical treatment and, if necessary, (2) defendants can overcome the presumption that any such future medical treatment is related to the original compensable injury.

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3. The dissent concedes "some of the language used by the Commission in its findings and conclusions may have blurred the lines between the two stages of inquiry." The dissent also excludes from its excerpt of the Commission's finding those portions in which the Commission combines the separate inquiries without acknowledging the requisite shifting in the burden of proof.

4. The Commission's finding that Dr. Lassiter did not have an accurate understanding of plaintiff's job is immaterial as Dr. Lassiter maintained plaintiff was at substantial risk of needing future medical treatment even after being confronted with the facts from Tucker's description of the job, opining only that if plaintiff was sedentary that it would reduce his risk of needing treatment.

5. The evidence before the Commission does not clarify the findings as there is evidence on both the issues of whether plaintiff was at substantial risk of needing future medical treatment and whether that risk was directly related to the original injury.

Vacated and remanded.

Judge ELMORE concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority opinion which vacated and remanded the Commission's opinion and award based on the majority's conclusion that the Commission may have improperly placed the burden of proof on plaintiff to prove that future medical treatment was related to the original injury.

In deciding whether to order a defendant to pay for future necessary medical compensation, the Commission must first determine whether there is a substantial risk of the necessity of future medical compensation. N.C. Gen. Stat. § 97-25.1 (2001). If the Commission concludes that the plaintiff has shown such substantial risk of the necessity of future medical compensation, then a rebuttable presumption arises "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." *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (citing *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286 (1996)). It is acknowledged that it is the better practice for the Commission to specifically delineate between these two stages of the inquiry in its findings and conclusions, clearly showing that it has given the plaintiff the benefit of the presumption in the second stage. *See Reinninger*, 136 N.C. App. at 260, 523 S.E.2d at 724. However, if the Commission concludes that the plaintiff has failed to satisfy his initial burden of proving that there is a substantial risk of future medical treatment, then it is unnecessary for the Commission to even reach the second stage of the inquiry. In this case, while some of the language used by the Commission in its findings and conclusions may have blurred the lines between the two stages of the inquiry, it is clear that the Commission found that plaintiff failed to meet his initial burden, thus negating the need to even address the second stage providing plaintiff with the benefit of the presumption. This is evident by the following language included in the Commission's finding of fact number ten:

> [T]he greater weight of the evidence, including Dr. Lassiter's deposition testimony, indicates that there is not at [sic] a substantial risk that plaintiff will require future medical treatment . . . . Furthermore, the greater weight of the evidence indicates that the likelihood of the risk of future medical treatment falls short of the standard that the risk be substantial . . . .

I now turn to the determination of whether the Commission erred in concluding that plaintiff "failed to prove by the greater weight of the evidence that there is a substantial risk for the necessity of future medical treatment as a result of his compensable injury by accident." The Commission found the following:

> The Form 18M filed by plaintiff includes Dr. Lassiter's statement that there is a substantial risk that plaintiff will require additional medical care resulting from his compensable injury. However, the greater weight of the evidence, including Dr. Lassiter's deposition testimony, indicates that there is not at [sic] a substantial risk that plaintiff will require future medical treatment as a result of his injury. Although Dr. Lassiter testified that plaintiff's age and job duties could cause plaintiff to have additional shoulder problems requiring additional treatment, Dr. Lassiter did not have an accurate understanding of plaintiff's job duties. Furthermore, the greater weight of the evidence indicates that the likelihood of the risk of future medical treatment falls short of the standard that the risk be substantial and related to the injury itself and not additional difficulties arising from age or activities. These difficulties are properly handled through claims for a change of condition or a new condition.

The proper standard of review for this finding of fact and the resulting conclusion of law is whether (1) there is some competent evidence that supports the finding of fact; and (2) whether the finding of fact supports the resulting conclusion of law. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541, 485 S.E.2d 867, 868 (1997). Furthermore, if there is competent evidence that supports the Commission's findings, the existence of contrary evidence does not render those findings inconclusive. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995).

In the case at bar, the Commission acknowledged Dr. Lassiter's initial opinion that there was a substantial risk that plaintiff will require additional medical care resulting from his compensable injury. However, the Commission further found that this opinion was

based on an erroneous view of plaintiff's job duties. After plaintiff's actual job requirements were made clear to Dr. Lassiter (i.e., being made aware that the knife used to cut the tires is heated thus greatly reducing the force required to cut them; and that plaintiff only had to lift tires from waist level, not from ground level), the doctor opined that he "would have to fall back and say [plaintiff] has a *moderate* risk of having to have more treatment and problems with that shoulder, despite the restrictions." (Emphasis added.)

Therefore, I believe there is competent evidence in the record to support the Commission's finding that plaintiff failed to meet his initial burden of proving that there was a substantial risk of future medical treatment. I acknowledge that there is also competent evidence in the record to support a finding to the contrary. However, this Court is bound to give deference to the findings of the Commission, as "the Commission, and not [the appellate] Court, is 'the sole judge of the credibility of witnesses' and the weight given to their testimony." *Pittman v. Thomas & Howard*, 122 N.C. App. at 129, 468 S.E.2d at 286 (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). In addition to concluding that the Commission's finding is supported by competent evidence, we further conclude that this finding supports the Commission's conclusion that "[p]laintiff has failed to prove by the greater weight of the evidence that there is a substantial risk for the necessity of future medical treatment as a result of his compensable injury by accident."

Based on the foregoing analysis, I would affirm the Commission's opinion and award.

ANALOG DEVICES, INC., PLAINTIFF v. CHRISTOPHER MICHALSKI, KIRAN KARNIK, AND MAXIM INTEGRATED PRODUCTS, INC., DEFENDANTS

No. COA02-659

(Filed 6 May 2003)

1. Appeal and Error— appealability—interlocutory order—denial of preliminary injunction—disclosure of trade secrets affects substantial right

Although an appeal from the denial of a preliminary injunction is an appeal from an interlocutory order, disclosure of trade secrets affects a substantial right.

2. Employer and Employee; Injunction— trade secrets—actual or threatened misappropriation—doctrine of inevitable disclosure—denial of preliminary injunction

The trial court did not err in a misappropriation of trade secrets case by refusing to issue plaintiff company a preliminary injunction to enjoin defendant company from seeking to hire any engineer at plaintiff company working in the high speed, high resolution analog-to-digital converters divisions and to enjoin two former employees of plaintiff company who went to work for defendant company from working in the development, design, implementation and marketing of high-speed analog to digital converters with specification of 12 bits or higher and sample rates of 65 MSPS or higher, because: (1) plaintiff has failed to show a likelihood of success on the merits since plaintiff has not produced sufficient evidence establishing actual or threatened misappropriation of their trade secrets that would entitle them to injunctive relief; (2) defendant company has expressly required and both individual defendants have expressly agreed not to use or disclose plaintiff company's trade secrets; (3) plaintiff failed to present evidence of specific trade secrets and processes; (4) the Court of Appeals did not need to reach the consideration of whether to adopt the doctrine of inevitable disclosure since it would not be applied in the fashion promoted by plaintiff; and (5) defendant individuals did not sign a non-compete clause as part of their employment contract with plaintiff. N.C.G.S. § 66-154.

Appeal by plaintiff from order entered 12 February 2002 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 30 January 2003.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Burley B. Mitchell, Jr., and Michael E. Ray, and Hale and Dorr L.L.P., by James C. Burling and John T. Gutkoski, for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., and Jonathan A. Berkelhammer, and Brown & Bain, P.A., by Alan H. Blankenheimer and Laura E. Underwood, for defendants-appellees.

CALABRIA, Judge.

This matter is before the Court on the plaintiff's appeal of the trial court's order denying the issuance of a preliminary injunction. Analog

Devices, Inc. ("Analog") and Maxim Integrated Products, Inc. ("Maxim") are corporations that compete to produce various types of integrated circuits including analog-to-digital converters ("ADCs"). ADCs are used to convert real world signals such as voice, sound, or light signals into digital representations that can be used by computers, cell phone systems, and other electronic equipment for processing or storage. The primary characteristics of an ADC can be broken down into two performance specifications: sample rate or speed (measured in megasamples per second or MSPS) and resolution or accuracy of conversion (measured in bits). Analog is currently the market leader in the field of high speed (sample rates of 65 MSPS or higher), high resolution (resolution of 12 bits or higher) ADCs.

Christopher Michalski ("Michalski") is a design engineer with a master's degree in electrical engineering. Michalski worked at Westinghouse Defense and Electronic Center for over eight years on ADCs. After leaving Westinghouse, Michalski worked for Analog for over five years as a lead design engineer on different ADC models designed and produced by Analog. Kiran Karnik ("Karnik"), also a former engineer at Analog with a master's degree in electrical engineering, worked for over a year in Analog's design center in the production of ADCs. In September of 2001, both Michalski and Karnik left Analog for positions at Maxim.

On the night before departing Analog, Michalski printed approximately 77 pages of confidential schematics and documents concerning Analog's ADC products and components. Analog contended Michalski took those documents with him when he left. Michalski denied taking the documents. He explained the reason he needed hard copies was to compare the schematics with technical journals to distinguish between techniques and devices known generally in the industry versus those which were proprietary to Analog.

During Michalski and Karnik's exit interviews, Analog provided proprietary rights agreements. Both signed the agreements not to disclose confidential information belonging to Analog. Neither Michalski nor Karnik signed a covenant not to compete when they commenced employment with Analog, and both refused to sign a covenant not to compete at their exit interviews.

On 21 September 2001 in Guilford County Superior Court, Analog moved for a temporary restraining order to prevent the disclosure of confidential information and trade secrets to Maxim. The Honorable Lindsay R. Davis granted Analog's motion for a temporary restraining

order. On 15 October 2001, Analog moved for a preliminary injunction to enjoin Maxim from seeking to hire any engineer at Analog working in the high speed, high resolution ("HSHR") ADC divisions and to enjoin Michalski and Karnik from "working in the development, design, implementation and marketing of high-speed analog to digital converters" with specification of 12 bits or higher and sample rates of 65 MSPS or higher. On 12 February 2002, after conducting a four-day hearing, the Honorable Peter M. McHugh entered an order dissolving the temporary restraining order and denying Analog's motion for a preliminary injunction. In so doing, the trial court found: (1) the process technology differences between Analog and Maxim rendered the trade secrets "mostly irrelevant . . . [and] of no use[;]" (2) Analog had failed to specifically identify any trade secrets or show either actual or threatened misappropriation as required by North Carolina law; and (3) Analog had failed to show irreparable harm should Michalski and Karnik work for Maxim. Analog appeals.

[1] "The denial of a preliminary injunction is interlocutory and as such an appeal to this Court is not usually allowed prior to a final determination on the merits." *N.C. Electric Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev.*, 108 N.C. App. 711, 716, 425 S.E.2d 440, 443 (1993). However, review is proper if "such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). "[T]his Court [has] recognized that disclosure of trade secrets could affect a substantial right." *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 777, 501 S.E.2d. 353, 355 (1998) (citation omitted). A substantial right is presented here since, absent a preliminary injunction, Maxim would be free to employ Michalski and Karnik in the design of HSHR ADC products and any disclosure or misappropriation of Analog's trade secrets would be irreparable.

[2] "The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*." *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984). "[A]n appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *McClure*, 308 N.C. at 402, 302 S.E.2d at 760. However, a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous. *Conference v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (citation omitted).

> A preliminary injunction is an extraordinary measure, and will be issued only if (1) [a] plaintiff is able to show a likelihood of success on the merits of his case and (2) [a] plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of his rights during the course of litigation.

Wade S. Dunbar Ins. Agency, Inc. v. Barber, 147 N.C. App. 463, 467, 556 S.E.2d 331, 334 (2001).

I. Likelihood of success on the merits

A. Actual or Threatened Misappropriation

North Carolina's Trade Secrets Protection Act provides "[e]xcept as provided herein, actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . ." N.C. Gen. Stat. § 66-154 (2001). Misappropriation is defined as the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. § 66-152(1) (2001). A trade secret is defined in N.C. Gen. Stat. § 66-152(3) (2001) as follows:

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

At this stage of the proceedings, Analog has failed to show a likelihood of success on the merits because Analog has not produced sufficient evidence establishing actual or threatened misappropriation of their trade secrets that would entitle them to injunctive relief. In fact, the evidence at trial indicates the integrated circuits produced by Maxim and Analog are too divergent to allow interchangeable use of Analog's trade secrets.

The production of integrated circuits can be categorized, among other ways, by process technology, by device size or geometry, and by device composition. Both Maxim and Analog fabricate integrated circuits using BiCMOS process technology. However, the device geometry and device composition used by the two companies differ. Analog utilizes larger geometries (.6 and .35 micron) in fabricating the integrated circuits they produce. By contrast, the geometry of the integrated circuits produced by Maxim is .18 and .5 microns. The reduction in the device size and the resulting decrease in the supply voltage preclude the use of many circuit designs that may otherwise be viable at a larger geometry. While Analog used a .18 micron TSMC process that shares some specifications with Maxim's .18 micron process, neither Michalski nor Karnik has designed using the .18 micron TSMC process while employed at Analog.

Moreover, Analog and Maxim use different device compositions. Analog uses a bulk silicon process in the manufacture of its ADCs while Maxim uses and has been using a silicon germanium process. Neither Michalski nor Karnik designed integrated circuits at Analog using a silicon germanium process. In fact, the record discloses no evidence that Analog is engaged in designing integrated circuits composed of silicon germanium. Maxim intends for both Michalski and Karnik to work on future ADC designs fabricated using a .18 micron silicon germanium BiCMOS process. Thus, both will be employed in the production of integrated circuits using a different device size and device composition.

These differences in sizes and compositions and the resulting design changes render the alleged trade secrets largely nontransferable. As the trial court held in contemplating the testimony of Analog's witnesses concerning the impact of these differences:

> The evidence is undisputed that the process technology impacts the design of ADCs. Analog's director of high-speed ADCs testified that all circuits are heavily process dependent. Mr. Michalski's supervisor, [engineer Tom] Tice, testified that a substantial difference in process technologies renders the trade secrets "mostly irrelevant" and further explained that if the device sizes for the processes are different, the trade secrets "would be of no use." Maxim uses a different process technology, having a different device size and a different composition (silicon germanium).

These conclusions are supported by the expert testimony of Dr. William T. Holman for defendants. Based on the differences between the geometry and the composition, Holman testified the design differences would be "significant." Such differences would require scaling down the circuit designs, lowering operating voltage, and creating new circuit topologies. When asked if the circuits involved in the case *sub judice* would have to be redesigned, Holman answered, "[m]any circuits . . . would have to be redesigned and [would] be completely nonfunctional at 1.8 volts [the corresponding voltage for a .18 micron design.]" Moreover, Maxim has expressly required and both individual defendants have expressly agreed not to use or disclose Analog's trade secrets. Based on the foregoing evidence, misappropriation of Analog's trade secrets by Maxim is unlikely, and a claim of misappropriation on the evidence currently before this Court must fail.

B. Specific Trade Secrets for Analog's Components or Combinations

Analog contends trade secret protection is warranted in three areas: (1) the ADC chips as a whole and the processes and techniques used to produce it, (2) specific components and implementations used by Analog, and (3) process of determining those efforts that will lead to successful developments and those efforts that will only be a waste of time and resources.

It is generally accepted that a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur. *See, e.g., FMC Corp. v. Cyprus Foote Mineral Co.*, 899 F. Supp. 1477, 1484 (W.D.N.C. 1995); *IDX Systems Corp. v. Epic Systems Corp.*, 285 F.3d 581, 584 (7th Cir. 2002); *Del Monte Fresh Produce Co. v. Dole Food Co. Inc.*, 148 F. Supp. 2d 1322, 1325 (S.D. Fla. 2001); *Xerox Corp. v. IBM Corp.*, 64 F.R.D. 367, 371-72 (S.D.N.Y. 1974). We find persuasive the analysis set forth by *FMC*, 899 F. Supp. at 1484, where a preliminary injunction was denied because the plaintiff failed to "present[] evidence of specific trade secrets and processes."

Just as the plaintiff in *FMC* asserted trade secrets at almost every stage in the production of their products but offered only general evidence in support of those assertions, Analog has asserted there are trade secrets at risk and has submitted schematics and documents in support of their claim. Analog has failed to show what, if anything, in those schematics is specifically deserving of protection. Instead, Analog has made general claims concerning areas of ADC production

and design and requested a preliminary injunction that acts as an absolute bar to Maxim's future efforts in ADC research through its employees, Michalski and Karnik. For example, in their proposed findings of fact to the trial court, Analog stated the following in defining their trade secrets:

> 47. The circuit designs and solutions developed by Analog Devices . . . .
>
> 48. While each of Analog's designs and solutions, along with their specific implementations . . . may contain individual trade secrets, "it's a combination of all of the aspects which constitute trade secrets that make the device itself a trade secret."
>
> . . .
>
> 50. "The techniques and the variations and the adjustments that are required to make . . . successful components . . . ."
>
> . . .
>
> 52. Trade secrets can be found in the overall design and implementation of Analog's 94xx products, even if all the constituent parts of that design were publicly known.

Analog invites this Court to acknowledge the existence of trade secrets in the submitted information without bearing the burden of identifying those trade secrets. We will not read into Analog's claims specific identification of devices worthy of trade secret protection when it is Analog's burden to come forward with evidence of such devices.

To the extent Analog has claimed the chips or their production processes and techniques are trade secrets, the evidence presented as of yet in the record discloses ADCs are easily and readily reverse engineered.[1] To the extent Analog has attempted to specifically state components deserving of trade secret protection,[2] the record

1. As the trial court found, development of an ADC takes millions of dollars and anywhere between one and one-half to three years. However, an ADC with 12-bit resolution and a sampling rate of 65 MSPS can be reverse engineered in twelve weeks at a cost of $26,000 to $35,000, depending on the type of information to be extracted.

2. Specific examples of trade secrets given by Analog include, among others, a technique for adjusting the duty cycle of the clock using fusible links, the implementation of the duty cycle adjustment clock, the absence of MOS switches at the inputs and the use of metal resistors, track-and-hold circuits, the slew rate enhancement circuits and the switch for gain reduction mode achieved using a MOS switch, the use of MOS switches and resistors for gain reduction in the MDAC amplifier, the BiCMOS

presently before this Court shows those examples do not merit trade secret protection because they are either generally known in the industry, are process dependent so as to preclude misappropriation, or are readily ascertainable by reverse engineering. To the extent Analog has claimed it possesses a trade secret as to the process of determining those efforts that will lead to successful developments and those efforts that will only be a waste of time and resources, the evidence presently indicates the substantial differences in the integrated circuits to be produced by Maxim will require new experimentation and development of new ways to effectively identify efforts that will lead to successful development. Otherwise, any process by any former Analog employee to develop new, different, or superior technologies, in the field of ADC design, would be precluded as a trade secret belonging solely to Analog.

C. Inevitable Disclosure

Analog urges this Court to adopt the doctrine of "inevitable disclosure"[3] and find it is inevitable that Michalski and Karnik will disclose trade secrets of Analog during the course of their employment if they are allowed to work for Maxim. We need not reach the consideration of whether to adopt the doctrine of inevitable disclosure since it would not be applied in the fashion promoted by Analog.

Analog's interpretation of the doctrine of inevitable disclosure would permit the injunction sought to act as an absolute barrier to working in the field of ADC design without reference to the composition, geometry, or process used to produce the ADC, all of which impact the relevance of the trade secrets for which protection is sought. Maxim has already produced ADCs with the resolution and speed denoted in the injunction. Again we find the analysis of *FMC* to be instructive: "if the doctrine is applied as urged by [Analog], then no employee could ever work for its former employer's competitor on the theory that disclosure of confidential information is 'inevitable.'

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comparator cell using bipolar devices in the latch cell, how Analog models the parasitic and how the BiCMOS comparator works with the ADC as a whole, electrostatic discharge protection circuitry, and the specific implementation of a reference generator block.

3. In simplest terms, the doctrine applies when an emloyee who knows trade secrets of his employer leaves that employer for a competitor and, because of the similarity of the employee's work for the two companies, it is "inevitable" that he will use or disclose trade secrets of the first employer. *See* K. Roberson, *South Carolina's Inevitable Adoption of the Inevitable Disclosure Doctrine: Balancing Protection of Trade Secrets with Freedom of Employment*, 52 S.C.L. Rev. 895 (2001).

In fact, if [Analog] succeeded in this case, then [Michalski and Karnik] would not be able to market [their] expertise." *FMC*, 899 F. Supp. at 1482-83.

Analog ignores the important countervailing considerations at issue: both Michalski and Karnik have a great deal of general skill and knowledge as engineers who have studied for and worked in this area for years. These skills are not specific to the techniques and processes used by Analog, and both engineers are free to market those skills to competitors. "The mere fact that [they] acquired some of these skills while working for [Analog] does not mean that [they] must work for [Analog] or not work at all." *Id.*, 899 F. Supp. at 1483. Michalski and Karnik have merely "exercised the privilege every citizen has of accepting employment in the field for which he is trained." *Engineering Associates v. Pankow*, 268 N.C. 137, 140, 150 S.E.2d 56, 59 (1966).

Michalski and Karnik have signed agreements not to divulge confidential information belonging to Analog, Maxim has instructed them not to do so, and there is no evidence that any party to this litigation intends to induce them to break their agreement.[4] "[A]n injunction [will not] be issued to restrain one from doing that which he is not attempting to do." *Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 696, 228 S.E.2d 478, 486 (1976). While Analog might have prevented Michalski and Karnik from working in the field of HSHR ADC design and development in the event they ceased working for Analog by making a non-compete clause part of their employment contract, no such clause has been presented.

II. Irreparable Harm

In light of our holding concerning likelihood of success on the merits, Analog cannot show the denial of a preliminary injunction will work an irreparable injury.

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4. While North Carolina case law does allow for an injunction preventing an employee from working for a former employer's competitor where there is a showing of bad faith, underhanded dealing, or inferred misappropriation (justified by circumstances tending to show the new employer plainly lacks comparable technology), no showing has been made that misappropriation is imminent or occurring. *See Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 424 S.E.2d 226 (1993). Moreover, while there are facts indicating Michalski's conduct was questioned by the trial court, the trial court rejected Analog's proposed finding of fact that Michalski's actions were in bad faith. The trial court specifically found that Karnik acted in good faith at all times relevant to this litigation and that there was no evidence Michalski used any of Analog's confidential information.

In sum, Analog has failed to present sufficient evidence tending to show misappropriation is threatened or actually going to occur. Analog has yet to come forward with evidence of or sought protection for particular and specific devices, combinations, or processes that would merit trade secret protection. "[A]n injunction [should not issue] merely to allay the fears and apprehensions or to soothe the anxieties of a party." *Turner*, 30 N.C. App. at 696, 228 S.E.2d at 486. Accordingly, we hold the trial court did not err in refusing to issue the preliminary injunction.

Affirmed.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA v. LARRY RILEY JONES, DEFENDANT

No. COA02-411

(Filed 6 May 2003)

1. Evidence— citation—not admissible

The admission of a citation charging defendant with resisting an officer and displaying a fictitious registration plate was prejudicial error. While a citation is not an indictment, there is no distinction between the potential for prejudice from the language of this citation and that found in indictments and other pleadings that may not be read to the jury by statute. The error was prejudicial because the case consisted almost entirely of witness testimony and turned on which account the jury believed. N.C.G.S. § 15A-1221(b).

2. Sentencing— habitual felon—underlying conviction reversed

A conviction for being an habitual felon was vacated when defendant was granted a new trial on the underlying conviction.

Appeal by defendant from judgment entered 31 May 2001 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 11 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland and Special Deputy Attorney General William P. Hart, for the State.

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

ELMORE, Judge.

Defendant, Larry Riley Jones, was indicted on 2 April 2001 for the following offenses: felony eluding arrest (00 CRS 56218); displaying a fictitious registration plate and resisting a public officer (00 CRS 56219); possession of over half an ounce of marijuana and possession of drug paraphernalia (00 CRS 56220); and for being an habitual felon (01 CRS 0070). All of the underlying cases came on together for trial at the 30 May 2001 criminal session of Buncombe County Superior Court. After jury selection, defendant pled guilty in the possession of marijuana and drug paraphernalia case. The State prosecuted the remaining charges, and on 31 May 2001 the jury found defendant guilty of felony eluding arrest and resisting a public officer. The jury was unable to reach a unanimous verdict on the fictitious registration plate charge, and the State ultimately dismissed that charge. The habitual felon case came on for trial at the same court session, and the jury found defendant guilty of having habitual felon status upon the felony eluding arrest conviction.

The trial court consolidated all the cases for sentencing and adjudged defendant to be an habitual felon. The parties stipulated that defendant had twenty-three prior record points and a prior record level of VI. The trial court sentenced defendant from the presumptive range to a minimum of 152 and a maximum of 192 months in prison. Defendant appeals from the convictions for felony eluding arrest, resisting a public officer, and having the status of habitual felon.

At trial, the parties presented very different accounts of the events which gave rise to these charges. The State's lone witness, Buncombe County Sheriff's Deputy T. K. Bradley (Deputy Bradley), testified that around dusk on 4 May 2000 he observed defendant operating a vehicle with a burned-out headlight on Deaverview Road in Asheville. Deputy Bradley pulled behind defendant in his marked patrol car, entered defendant's license plate number into his computer, and determined that the plate was not registered to defendant's vehicle. Deputy Bradley followed as defendant turned onto Hi-Alta

Avenue, and their speeds increased to "right at seventy and eighty miles per hour" through a "very highly populated residential area" with a posted speed limit of thirty miles per hour. As their speeds increased, Deputy Bradley activated his blue lights and siren and attempted to pull defendant over. Defendant responded by running a four-way stop on Hi-Alta Avenue and turning right onto Central Avenue, then left onto Hemlock Lane. Deputy Bradley testified that these streets were curvy and "very narrow," with many cars parked along the roadside and with residences "fairly close to the street," and that defendant was "driving very erratic[ly]." According to Deputy Bradley, he "slowed the [patrol] car sideways," "went off the edge of the roadway several times[,]" and "almost hit several parked vehicles" while pursuing defendant. At one point, defendant's car almost left the roadway while rounding a sharp curve; Deputy Bradley testified that had it done so, it would have crashed into a residence situated near the road.

After pursuing defendant for a total of "approximately eight- to nine tenths of a mile[,]" Deputy Bradley testified that defendant's vehicle ran out of gas on Hemlock Lane. Defendant exited the vehicle and ignored Deputy Bradley's commands to place his hands on the car, whereupon Deputy Bradley "had to wrestle him for a few minutes" before placing defendant under arrest. A subsequent search of defendant's person revealed four syringes and a small bag of marijuana. Deputy Bradley determined that defendant's driver's license had been revoked and also issued him a citation for the misdemeanor offenses of displaying a fictitious registration plate and resisting a public officer. This citation was admitted into evidence at trial over defendant's objection, and was later published to the jury, at the jury's request, during deliberations. Defendant stipulated at trial that his license had been permanently revoked in 1997.

Defendant testified at trial that on the evening in question he was returning home when he passed two patrol cars parked just off Deaverview Road. Defendant testified that both of his headlights were working and he was traveling thirty-five miles per hour, yet he saw Deputy Bradley look at him and "knew he was coming after me." Defendant did not see Deputy Bradley behind him and did not see any blue lights when he turned onto Hi-Alta Avenue, and he denied running the four-way stop. As defendant proceeded around the curves on Hi-Alta, he "might have got [sic] over thirty-five" but his speed never reached fifty miles per hour, much less seventy or eighty. Defendant testified that because of the curves and hills it would be

impossible to drive that fast on Hi-Alta. As defendant was turning onto Central Avenue, the street on which he lived, he saw Deputy Bradley's blue lights behind him for the first time. At this point defendant's vehicle ran out of gas, and he coasted down Central past his house and onto Hemlock Avenue, where he pulled off the road. According to defendant, he coasted past his house because he did not want his dying mother to see or hear him being arrested. Defendant testified that despite exiting the car with his hands straight up and obeying Deputy Bradley's instructions, the deputy drew his service weapon, handcuffed him and "grabbed me by the hair of my head and just slammed me down on my car."

Defendant presented testimony at trial from three witnesses who tended to corroborate various portions of defendant's testimony. Clyde Bugg, defendant's neighbor, testified that he saw defendant's car pass his house on the evening in question, followed by a police car flashing its blue lights but without a siren. Bugg also testified that he has never driven fast on Hi-Alta Avenue because it is "too crooked." Geraldine Austin, defendant's sister, testified that she saw defendant's car pass the house on Central Avenue she shared with defendant and their sick mother, followed by a police car with blue lights on but no siren. Austin testified that she witnessed her brother's arrest and that it occurred in substantially the manner he described. Theresa Murphy, defendant's niece, likewise testified that she was at defendant's house and saw his car pass the house "going no more than twenty or thirty miles an hour" followed by a police car with blue lights activated, but no siren.

Defendant brings forth thirteen assignments of error and argues that his habitual felon conviction should be vacated, and that he should receive a new trial on the felony eluding arrest and misdemeanor resisting a public officer charges. For the reasons discussed below, we agree.

[1] Defendant assigns error to the admission into evidence, and subsequent publication to the jury, of the citation Deputy Bradley issued to defendant for resisting a public officer and displaying a fictitious registration plate. Defendant interposed a timely objection to both the admission and publication of this citation; the trial court overruled defendant's objections, admitted the citation, and allowed its publication to the jury without a limiting instruction. On appeal, defendant argues that the trial court's actions were analogous to admitting an indictment into evidence and publishing it to the jury and were therefore prohibited by N.C. Gen. Stat. § 15A-1221(b),

and that these errors precluded defendant from receiving a fair trial. We agree.

Section 15A-1221(b) of the North Carolina General Statutes provides that "[a]t no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury." N.C. Gen. Stat. § 15A-1221(b) (2001). Our Supreme Court has articulated the rationale behind this prohibition as follows: "The legislature apparently intended that jurors not be given a distorted view of the case before them by an initial exposure to the case through the *stilted language of indictments and other pleadings.*" *State v. Leggett*, 305 N.C. 213, 218, 287 S.E.2d 832, 836 (1982) (emphasis added); *see also State v. Flowers*, 347 N.C. 1, 35, 489 S.E.2d 391, 411 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998).

In the case at bar, the citation stated in pertinent part that:

> The undersigned officer has probable cause to believe that on or about [4 May 2000] . . . the named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) . . . [while] display[ing] a registration plate number knowing the same to be fictitious . . . and . . . the named defendant did unlawfully and willfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office[,] to wit: fighting with officer and arguing while being taken into custody after fleeing from officer in a vehicle pursuit.

Moreover, the following language appeared in a section of the citation entitled "MAGISTRATE'S ORDER-MISDEMEANOR ONLY[:]"

> The named defendant has been arrested without a warrant and there is probable cause for the defendant's detention on the stated charges. This Magistrate's Order is issued upon information furnished under oath by the named officer.

Finally, in a section of the citation entitled "COURT USE ONLY" a handwritten instruction to "Transfer to S. Crt[.] w/ related fel[.] case" appears, under signature of District Court Judge Pope.

We hold that N.C. Gen. Stat. § 15A-1221(b), and our Supreme Court's interpretation of the statute as a means of protecting jurors from being influenced by "the stilted language of indictments and other pleadings[,]" render the admission and publication of the instant citation erroneous. *Leggett*, 305 N.C. at 218, 287 S.E.2d at 836.

We are mindful of our legislature's provision that a citation may serve as the State's pleading in all criminal cases save those initiated in the superior court division. N.C. Gen. Stat. § 15A-921 (2001); N.C. Gen. Stat. § 15A-923(a) (2001). While a citation is not an indictment, we find no distinction between the potential for prejudice resulting from the language of this citation and that found in "indictments and other pleadings."

The citation in the case *sub judice* contains much of the same "stilted language" commonly found in indictments and pleadings. In fact, the language used in this citation is almost identical to that employed in defendant's later indictment for these offenses. The citation states there is "probable cause to believe" defendant "did unlawfully and willfully operate" his car with a fictitious registration plate, and that he resisted, delayed or obstructed "a public officer in discharging or attempting to discharge a duty of his office" by fighting and arguing with Deputy Bradley "while being taken into custody after fleeing from [an] officer in a vehicle pursuit."

We hold that the citation's recitation of the charges against defendant, phrased in the "stilted" language commonly found in indictments, gave the jury a "distorted view" of the case against defendant. We find it significant that the citation also contained a signed portion entitled "MAGISTRATE'S ORDER-MISDEMEANOR ONLY" stating "there is probable cause for the defendant's detention on the stated charges[,]" as well as a section entitled "COURT USE ONLY" with what appear to be instructions to transfer these offenses to superior court along with the related felony eluding arrest charge, since the jury could interpret these statements by two different judicial authorities as conclusive evidence that defendant is guilty of the offenses mentioned therein. This is especially true where, as here, no limiting instruction was given.

We are not persuaded by the State's argument that admission of the citation near the end of Deputy Bradley's direct examination, and its publication at the jury's request only after deliberations had begun, is not an "initial exposure to the case" and therefore takes the citation outside the purview of N.C. Gen. Stat. § 15A-1221(b) and *Leggett*. *See Flowers*, 347 N.C. at 35, 489 S.E.2d at 411 (holding that the statute is applicable "during the jury selection and guilt/innocence phases of criminal trials" and "[o]nce a case has reached the sentencing proceeding after the trial, fear that the jury's *initial exposure* to the case will result in a *distorted* view is no longer a concern").

Having concluded that the trial court erred by admitting the citation into evidence and publishing it to the jury, we must now determine whether the error was prejudicial and thus warrants a new trial. The test for prejudicial error is whether there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2001); *State v. Frazier*, 344 N.C. 611, 617, 476 S.E.2d 297, 300 (1996).

After a thorough review of the record, we find that defendant has satisfied his burden of showing prejudicial error. The evidence in this case, which consisted almost entirely of witness testimony, was not overwhelmingly in favor of defendant's guilt on either the speeding to elude arrest or resisting a public officer charges. The State's lone witness, Deputy Bradley, presented a very different account of what happened after defendant's car passed him on Deaverview Road than did defendant and his three witnesses. The jury's verdicts essentially turned on which account the jury believed.

Section 20-141.5 of the North Carolina General Statutes defines "speeding to elude arrest" as follows:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> . . .
>
> (3) Reckless driving as proscribed by G.S. 20-140.
>
> . . .
>
> (5) Driving when the person's drivers license is revoked.

N.C. Gen. Stat. § 20-141.5 (2001). Our General Statutes also provide that "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2001).

In convicting defendant of felony eluding arrest, the jury obviously believed Deputy Bradley's testimony that defendant knew he was being pursued by Deputy Bradley and that defendant drove recklessly in attempting to elude him. Likewise, defendant's conviction for resisting a public officer indicates the jury believed Deputy Bradley's testimony that defendant was belligerent and uncooperative when Deputy Bradley tried to arrest him. The citation's language tended to corroborate Deputy Bradley's testimony with respect to each charge. Moreover, the very fact that it was issued by a police officer and contained comments attributed to both a magistrate and a district court judge imbued the citation with the imprimatur of the State, a circumstance likely to give it undue influence with the jury. Given the almost total reliance by both parties in this case on testimonial evidence, and the conflicting nature of that testimony, we find it reasonably possible that the citation's improper admission and publication was a factor in the jury believing Deputy Bradley's testimony, thus tipping the scales in favor of conviction on the resisting a public officer and felony eluding arrest charges. Accordingly, we hold that defendant is entitled to a new trial on the felony eluding arrest and misdemeanor resisting a public officer convictions.

[2] Next, we turn to defendant's conviction for having habitual felon status, which was predicated on defendant's conviction on the felony eluding arrest charge. It is well settled that:

> [t]he only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. . . . 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. Allen, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) (citations omitted). Since we hold that defendant is entitled to a new trial on the felony eluding arrest charge, which served as the "substantive felony" underlying his conviction for having habitual felon status, defendant's habitual felon conviction must be vacated.

Because we hold that defendant is entitled to a new trial on his convictions for felony eluding arrest (00 CRS 56218) and resisting a public officer (00 CRS 56219), and that defendant's conviction for

having habitual felon status (01 CRS 0070) must be vacated, we do not address defendant's remaining assignments of error.

New trial in part; vacated in part.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. VIRGIL GLENN LATHAM

No. COA02-595

(Filed 6 May 2003)

1. Evidence— prior assaults—domestic partner—relevant

Evidence of prior assaults by the accused against a murder victim are both relevant and admissible when the victim is a domestic partner. Moreover, the defendant in this case did not object at trial, and any possible prejudice was outweighed by the probative value in determining whether the shooting was an accident.

2. Evidence— hearsay—murder victim's fear of defendant—state of mind exception

Statements made by a murder victim to several witnesses concerning her fear of defendant were admissible under the state of mind exception of the hearsay rule to show that the shooting of the victim was not accidental. N.C.G.S. § 8C-1, Rule 803(3).

3. Appeal and Error— preservation of issues—brief—case law not cited—argument not considered

An argument that the admission of hearsay violated a first-degree murder defendant's right to confront his accuser was not addressed because defendant cited no supporting case law.

4. Evidence— defendant's remorse—admissible

The exclusion of lay testimony that a first-degree murder defendant might feel remorse for killing the victim was not error, much less plain error. The witness did not recount a statement, but gave an opinion which was not based on first-hand observation. Also, it is not clear how the opinion was relevant to any facts at issue in the case.

5. Homicide— first-degree murder—short-form indictment

Use of a short-form murder indictment was not error.

Appeal by defendant from judgment entered 28 September 2001 by Judge Cy A. Grant in Pitt County Superior Court. Heard in the Court of Appeals 18 February 2003.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Gary R. Govert, for the State.

Osborn & Tyndall, P.L.L.C., by Amos Granger Tyndall, for defendant-appellant.

HUNTER, Judge.

Virgil Glenn Latham ("defendant") appeals from a first degree murder conviction, whereby he was sentenced to life imprisonment without the possibility of parole. For the reasons stated herein, we find no error.

The State's evidence at trial tended to show that decedent, Wylene Little ("Wylene"), was killed as the result of a gunshot wound to the head, and that the gun was fired by defendant. The shooting occurred on the day that Wylene asked defendant to move out. At trial, defendant claimed the shooting was the result of an accident. Defendant alleged that he took his gun from the trunk of his car and put it in his waistband as he gathered his belongings. He further claimed that Wylene threw some clothes at him at the same moment he was trying to prevent the gun from slipping, which resulted in the gun going off. The gun was fired twice, and Wylene was struck by a bullet in the back of her head. Several eyewitnesses testified that they did not see Wylene throw anything at defendant immediately prior to the shots being fired. At least four witnesses testified that they heard defendant curse at the victim immediately prior to the shooting. One eyewitness, Tristan Little ("Tristan"), Wylene's nephew, testified that he heard Wylene ask defendant to leave; he watched defendant pack his things into garbage bags; and when Tristan tried to hand defendant some hair clippers, defendant "walked right by" him and said to Wylene, "are you going to kick me out, bitch?" Tristan then testified that after defendant said this, he watched defendant shoot Wylene. Furthermore, two eyewitnesses testified to hearing defendant, also immediately prior to the shooting, say something to the effect that if he had to leave, Wylene would be leaving too.

Testimony was admitted by the trial court indicating that defendant had assaulted Wylene on at least two occasions prior to the shooting. For example, Erica Little ("Erica"), Wylene's daughter, was permitted to testify that on one occasion, Wylene came home with a swollen lip and bloody shirt after going out with defendant. Defendant told Erica that Wylene had hit her lip on the door. Additionally, evidence was admitted that defendant pled guilty to assault inflicting serious injury in connection with an incident where defendant hit Wylene with a mirror, resulting in a serious injury to her leg. Eyewitnesses to this assault were permitted to testify at trial about the incident. In contrast, defendant attempted to elicit testimony from Teresa Brown ("Brown") as to her opinion whether defendant was the type of person who would feel remorse for shooting and killing Wylene. The trial court sustained the State's objection to this solicitation, and later allowed defendant to pursue the inquiry with Brown on a *voir dire* cross-examination, out of the presence of the jury, where she stated: "I think if he could take it back, he would."

Further, several witnesses were permitted to testify at trial that Wylene had expressed fear of defendant prior to the shooting. Tristan testified that on the day of the shooting, Wylene asked him to stay with her because she was scared that defendant might "try something" when she asked him to move out. Deirde Little, Tristan's mother, testified that her son called her that evening and asked her to come over to the victim's house "because Wylene was afraid that [defendant] was going to start something." Additionally, Erica, the victim's daughter, testified that when she asked her mother why she was kicking defendant out, Wylene's reply was that "he had a little attitude, and she knew he was going to start some trouble."

Defendant was indicted for murder through the use of a short form indictment on 1 November 1999. Thereafter, on 28 September 2001, a jury unanimously convicted him of first degree murder. Defendant was subsequently sentenced to life imprisonment without the possibility of parole. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred in admitting evidence of his prior assaults against the victim. Specifically, the trial court admitted testimony by several witnesses regarding two assaults that defendant perpetrated against Wylene prior to the shooting. Defendant did not object at trial to the majority of the testimony

regarding the prior assaults, thus we must use the plain error rule in considering defendant's arguments in this respect.

The "plain error" rule is well settled in this State and has been set forth as follows:

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

State v. Black, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Defendant argues that evidence of his prior assaults against the victim should have been inadmissable because of its lack of relevance, its overly prejudicial effect, because the acts were not similar to the crime charged, and because the acts were introduced to show defendant's propensity for violence. Defendant cites to N.C. Rules of Evidence 401, 403, and 404(b) in support of these arguments. Under Rule 401, evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Contrary to defendant's claim, evidence of defendant's relationship with the victim is directly relevant to the issue of whether the shooting was in fact an accident, as discussed in the Rule 404(b) analysis that follows.

"Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.' " *State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002) (quoting *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991)). While defendant argues that prior assaults against the victim are not similar to the charge of murder, his focus on the details of the acts are misplaced. On the contrary:

> "Rule 404(b) is a rule of '*inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show

> that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' "

State v. Scott, 343 N.C. 313, 330, 471 S.E.2d 605, 615 (1996) (quoting *State v. Weathers*, 339 N.C. 441, 448, 451 S.E.2d 266, 270 (1994)). Additionally, " '[e]vidence of another offense is admissible under Rule 404(b) so long as it is relevant to any fact or issue other than the character of the accused.' " *State v. Kyle*, 333 N.C. 687, 697, 430 S.E.2d 412, 417 (1993) (quoting *State v. Simpson*, 327 N.C. 178, 185, 393 S.E.2d 771, 775 (1990)).

The evidence of prior acts of domestic violence, namely assaults by defendant against the victim, his girlfriend, were both relevant and admissible in this case. Defendant was charged with first degree murder, requiring a showing of willfulness and malice aforethought. *See* N.C. Gen. Stat. § 14-17 (2001). Evidence of prior assaults against the victim hold a special place in the context of domestic violence:

> "In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of [the defendant's] feelings." Specifically, evidence of frequent quarrels, separations, reconciliations, and ill-treatment is admissible as bearing on intent, malice, motive, premeditation, and deliberation.

Scott, 343 N.C. at 331, 471 S.E.2d at 616 (citations omitted) (finding testimony regarding prior violent acts towards wife was admissible under Rule 404(b) to prove issues in dispute such as malice, intent, premeditation, and deliberation) (quoting *State v. Moore*, 275 N.C. 198, 207, 166 S.E.2d 652, 658 (1969)); *see also State v. Syriani*, 333 N.C. 350, 376, 428 S.E.2d 118, 132 (1993) (holding that "testimony about defendant's misconduct toward his wife was proper under Rule 404(b) to prove motive, opportunity, intent, preparation, [and] absence of mistake or accident with regard to the subsequent fatal attack upon her"); *Simpson*, 327 N.C. at 185, 393 S.E.2d at 775 (holding that trial court did not err in admitting evidence of defendant's prior assault on the victim as it tended to establish malice, an issue relevant to a first degree murder charge). These cases provide precedent clearly indicating that when the spouse (or domestic partner, as in this case) is the victim, evidence of prior assaults by the accused against the victim are both relevant and admissible.

Additionally, defendant relies on Rule 403, which calls for the exclusion of relevant evidence "if its probative value is substantially

outweighed by the danger of unfair prejudice . . . ." N.C.R. Evid. 403. Any possible prejudicial effect of the evidence of defendant's prior assaults against the victim are outweighed by their probative value in determining whether the shooting was indeed an accident. Furthermore, "[w]hether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Stager*, 329 N.C. at 315, 406 S.E.2d at 897 (citing *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 54 (1990)). Defendant has not shown that the trial court abused its discretion in admitting the evidence of defendant's prior assaults against the victim. Therefore, there was no error, much less plain error, in the admission of this evidence.

II.

[2] Defendant next argues that the trial court erred by admitting hearsay statements by the decedent concerning her relationship with defendant, specifically regarding her fear of him. Since defendant did not object during trial to the admission of each of these statements, we must also review this argument using the "plain error" rule, as set forth in Part I of this opinion.

Defendant argues that the hearsay statements did not show the victim's state of mind and thus did not fall under the hearsay exception set forth in N.C. Rule of Evidence 803(3). On the contrary, Wylene's statements regarding her fear of defendant fall under Rule 803(3), since "[i]t is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant." *Scott*, 343 N.C. at 335, 471 S.E.2d at 618 (holding that testimony of several witnesses regarding conversations with the victim "related directly to [the victim's] fear of [the] defendant" and thus were "properly admitted pursuant to the state of mind exception"); *see also State v. Glenn*, 333 N.C. 296, 305, 425 S.E.2d 688, 694 (1993) ("[t]he victim's fear of defendant was relevant to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind prior to the murder"). Here, defendant argued at trial that the shooting of Wylene was an accident. Testimony from a number of witnesses regarding the victim's fear of defendant tends to demonstrate a likelihood that her shooting was not an accident, thereby making the hearsay evidence relevant to show her state of mind. *See Stager*, 329 N.C. at 315, 406 S.E.2d at 897. Defendant also argues that the statements should have been excluded under Rule 403 because their prejudicial effect outweighed any probative value. However, "[w]hether to exclude evi-

dence under Rule 403 is a matter left to the sound discretion of the trial court." *Stager*, 329 N.C. at 315, 406 S.E.2d at 897 (citing *Coffey*, 326 N.C. at 281, 389 S.E.2d at 54). Thus, upon a complete review of the record in this case, we conclude that the trial court did not abuse its discretion in admitting these statements.

[3] Additionally, defendant argues that admission of this hearsay violated his right to confront his accuser under the Sixth Amendment of the United States Constitution and his rights under Article I, Section 23 of the North Carolina Constitution. However, we decline to address this contention because defendant cites no supporting case law for this argument, in violation of N.C. Rule of Appellate Procedure 28(b)(6) which requires "citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6). In conclusion, the trial court did not err in allowing the State to elicit hearsay statements regarding the victim's state of mind (with respect to her fear of defendant) prior to her death.

III.

[4] Defendant further argues that the trial court erred in excluding opinion testimony of a lay witness regarding the possibility that defendant might feel some remorse for killing Wylene. Defendant alleges clear, plain and reversible error on the part of the trial court, arguing that the testimony of Brown should have been admitted under N.C. Rules of Evidence 701 and 803(3). Again, the "plain error" rule is set forth in Part I of this opinion.

Rule 701 requires that to be admissible, the lay opinion must be "rationally based on the perception of the witness" and "helpful to a clear understanding of [her] testimony or the determination of a fact in issue." N.C.R. Evid. 701. Defendant has not shown that either of the requirements of Rule 701 were met. If Brown's opinion had been based on first hand observations, it may have been admissible as a shorthand statement of fact under Rule 701. *See State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *Matheson v. City of Asheville*, 102 N.C. App. 156, 174, 402 S.E.2d 140, 150 (1991). Yet, there is no evidence in the record indicating that Brown had an opportunity to speak with or observe the defendant from the time that she saw him *before* the shooting and the day she testified at trial. For this very reason, Brown's testimony was also inadmissible under Rule 803(3), the state of mind hearsay exception, because Brown was being asked to give her opinion on a matter, not to repeat a hearsay statement of defend-

ant. After sustaining the State's objection, the trial court allowed the defense to pursue the inquiry of Brown on *voir dire*, where the extent of her testimony was, "I think if he could take it back, he would." This is not hearsay testimony regarding state of mind. Moreover, it is unclear how Brown's opinion was relevant to any facts at issue in the case. Thus, her testimony regarding the mere possibility that defendant might feel remorse was properly excluded, and because defendant has not shown that the jury would have found differently had it heard Brown's statement, the trial court did not commit error, much less plain error.

IV.

[5] Defendant finally argues that the trial court erred in permitting the State to proceed on a short-form indictment. Defendant admits, however, that the North Carolina Supreme Court has upheld the use of short-form indictments such as the one used in this case. *See State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43 (2000). Therefore, this assignment of error is without merit.

We conclude that defendant received a fair trial, free from error.

No error.

Judges BRYANT and ELMORE concur.

DAVID G. KOGUT, PLAINTIFF v. JOANNE ROSENFELD, CPA, D/B/A JOANNE ROSENFELD, P.A., DEFENDANT

No. COA02-264

(Filed 6 May 2003)

Bankruptcy; Release— settlement and release—satisfaction—misrepresentation—professional negligence

The trial court erred in a misrepresentation and professional negligence case by granting summary judgment in favor of defendant accountant even though plaintiff recovered similar damages from another party through a bankruptcy settlement and release, because: (1) a genuine issue of material fact exists as to the intended scope and effect of the bankruptcy order approving the release and settlement agreement; and (2) there

was not satisfaction, and the release and settlement agreement specifically stated that defendant was not released from any claims of plaintiff.

Judge TIMMONS-GOOSDON dissenting.

Appeal by plaintiff from an order and judgment entered 3 November 2001 by Judge W. Erwin Spainhour in Iredell County Superior Court. Heard in the Court of Appeals 13 November 2002.

Fisher Law Firm, PLLC, by Shane T. Stutts for plaintiff-appellant.

Sharpless & Stavola, P.A., by Frederick K. Sharpless and Eugene E. Lester, III for defendant-appellee.

WYNN, Judge.

In this appeal, plaintiff, David G. Kogut, presents the following issue: Where plaintiff, through a bankruptcy settlement, releases one party from liability, are claims against another party barred by our decision in *Chemimetals Processing Inc. v. Schrimsher, et al.*, 140 N.C. App. 135, 535 S.E.2d 594 (2000). We hold that a genuine issue of material fact exists as to the intended scope and effect of the bankruptcy order approving a release and settlement agreement; accordingly, we reverse the trial court's grant of summary judgment in favor of defendant.

The underlying facts tend to show that plaintiff David G. Kogut and Aimee A. Toth were married until they divorced in 1996. During the marriage, Ms. Toth formed Capstar Corporation and served as president. Capstar borrowed money from NationsBank secured by collateral and personal guarantees from the couple.

Defendant, Joanne Rosenfeld, a certified public accountant, prepared personal tax returns for Dr. Kogut, Ms. Toth, and Dr. Kogut's medical practice, Iredell Digestive Disease Clinic. Ms. Rosenfeld also provided professional services to Capstar and was involved in the financial affairs of Capstar, including but not limited to the preparation of reports to NationsBank regarding the financial status of Capstar. After his divorce from Ms. Toth, Dr. Kogut terminated his professional relationship with Ms. Rosenfeld.

On 29 May 1997, Capstar filed for bankruptcy protection in the Western District of North Carolina under Chapter 11 of the Bankruptcy Code. To recover a substantial secured debt owed by

Capstar, NationsBank sued Capstar, Dr. Kogut, and Ms. Toth on the Capstar guarantees. That action resulted in a judgment, dated 2 September 1997, of $1,725,534.76 against Dr. Kogut.

On 19 September 1997, Dr. Kogut, through a wholly owned corporation, Acme Liquidation Company, paid his obligation under the guaranty to NationsBank. In turn, NationsBank assigned its notes to Dr. Kogut as well as its collateral securing the notes, the judgment confirming the award against Dr. Kogut, and claim against Capstar. Subsequently, Dr. Kogut brought an action against Ms. Rosenfeld alleging that she led him to believe that Capstar was profitable, and unfairly induced him to sign the NationsBank guaranty.

In the meantime, while a domestic equitable distribution action was pending between Dr. Kogut and Ms. Toth, Ms. Toth filed for bankruptcy protection in the Western District of North Carolina. In June 1998, Dr. Kogut, individually and through Acme Liquidation Company, brought an action against Ms. Toth in bankruptcy court to recover for investments he made in Capstar and for reimbursement on NationsBank guaranty. In September 1998, Ms. Toth removed the domestic equitable distribution action pending between Dr. Kogut and Ms. Toth to the bankruptcy court. Ms. Rosenfeld was not a party to either action.

On 16 May 2000, Dr. Kogut and Ms. Toth resolved their differences under a "Bankruptcy Order" decreeing the following: (1) incorporation of the terms of a "Release and Settlement Agreement" distributing assets and legal rights among Ms. Toth, Dr. Kogut and Acme Liquidation Company; (2) dismissal with prejudice of Dr. Kogut and Ms. Toth claims against each other; (3) an award to Dr. Kogut of $400,000.00 on the claim for equitable distribution; (4) entitlement to Dr. Kogut of his claim in the amount of $89,000.00; (5) denial of Dr. Kogut and Acme Liquidation Company claims in the amount of $2,305,088.29; and (6) an order discharging Ms. Toth and enjoining her creditors. The release awarded real property in North Carolina and South Carolina to Dr. Kogut, estimated to be worth in excess of 1.2 million dollars and dismissed all alimony and support claims with prejudice. Acme Liquidation Company retained its liens on the property and the amount of debt owed to it. The Order also provided "that the claims of Dr. Kogut and his Related Entities, . . . , which have been or might be asserted in the bankruptcy case of Capstar Manufacturing Company . . . pending in this Court, are hereby denied, and Kogut and his Related Entities are directed to withdraw any such claims with prejudice."

As to Dr. Kogut's action against Ms. Rosenfeld, in 1999, he voluntarily dismissed that action but re-filed it in October 2000 alleging again that Ms. Rosenfeld led him to believe that Capstar was profitable, and that she unfairly induced him to sign the NationsBank guaranty. On 14 September 2001, Ms. Rosenfeld filed a motion for summary judgment. Prior to a hearing on the motion, Dr. Kogut dismissed his claims for constructive fraud and extortion, leaving his claims for misrepresentation and professional negligence before the trial court. On 7 November 2001, the trial court granted summary judgment in favor of Ms. Rosenfeld which read in pertinent part:

. . . .

> After considering the materials of record, and the arguments and authorities urged upon by the parties, and after considering the decision in *Chemimetals Processing Inc. v. Schrimsher, et al.*, 140 N.C. App. 135, 535 S.E.2d 594 (2000), the court is of the opinion that there is no genuine issue as to any material fact and that the defendant's motion should be allowed.

. . . .

From this order, Dr. Kogut appeals.

In light of the facts of this case, the issue on appeal is whether our decision in *Chemimetals Processing Inc. v. Schrimsher, et al.*, 140 N.C. App. 135, 535 S.E.2d 594 (2000) bars, as a matter of law, Dr. Kogut from recovering damages against Ms. Rosenfeld because he recovered similar damages from Ms. Toth through a bankruptcy settlement and release? We answer, no.

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The party moving for summary judgment must "clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 324 (1999). In reviewing a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing the motion. *Id.*

In granting summary judgment, the trial court relied on *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 535

S.E.2d 594 (2000). In *Chemimetals*, the plaintiff sued its corporate president for breach of contract, breach of fiduciary duty and unfair and deceptive trade practices arising from the president's scheme to divert money to himself. Before the case proceeded to trial, the parties entered into a "Settlement Agreement and Mutual Release." In consideration for the settlement, plaintiff dismissed the complaint. Plaintiff then initiated a second lawsuit against the board of directors and accountants alleging that they conspired to present financial statements which overstated the assets for three fiscal years. *Id.* at 137-38, 535 S.E.2d at 596. The trial court entered summary judgment for the board of directors and accountants.

The plaintiff in *Chemimetals* appealed the order of summary judgment arguing that the release entered in the first action did not preclude the claims brought in the second action against the board of directors and accountants. This Court acknowledged that although the plain terms of the release did not bar the second action, the plaintiff could not assert a second action against the board of directors and accountants to collect for the same losses recovered in the first action against its president. *Id.* at 139, 535 S.E.2d at 597. Our Court asserted that

> [The plaintiff] has suffered but one injury in this case—monetary loss due to the purported diversion of profits and labor from [the plaintiff] by [the plaintiff's president]. Under the facts as alleged by [the plaintiff], all actions in the course of events leading to financial demise of [the company] were concurrent. [The plaintiff's] monetary loss, which was the injury created by [the president's] scheme, is the same injury caused by the alleged failure of the board of directors and CPAs to notice [the president's] unlawful acts. That only one injury occurred is in no way altered by the fact that the board of directors and CPAs may have been guilty of separate wrongdoing.

Id. The *Chemimetals* court held that by entering into the settlement agreement in the first action, plaintiff had been compensated for the company's decline in income and could not seek to recover for those same losses from the board of directors and CPAs. *Id.*

While the facts resemble the facts in *Chemimetals*, we must hold that summary judgment is precluded in this case because, unlike *Chemimetals*, the record in this case shows a genuine issue of material fact exists regarding the intended scope and effect of the bankruptcy order.

In this case, the bankruptcy court decided the parties' equitable distribution action, as well as Dr. Kogut's tort action against Ms. Toth. When the court subsequently entered a bankruptcy order resolving all issues between the parties, that order did not specify which part of the award was intended to make Dr. Kogut whole for the losses he attributed to Ms. Toth in his tort action. The monetary and property awards received by Dr. Kogut appear to be related primarily to the equitable distribution award. In addition, the bankruptcy order also denied Dr. Kogut's claims asserted in the Capstar Manufacturing Company bankruptcy case and directed him to withdraw any such claims with prejudice.

Moreover, we further distinguish *Chemimetals* to point out that in that case the plaintiff recovered damages that were intended to make it whole. Thus, *Chemimetals* did not abrogate the general rule that absent a general release from liability, a plaintiff may obtain separate judgments against each of several wrongdoers if those judgments equal only one satisfaction or full compensation for his injury. *See* N.C. Gen. Stat. § 1B-4 (2001); *see also* Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 22.90, at 451 (2nd ed. 1999). Accordingly, any portion of the award that Dr. Kogut received as reimbursement of his losses would not prevent him from recovering the remainder of those losses from Ms. Rosenfeld because (1) there was not satisfaction, and (2) the Release and Settlement Agreement specifically stated that Ms. Rosenfeld was not released from any claims of Dr. Kogut. *See Bowen v. Insurance Co.*, 270 N.C. 486, 155 S.E.2d 238 (1967).

In sum, since we hold that a genuine issue of material fact exists as to the intended scope and effect of the release agreement between Dr. Kogut and Ms. Toth incorporated into the bankruptcy order, we must further hold that the trial court's order of summary judgment is,

Reversed.

Judge HUNTER concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

For the reasons stated in *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 535 S.E.2d 594 (2000), and in reliance on the authorities cited therein, I respectfully dissent.

In reversing the order of summary judgment, the majority also relies on *Chemimetals*. While I agree with the majority's assessment that the bankruptcy court order did not specify which part of the award was intended to make Kogut whole for losses he attributed to Toth in his tort action, Acme, the company formed by Kogut to hold the bank assignments and collect payment on the notes, was clearly part of the release agreement. It is clear that the release allowed Acme to retain liens, in excess of $1,000,000.00, against property located in South Carolina and North Carolina. Acme had no standing in the Kogut-Toth equitable distribution proceeding, and proceeded against Toth in the bankruptcy adversarial proceeding in her capacity as a corporate officer of Capstar.

In the case *sub judice*, Kogut brought virtually identical actions against Toth and Rosenfeld seeking recovery for his losses arising from Capstar's demise due to their alleged misrepresentation and negligence. As in the case of *Chemimetals*, Kogut cannot bring this action against Rosenfeld, despite any limiting language in the release with Toth or any alleged separate wrongdoing by Rosenfeld. Kogut has suffered but one injury as a result of signing the Bank guaranty allegedly induced by Toth. The one injury is in no way changed by Rosenfeld's alleged participation or furtherance of Toth's misdeeds.

Accordingly, the trial court did not err in granting an order of summary judgment in favor of Rosenfeld.

STATE OF NORTH CAROLINA v. JEFFREY SCOTT SMITH, DEFENDANT

No. COA02-798

(Filed 6 May 2003)

1. Evidence— admissions—drinking and driving—statements to medical personnel

An officer's testimony that defendant admitted drinking and driving to nurses and a doctor in an emergency room was admissible as an admission by a party opponent. The officer was standing at the head of defendant's bed during treatment and defendant was aware that he had been in a high-speed chase that ended in an accident. N.C.G.S. § 8C-1, Rule 801(d)(A).

2. Evidence— hearsay—hospital records—double hearsay—limiting instruction

The admission of hearsay was harmless error in a second-degree murder and DWI prosecution where the identity of the driver of the car was in dispute and the court admitted hospital records containing double hearsay that defendant was the driver. The court gave an instruction limiting consideration of the records to the type of treatment given to defendant.

3. Evidence— prior DWI convictions—admissible for malice

Defendant's prior convictions for driving while impaired were admissible in his second-degree murder and impaired driving prosecution where the prior convictions were remote in time but were offered to establish malice.

4. Evidence— expert opinion—vehicle crash—cause of death—medical examiner's testimony

The testimony of a medical examiner that the victim was killed when she struck the passenger side of a truck's door frame was admissible in a second-degree murder and DWI prosecution in which the identity of the driver was in dispute. Although defendant argued that the testimony was outside the witness's area of expertise, the witness had been accepted as an expert without objection and a medical examiner's statutory responsibilities include the inspection of physical evidence and inquiries into the manner of death. N.C.G.S. § 130A-385.

5. Evidence— outstanding charges and warrants—relevance

A defendant's outstanding criminal charges and unserved warrants were relevant in a second-degree murder and DWI prosecution which resulted from a high speed chase where questions were raised about the reason for the pursuit.

Judge TYSON concurring in part and concurring in the result.

Appeal by defendant from judgment entered 30 November 2001 by Judge James U. Downs in Superior Court, Henderson County. Heard in the Court of Appeals 25 March 2003.

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

Megerian & Wells, by Franklin E. Wells, Jr., for the defendant-appellant.

WYNN, Judge.

By this appeal, defendant Jeffery Scott Smith presents several evidentiary questions for our review: Did the trial court erroneously admit (I) hearsay statements; (II) prior driving while impaired convictions too remote in time to have any probative value; (III) an expert opinion outside of the expert's field of expertise and (IV) testimony on defendant's outstanding arrest warrants? We find no error in the admission of this evidence.

The evidence at trial tended to show that defendant and his girlfriend, Melanie Issacs, consumed alcohol throughout the day of 16 January 2001. Ultimately, while riding together in defendant's pickup truck, they became engaged in a high-speed pursuit by several Hendersonville police officers that ended in a single-car accident killing Ms. Isaacs and injuring defendant.

As a result of the incident, the State charged defendant with second-degree murder, driving while impaired, felonious speeding to elude arrest, and assault with a firearm on a law enforcement officer. At trial, the State contended defendant drove the vehicle; whereas, defendant contended Ms. Isaacs drove it. The jury acquitted defendant of assault with a firearm on a law enforcement officer and convicted him of the remaining charges. Thereafter the trial court sentenced defendant, consecutively, to terms of 251 to 311 months for second-degree murder; 11 to 14 months for felonious speeding to elude arrest; and 12 months for driving while impaired. Defendant appealed to this Court.

[1] On appeal, defendant first contends the trial court erroneously admitted the following hearsay testimony of Officer Jim Player, who testified he was in the emergency room standing at the head of defendant's hospital bed during treatment:

> Q: Was he asked by the treating nurses and doctors if he was the driver or the passenger of the vehicle? Did you hear that question asked?
>
> A: Yes, sir, I did.
>
> Q: What was his response?
>
> MR. GARDO: Objection.
>
> THE COURT: Overruled.
>
> A: He advised he was the driver.

Q: Did they ask him if he had been drinking?

A: Yes, sir, they did.

Q: What did he tell them?

A: He said, yes he had.

MR. GARDO: Objection.

THE COURT: Overruled.

Defendant contends that Officer Player's hearsay testimony did not meet the medical diagnosis exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(4).[1]

However, we need not decide whether this testimony was admissible as an exception under Rule 803(4) because we hold defendant's alleged statement constitutes an admission by party-opponent. Under N.C. Gen. Stat. § 8C-1, Rule 801(d)(A): "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or representative capacity." "An admission is a statement of pertinent facts which, in light of other evidence, is incriminating." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986).

In this case, defendant was aware he had just been involved in a high-speed chase with the police that ended in an accident. Thus, his alleged statement that he was driving is incriminating and constitutes an admission. Accordingly, we hold that under Rule 801(d)(A), no error was committed in admitting Officer Player's statement regarding defendant's admission.

[2] Defendant also contends the trial court erred in admitting his hospital records because the records contain hearsay statements that he was the driver of the vehicle "when there was no objective indication that such statements were reliable and had no way to determine the source of the statements." Hospital records are admissible under the business records exception to the hearsay rule with the proper foundation. *See State of North Carolina v. Wood*, 306 N.C. 510, 515, 294 S.E.2d 310, 312-13 (1982). To lay the proper foundation, "the hospital

1. To be admissible as a statement made for purposes of medical diagnosis or treatment, a two part inquiry is required: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment. Obviously, defendant's alleged statement was not related to medical diagnosis or treatment. N.C. Gen. Stat. § 8C-1, Rule 803(4) (2001).

librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam*. The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay." *Id.*

In this case, Dr. Jones testified the notation that defendant was the unrestrained driver of the vehicle may have come from the paramedics. Nurse Walker could not recall the defendant stating he was the driver. Therefore the notation constituted hearsay on hearsay and should have been excluded from the jury's consideration. However, at trial, the trial court gave a limiting instruction to the jury that they could use the hospital records in their consideration of the type of medical treatment given defendant. The trial court specifically said "any other material or so-called histories of what occurred in regard to the accident or anything like that, designating him as the driver or passenger or whatever, you can only consider for corroboration purposes. And that means this: you can't consider that as substantive evidence that he was or was not the driver of the vehicle." We hold that the trial court's limiting instructing rendered any error in admitting the hearsay testimony in the records, harmless.

[3] By his next assignment of error, defendant contends the trial court erred in admitting into evidence certified copies of his prior convictions for driving while impaired because those convictions were too remote in time to have probative value. Specifically, defendant contends the evidence[2] "tended to show only that defendant was the sort of person who would drive while under the influence of some impairing substance and therefore was impermissible character evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b)." However, the transcript indicates the state offered these convictions into evidence to establish the malice element of second degree murder.[3] In light of our Supreme Court's holding in *State v. Rich*, we find defendant's argument to be without merit. 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000)

2. The state admitted certified copies of defendant's convictions for driving while impaired in 1984 and 1990.

3. "Second degree murder is an unlawful killing with malice, but without premeditation and deliberation." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). "Intent to kill is not a necessary element of second degree murder, but there must be an intentional act sufficient to show malice." *Id.* at 522, 402 S.E. 2d at 385.

(holding the State had not violated Rule 404(b) when it entered a defendant's prior speeding convictions into evidence in a second-degree murder trial because "the State offered the evidence to show that defendant knew and acted with a total disregard of the consequences, which is relevant to show malice").

[4] Defendant next contends the trial court erred in permitting the medical examiner to offer an opinion that Ms. Isaacs was killed when she was struck by the passenger side of the truck's door frame because it was outside his area of expertise. We find defendant's argument to be without merit. The medical examiner, Dr. William Burwell Dunn, III, was accepted by the trial court, without objection, as a medical expert specializing in forensic pathology and medical examination. As part of his responsibilities, a medical examiner is required to "make inquiries regarding the cause and manner of death" and is "authorized to inspect all physical evidence and documents which may be relevant to determining the cause and manner of death of the person whose death is under investigation." N.C. Gen. Stat. § 130A-385 (2001). Because Dr. Dunn was qualified as an expert in medical examination, the trial court did not err in permitting his expert opinion as to the cause of Ms. Isaac's death.

[5] Defendant, by his last assignment of error, argues the trial court erred in permitting testimony about outstanding criminal charges and unserved warrants against him. Evidence is relevant if it can assist the jury in understanding the evidence. *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E. 2d 279, 283 (1990). "Every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E. 2d 506, 513 (1965).

In this case, the State pointed out at trial that this information was presented because "there have been an awful lot of question about why this pursuit went on, and I think it is relevant to that issue—whether or not someone was wanted legitimately by a criminal process." Thus, under the facts of this case and our rules of evidence, evidence as to why the pursuit occurred was relevant and admissible. Accordingly, we hold that the trial court did not err in permitting testimony about defendant's outstanding charges and unserved warrants.

No prejudicial error.

Judge STEELMAN concurs.

Judge TYSON concurs in part and concurs in the result.

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

I concur with the majority opinion which finds no prejudicial error in the conviction of defendant for second-degree murder, driving while impaired and felonious speeding to elude. I write separately with regard to the admission of evidence of outstanding criminal charges and unserved warrants against defendant. The majority's language is too broad and sweeping. Relevancy must be proven by the admitting party under Rule 401 of the North Carolina Rules of Evidence.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2001). Rule 402 of the North Carolina Rules of Evidence states that "[a]ll relevant evidence is admissible, except as otherwise provided. . . . Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402. "[Relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

> Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence. Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.

State v. Wallace, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992) (citations omitted).

Defendant contends that evidence of outstanding criminal charges and unserved warrants are not relevant because he did not know of the outstanding charges or warrants at the time. The State responds that the evidence was not admitted to show the state of

mind of defendant but the state of mind of the police officers during the high speed pursuit.

During direct examination, Officer Raymond Lyle Case of the Henderson Police Department testified:

> Q In fact, had you had some involvement with the two of them [defendant and the victim] not too long before this?
>
> A Yes, sir, about 10 days prior I had helped the Hendersonville Police Department execute a search warrant on 514 Dairy Street.
>
> Q Would you tell us whether or not as a result of that search, there was a criminal process outstanding for both of these defendants on January 16th?
>
> A Yes, there was.
>
> [DEFENSE COUNSEL]: Objection
>
> THE COURT: How is that relevant?
>
> [PROSECUTOR]: There have been an awful lot of question [sic] about why this pursuit went on, and I think it is relevant to that issue—whether or not someone was wanted legitimately by a criminal process.
>
> THE COURT: Overruled.

Officer Case testified that defendant had felony and misdemeanor warrants outstanding. Although Officer Case was not on the scene during the chase, he testified that he was en route when defendant began to flee and transmitted information that defendant was wanted on outstanding felony warrants via radio to the officers involved in the pursuit. The police officers' knowledge of the pending felony warrants and outstanding criminal process at the time of and during the pursuit is relevant to the state of mind of the officers in their pursuit of defendant. The trial court did not abuse its discretion in determining that the evidence was relevant and admissible.

CENCOMP, INC., D/B/A PHILLIPS IRON WORKS, AND TED CIHOS D/B/A PHILLIPS IRON WORKS, PLAINTIFFS v. WEBCON, INC., AND INTERNATIONAL FIDELITY INSURANCE COMPANY, DEFENDANTS

No. COA02-924

(Filed 6 May 2003)

1. Appeal and Error— appealability—summary judgment—interlocutory order—substantial right

Although an appeal from the trial court's grant of summary judgment in favor of defendant is an appeal from an interlocutory order since it did not dispose of all the claims in the case, the order is immediately appealable because the right to avoid the possibility of two trials on the same issues when there are issues of fact common to the claims appealed and remaining claims affects a substantial right.

2. Construction Claims— breach of contract—quantum meruit—payment bond—timeliness of claim—final settlement

The trial court did not err in a breach of contract and quantum meruit case arising out of a construction payment bond claim under N.C.G.S. § 44A-26 by granting summary judgment in favor of defendant payment bond surety on the basis that plaintiff failed to file its complaint within the allotted time restrictions provided under N.C.G.S. §44A-28(b) even though plaintiff asserts the settlement reached between the parties on 21 September 1999 was not a final settlement since the pertinent city retained approximately $50,000, because: (1) although a project must be substantially completed before a government agency may determine the final settlement, our legislature does not require the contract to be 100% complete before the government may determine the final settlement; and (2) a governmental entity may administratively fix the amount it is bound to pay and then retain a portion of that payment to ensure not only that the contractor completes the entire project, but also that no liens are outstanding.

3. Venue— transfer—propriety of summary judgment

Although plaintiff appealed the venue transfer predicated on a determination by the appellate court that summary judgment was improper, this assignment of error is overruled because the appellate court determined that the trial court properly granted summary judgment in favor of defendant payment bond surety.

Appeal by plaintiffs from orders entered 10 April 2002 by Judge Howard E. Manning, Jr., in Person County Superior Court. Heard in the Court of Appeals 19 February 2003.

William M. Black, Jr., for plaintiff-appellant.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendants-appellees.

CALABRIA, Judge.

Plaintiffs, Cencomp, Inc., d/b/a Phillips Iron Works and Ted Cihos d/b/a Phillips Iron Works (collectively "Phillips"), were subcontractors of defendant Webcon, Inc. ("Webcon") on a construction project related to a sewer line for the City of Roxboro ("the City"). Defendant International Fidelity Insurance Company ("Fidelity") was the payment bond surety on the project.

On 11 December 2000, Phillips filed suit against Webcon asserting breach of contract and quantum meruit claims, and against Webcon and Fidelity asserting a payment bond claim pursuant to N.C. Gen. Stat. § 44A-26 (2001). The court granted Fidelity's motion for summary judgment, finding the suit was time-barred because: (1) N.C. Gen. Stat. § 44A-28(b) required Phillips file its claim on the bond within one year after the City and Webcon reached a "final settlement;" (2) a final settlement occurred on 21 September 1999; and (3) Phillips' suit was not filed until 11 December 2000, more than one year later. The court then granted Webcon's motion for a change of venue because without Fidelity there was no basis for venue in Person County. Phillips appeals.

[1] "The order of the superior court granting the defendant's motion for summary judgment did not dispose of all the claims in the case, making it interlocutory." *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 584, 500 S.E.2d 666, 667 (1998). Although an interlocutory order is ordinarily not immediately appealable, an interlocutory order may be immediately appealed if it affects a substantial right. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2001). Phillips asserts a substantial right "to have the case heard in Person County and to have the liability of all Defendants determined in one proceeding" will be lost without appellate review. " 'The right to avoid the possibility of two trials on the same issues can be . . . a substantial right' that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims." *Phillips v.*

Restaurant Mgmt. of Carolina, L.P., 146 N.C. App. 203, 207, 552 S.E.2d 686, 689, *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2001) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982)). Here, the summary judgment disposed of only the claim on the payment bond against Fidelity, and remaining claims against Webcon include claims on the payment bond, breach of contract, and quantum meruit. Since the claims against Webcon remain and there are common issues of fact, we find Phillips properly asserted a substantial right and appealed the interlocutory summary judgment order against Fidelity.

[2] Phillips asserts the trial court erred by: (I) determining no genuine issue of material fact existed as to whether a "final settlement" was reached between Webcon and the City in September 1999; and (II) ordering venue be transferred.

I. Summary Judgment

"Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. . . . [T]he evidence is viewed in the light most favorable to the non-movant." *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002). Since the trial court granted Fidelity summary judgment on the basis that Phillips failed to file its complaint within the allotted time restrictions provided for by N.C. Gen. Stat. § 44A-28(b), the issue for this Court is whether, in the light most favorable to Phillips, a genuine issue of material fact exists regarding the timeliness of the complaint.

North Carolina law provides:

> No action on a payment bond shall be commenced after the expiration of the longer period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the contractor.

N.C. Gen. Stat. § 44A-28(b) (2001). This statute is a statute of repose and a condition precedent, therefore, plaintiff has the burden of proving its cause of action was brought within the one-year time period. *Tipton & Young Construction Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118, 446 S.E.2d 603, 605 (1994). If plaintiff fails to meet its burden, " 'plaintiff's case is insufficient as a matter of law[,]' " and

summary judgment for defendant is proper. *Id.*, (quoting *Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 426, 391 S.E.2d 211, 213 (1990)).

Phillips asserts it met its burden and complied with the statute because the settlement reached between Webcon and the City in September 1999 was not a "final settlement" since the City retained approximately $50,000.00. Defendants disagree asserting that on 21 September 1999 the City determined the "final settlement" and therefore Phillips' claim against Fidelity is barred by the one-year statute of repose.

The meaning of the term "final settlement," originally a federal term from the 1905 Heard Act and later the 1935 Miller Act, "was litigated extensively and caused considerable uncertainty in the construction industry. In 1959, Congress abandoned the term[.]" *Safeco Ins. Co. of America v. Honeywell, Inc.*, 639 P.2d 996, 1000 (Alaska 1981). Unlike Congress, our state legislature has not abandoned the term.

When interpreting the meaning of "final settlement," our courts turn to federal law for guidance. *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 85 N.C. App. 114, 354 S.E.2d 360 (1987), *rev'd on other grounds*, 321 N.C. 435, 364 S.E.2d 380 (1988). In *Pyco*, this Court quoted the seminal United States Supreme Court decision, *Illinois Surety Co. v. U.S. to the use of Peeler, et al.*, 240 U.S. 214, 60 L. Ed. 609 (1915), in which,

> the [United States Supreme] Court held that final settlement occurred *when*, so far as the government was concerned, *the amount which it was bound to pay was administratively fixed* by the proper authority. . . . [And the Court explained t]he date of the final settlement does not depend upon the contractor's agreement and must be clear, readily ascertainable and occur at a definite time.

Pyco, 85 N.C. App. at 120-21, 354 S.E.2d at 364 (emphasis added). In *Illinois Surety*, the Court expressly stated that final settlement is not synonymous with final payment. *Illinois Surety*, 240 U.S. at 218-19, 60 L. Ed. at 613. *See also Zimmerman's Electric, Inc. v. Fidelity and Deposit Co. of Maryland*, 231 N.W.2d 342, 344 (Neb. 1975); *United States v. Arthur Storm Co.*, 101 F.2d 524, 526 (6th Cir., 1939).

Therefore, the question for this Court is whether there is any genuine issue of material fact as to whether the City administratively

fixed the amount it was bound to pay on 21 September 1999. Phillips asserts that since the contract was not complete and the City retained a portion of the final payment, no final settlement could have been reached. We disagree.

First, we address the completion requirement. The federal act expressly required completion of the contract as a prerequisite to "final settlement." *Zimmerman*, 231 N.W.2d at 344-45 (citing and discussing numerous federal cases regarding the completion requirement). Although not expressly included in state statutes, the completion requirement has been interpreted as "an inherent requirement." *Id.*, 231 N.W.2d at 344. The Supreme Court of Nebraska reasoned that without this final completion "there could be a final ascertainment of the amount due immediately on the execution of a contract providing for the payment of a specified sum or on issuance of each monthly statement as the work progressed[.]" *Id.* While such an interpretation is possible, we do not find a final completion requirement need be implied into our statute since the doctrine of substantial completion adequately addresses the aforementioned concerns. Certainly a project must be substantially complete before a governmental agency is capable of administratively fixing the amount it is bound to pay, however, our legislature did not expressly require the contract to be one-hundred-percent completed before the government may determine the final settlement, and we choose not to import this language into our law.

Second, we address the effect of a governmental entity retaining some of the final settlement. It is true that "[the government's] retainage of funds casts doubt on whether its [] payment was intended to be a genuinely 'final' payment." *Pyco*, 85 N.C. App. at 121, 354 S.E.2d at 365. However, as explained earlier, final payment and final settlement are not synonymous. While retainage directly affects final payment, it does not have a similar impact on final settlement. A governmental entity may administratively fix the amount it is bound to pay, and then retain a portion of that payment to ensure not only that the contractor completes the entire project, including the punchlist, but also that no liens are outstanding.

Since we have now established a final settlement *could* have been reached under North Carolina law, the question for this Court is whether there is a genuine issue of material fact regarding whether "the amount which [the governmental entity] was bound to pay was administratively fixed by the proper authority" and therefore a final settlement, *in fact*, occurred.

The evidence tended to show that on 15 September 1999 Webcon sent a final billing to the City. The total bill was $503,458.93, and since the City had paid $321,044.85, the total due was $182,414.08. Shortly thereafter, Kimley-Horn, the engineers for the project, also wrote to the City explaining: "the work performed by WEBCON is substantially complete. Final payment (less retainage) should be made. . . . Th[e] retainage balance should be paid to WEBCON after the City is satisfied that the project is 100% complete." On 20 September 1999, the President of Webcon wrote to Kimley-Horn explaining some miscalculations and noting "[p]er my meeting with the Town of Roxboro, the project has been accepted and all monies are due." On 21 September 1999, the City wrote to Webcon, enclosing a check for $132,122.34, which represented the $182,414.08 due less $50,291.74 in retainage. The City explained:

> [t]he City of Roxboro has received several complaints from subcontractors and suppliers regarding the failure of Webcon Incorporated to pay invoices for materials and services related to this project in a timely manner. Therefore, the retainage amount shown above of $50,291.74 will not be remitted to Webcon Incorporated until all suppliers and subcontractors have been paid in full. In addition, the City will require Webcon Incorporated to sign a waiver of lien stating that all vendors have been paid in full and that there are no outstanding liens or claims against the City of Roxboro relating to the Reamstown Sewer Line Extension Project.

In a deposition, the Finance Director for the City, James C. Overton, Jr., ("Overton") testified: "[a]s far as I'm concerned, that's the final amount [$503,458.93] that we owe them." He further explained the concept of retainage:

> [u]sually on construction contracts, we retain either five or ten percent from the total contract. Each invoice that comes in, we retain five to ten percent. That retainage is held back to make sure that the contract is completed to the satisfaction of the city, that it passes final inspection, and that all bills have been paid and that there's no liens against it. And once all of that final inspection's been done, we release and pay the retainage.

Overton clarified that unless Webcon failed to meet these requirements, the retainage would be released. Thomas S. Warren, Jr., the City's engineering technician for the Reamstown project, testified that although the contractor generally submits a final bill for every-

thing they are owed including the retainage, "[the City] usually do[es] not pay the retainers in the final billing. The retainage is usually [paid] one to two to three months after that."

Taking this evidence in the light most favorable to Phillips, although the project was not one-hundred-percent complete and the City retained a portion of the amount due, it is nevertheless apparent that on 21 September 1999, the City administratively fixed the amount it was due to pay, thereby reaching a final settlement. Since Phillips filed suit on 11 December 2000, more than one year after final settlement, in violation of N.C. Gen. Stat. § 44A-28(b), the trial court properly granted Fidelity summary judgment.

II. Venue

[3] Phillips' appeal of the venue transfer was predicated upon this Court's determination that summary judgment was improper. Since we determined the trial court properly granted summary judgment for Fidelity, this assignment of error is overruled.

The orders of the trial court are affirmed.

Affirmed.

Judges McCULLOUGH and TYSON concur.

ALLISON A. WALDEN, PLAINTIFF v. C. RICHARD VAUGHN, EDWARD V. ZOTIAN, AND T. PAUL HENDRICK, DEFENDANTS

No. COA02-819

(Filed 6 May 2003)

1. Accord and Satisfaction— enforcement of judgment— defense proper

The trial court did not err by considering an accord and satisfaction defense to enforcement of a foreign judgment.

2. Courts— disputed settlement—checks deposited in Virginia—Virginia law controlling

Virginia law was properly applied to a disputed settlement in a civil lawsuit where the checks were accepted and deposited in Virginia. The interpretation of a contract is governed by the law

of the place where the contract was made, a contract is made where the last act necessary to make it binding occurred, and the acceptance and deposit of the checks was the last act necessary to form this contract.

3. Accord and Satisfaction— disputed settlement—Virginia law

There was an accord and satisfaction of a judgment under Virginia law, and the North Carolina trial court did not err by denying a motion to enforce that judgment, where the parties' actions in negotiating a settlement constituted a binding offer and acceptance under Virginia law.

Appeal by plaintiff from judgment entered 12 February 2002 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 20 February 2003.

Brooks Pierce McLendon Humphrey & Leonard, LLP, by Derek J. Allen and Andrew J. Haile, for plaintiff-appellant.

Robinson & Lawing, LLP, by Norwood Robinson and James R. Theuer, for defendants-appellees.

STEELMAN, Judge.

Plaintiff, Allison A. Walden, appeals a judgment denying a motion to enforce a foreign judgment. We affirm.

On 20 May 1999, plaintiff obtained a judgment against defendants, C. Richard Vaughn, T. Paul Hendrick, Edward V. Zotian and Hampton Nissan Limited Partnership, jointly and severally, in the Circuit Court of Hampton, Virginia. This judgment was for the following amounts: $115,873.00 on a claim for breach of a non-compete agreement, $115,873.00 for breach of a consulting agreement, $20,000.00 in attorney fees, together with interest at 9% per annum.

In August 1999, defendant Hendrick contacted plaintiff's Virginia trial attorney, George Rogers, regarding paying his portion of the judgment. Rogers told him to contact Robert Quadros, a Virginia attorney specializing in collections who was representing plaintiff with respect to the collection of the judgment.

On 7 September 1999, Quadros sent identical letters to each of the three defendants. The letter acknowledged that a payoff on the judgment had been requested. The letter demanded payment of the prin-

cipal amount of the judgment ("$115,873.00") together with interest and attorney fees, for a total of $146,301.37. The letter also contained the following language:

> If you wish to negotiate anything with us then please forward us your suggestion along with your certified check for the amount of the offer. Any further discussion, correspondence or verbiage of any kind that are not accompanied by certified funds will be ignored.
>
> . . . .
>
> The more trouble and the more time you waste, the less likely we are to accept anything but full payment.
>
> I will wait ten days for your offer and at that point will order North Carolina counsel to proceed with all speed.

Quadros contends that he inadvertently omitted from the demand letter the principal and interest due under the second part of the judgment, which would have been an additional $126,301.37.

By letter dated 13 September 1999, defendants tendered to Quadros an offer and three certified checks totaling $146,301.36. The letter and its contents were received by Quadros on 14 September 1999. Quadros received a letter from Rogers on 15 September 1999 informing him of the mistake in the amount demanded from defendants. Quadros's bookkeeper also informed him of the mistake. Nonetheless, Quadros deposited the three checks in his trust account on 15 September 1999. Defendants' letter dated 13 September 1999 which accompanied the three checks stated that the funds were tendered "in full satisfaction of the above-referenced judgment." Each of the checks were marked "Satisfaction in full of Judgment 97-36430 Circuit Court, Hampton, VA." On 19 November 1999, Quadros sent defendant Hendrick a letter attempting to return the money to defendants. Defendants, however, never accepted the return of the money.

On 3 August 2000, plaintiff filed the judgment of the Circuit Court of Hampton, Virginia, in the Superior Court of Forsyth County pursuant to N.C. Gen. Stat. §§ 1C-1703 and 1C-1704 seeking to enforce the judgment against defendants. On 8 September 2000, defendants filed a notice of defense under N.C. Gen. Stat. § 1C-1705. The trial court, sitting without a jury, entered a judgment denying plaintiff's motion to enforce the Virginia judgment. Plaintiff appeals.

I.

[1] In the first assignment of error, plaintiff argues the trial court erred in considering defendants' accord and satisfaction defense to enforcement of the judgment. We disagree.

The "Uniform Enforcement of Foreign Judgments Act" (Act) provides that a judgment from another state, filed in accordance with the procedures set out in the Act, has the same effect and is subject to the same defenses as a judgment issued by a North Carolina court and shall be enforced or satisfied in a like manner. N.C. Gen. Stat. § 1C-1703(c) (2001).

In North Carolina, accord and satisfaction is a valid defense against a claim to enforce a judgment. N.C. Gen. Stat. § 1-60 (2001). *See also* N.C.R. Civ. P. 60(b)(5). We therefore hold that the trial court did not err in considering defendants' defense of accord and satisfaction. This assignment of error has no merit.

II.

[2] In the second assignment of error, plaintiff argues the trial court erred in applying Virginia law rather than North Carolina law in analyzing the accord and satisfaction defense. We disagree.

Under contract law, "the interpretation of a contract is governed by the law of the place where the contract was made." *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 516, 157 S.E. 860, 863 (1931). A contract is made "in the place where the last act necessary to make it binding occurred." *Century Data Sys., Inc. v. McDonald*, 109 N.C. App. 425, 432, 428 S.E.2d 190, 193-94 (1993) (citations omitted).

The trial court found that the 7 September 1999 letter from Quadros to defendants was a demand letter and not an offer. Defendants' letter dated 13 September 1999 was an offer to settle the matter, which strictly complied with the parameters set forth in the 7 September 1999 letter. This offer was accepted by the cashing and retention of the checks enclosed in the letter. The last act necessary to make the contract binding was the acceptance and deposit of the checks into Quadros's trust account, which occurred in Virginia. We therefore hold that the trial court did not err in applying the law of Virginia. This assignment of error has no merit.

III.

[3] In the third and final assignment of error, plaintiff argues the trial court erred in finding that the parties had entered into an accord and satisfaction. We disagree.

Where the trial is conducted by the judge sitting without a jury, as occurred in this case, the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding. *See Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984).

Section 11-12 of the Virginia Code, titled "Part performance extinguishing obligation," reads as follows: "Part performance of an obligation, promise or undertaking, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise, or undertaking." Va. Code Ann. § 11-12 (2003). This statute expressly allows the extinguishment of an obligation by the partial performance of the debtor, accepted as such by the creditor. *Id.*

In *Kasco Mills, Inc. v. Ferebee*, 197 Va. 589, 592-93, 90 S.E.2d 866, 870 (1956) (citing *Standard Sewing Mach. Co. v. Gunter*, 102 Va. 568, 574, 46 S.E. 690 (1904)), the Virginia Supreme Court held that:

> An accord and satisfaction is founded on contract, and the essentials of a valid contract must be present. Under Code § 11-12 the burden was on the debtors to show that the payment of less than was due was "expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose[."]

The essential elements of a contract are an offer, acceptance and consideration. *Bruton & Co. v. Toth*, 48 Va. Cir. 516 (1999).

The evidence before the trial court showed that: (1) Quadros had the authority to act on plaintiff's behalf; (2) Quadros sent a letter to defendants soliciting an offer to settle the matter; (3) Quadros's letter set forth specific parameters that any offer of defendants had to meet; (4) Quadros's letter stated that the more time defendants wasted in making an offer, the less likely plaintiff would accept anything but full payment; (5) Quadros's letter openly solicited an offer less than the full amount due; (6) defendants submitted an offer that was less than

the full amount of the judgment and which complied with the requirements of Quadros's demand letter; (7) defendants' offer was clearly and unequivocally submitted in full satisfaction of the judgment; (8) defendants' offer was accepted by Quadros on behalf of plaintiff by depositing the three checks into his trust account; and (9) no attempt was made by Quadros to rescind the agreement until some two months later.

Under these circumstances, we hold that the parties' actions constituted a binding offer and acceptance under Virginia law. *See Gelles & Sons Gen. Contr., Inc. v. Jeffrey Stack, Inc.*, 264 Va. 285, 569 S.E.2d 406 (2002); *Kasco Mills, Inc. v. Ferebee*, 197 Va. 589, 90 S.E.2d 866 (1956). The instant case is distinguishable from cases cited by plaintiff where the creditor informed the debtor that it expected more money before cashing or depositing a check. *See generally*, 42 A.L.R.4th 117 (2002).

Section 8.3A-311 of the Virginia Code, titled "Accord and satisfaction by use of instrument," provides that there is no accord and satisfaction if the claimant "proves that within ninety days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted." Va. Code Ann. §8.3A-311(c)(2) (2003). However, this statute only applies to situations where there is an unliquidated or disputed amount. In their briefs, both plaintiff and defendants concede that the amount due under the judgment was not in dispute. Consequently, section 8.3A-311 does not apply to this case.

The findings of fact of the trial court were supported by competent evidence which, in turn, supported the conclusions of law. This assignment of error is without merit.

AFFIRMED.

Judges McGEE and HUDSON concur.

IN RE ESTES

[157 N.C. App. 513 (2003)]

IN RE: LARRY WILLIAM ESTES, JR.

No. COA02-971

(Filed 6 May 2003)

Termination of Parental Rights— failure to appoint guardian ad litem—mental illness

The trial court erred by terminating respondent mother's parental rights without appointing a guardian ad litem under N.C.G.S. § 7B-1101 to represent respondent at the termination hearing where the petition or motion to terminate parental rights alleged, and the evidence supporting such allegation tended to show, that respondent was incapable of providing proper care and supervision to the child due to mental illness.

Appeal by respondent from order entered 27 September 2001 by Judge Julia Gullett in Iredell County District Court. Heard in the Court of Appeals 12 February 2003.

Hall & Hall, Attorneys at Law, P.C., by Susan P. Hall, for respondent appellant.

Iredell County Department of Social Services, by Thomas R. Young, and Crosswhite, Edwards and Crosswhite, P.A., by Andrea Edwards, for petitioner appellee.

TIMMONS-GOODSON, Judge.

Patricia Ann Howard Estes ("respondent") appeals from an order of the trial court terminating her parental rights as to Larry William Estes, Jr. ("the minor child"), born 26 July 1999. For the reasons stated herein, we reverse the order of the trial court.

The pertinent factual and procedural history of the instant appeal is as follows: On 11 May 2001, the Iredell County Department of Social Services ("DSS") filed a motion to terminate the parental rights of respondent, alleging that respondent had neglected her minor child, and that she was incapable of providing proper care and supervision for the minor child, such that the minor child was a dependent child within the meaning of the North Carolina General Statutes. In support of its allegations of neglect and dependency, DSS specifically alleged, *inter alia*, that: (1) respondent had been exhibiting irrational behavior and thought patterns prior to and following the birth of the minor child; (2) respondent had failed to provide appropriate care for

her newborn child; (3) following an adjudication of neglect and dependency of the minor child, respondent was required to complete a psychological evaluation; (4) respondent exhibited irrational outbursts at visitations with her child; (5) respondent's behavior was such that she was incapable of caring for the minor child.

On 25 August 2001, the trial court held a termination hearing at which respondent was represented by counsel. The court did not appoint, however, a guardian ad litem for respondent. After hearing the evidence, the trial court made the following pertinent findings of fact:

> 10. The Department of Social Services initially filed a Juvenile Petition on 8/3/99, alleging that the Respondent Mother was exhibiting irrational behavior and thought patterns during the course of her pregnancy and delivery, to wit, that she failed to keep her pre-natal appointments due to the mother's perception she was being stalked, that the mother remained in the parking lot of the hospital after her water broke for two hours due to [there] being "trash" in the parking lot, that the mother stated she had a professed hatred of her other children and that she should have "killed the children when she had the chance," that she had fixated irrationally upon colors, objects, and numbers, and that the mother had to be prompted by hospital staff to properly care for her [newborn] child. The petition further alleged that the mother was diagnosed as suffering from paranoid schizophrenia . . . and that the mother had a history of mental illness including one occasion in which the mother had been confined to Broughton Hospital.
>
> 11. The minor child was adjudicated a dependent child on 8/20-26/99. A dispositional hearing was held on the same dates. Pursuant to court order, the Respondent Mother was to comply with the terms of her Family Services Case Plan, complete treatment recommended by Dr. Patricia Hill and obtain a psychological evaluation.
>
> . . . .
>
> 13. In addition to a Psychological Evaluation requested by Department of Social Services, a Psychiatric Evaluation was undertaken at the Respondent Mother's request. The psychological evidence suggested that the diagnosis for the Respondent Mother's behavior was unclear.

14. Between 8/99 and 4/00, the Respondent Mother made some limited progress. However, the Mother sporadically made irrational outbursts during visitation and failed to follow through with recommended counseling and treatment. Further, on occasion she would sporadically miss visits, show up late or show up unannounced. At one point the Respondent Mother indicated to [DSS] that she was not going to work toward reunification any longer and that she wanted a final visit. Following this discussion, she stopped making regular contact with the agency. Further, the mother was additionally unable to consistently maintain stable housing, coming to live with friends and acquaintances who were never identified to the social worker so as to allow the worker to determine the appropriateness of the living quarters for the child.

Based on these findings, the trial court concluded that respondent had neglected her child and that she was "incapable of providing for the proper care and supervision of the minor child, such that the minor child is a dependent juvenile within the meaning of N.C.G.S. 7B-101." The trial court thereafter determined that it was in the best interests of the minor child that the parental rights of respondent be terminated and entered an order providing for such termination. From the order terminating her parental rights, respondent appeals.

The dispositive issue on appeal is whether the trial court could properly terminate respondent's parental rights without appointing a guardian ad litem to represent respondent at the termination hearing where the petition or motion to terminate parental rights alleged, and the evidence supporting such allegations tended to show, that respondent was incapable of providing proper care and supervision to the child due to mental illness. Because we conclude that section 7B-1101 requires the trial court to appoint a guardian ad litem in such instances, we reverse the order of the trial court.

Section 7B-1101 of the North Carolina General Statutes provides in pertinent part that

> The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. The parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. . . . In addition to the right to appointed counsel set forth above, a guardian ad litem *shall* be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:

> (1) Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6); or
>
> (2) Where the parent is under the age of 18 years.

N.C. Gen. Stat. § 7B-1101 (2001) (emphasis added). Section 7B-1111(6) states that a trial court may terminate parental rights upon a finding

> That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, *mental illness*, organic brain syndrome, *or any other similar cause or condition.*

N.C. Gen. Stat. § 7B-1111(a)(6) (2001) (emphasis added). Dependent juveniles include those "whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2001).

In the instant case, the majority of the allegations contained in the motion to terminate respondent's parental rights centered on respondent's "irrational behavior and thought patterns." The neglect and dependency petition filed by DSS alleged that respondent "was diagnosed as suffering from paranoid schizophrenia" and "had a history of mental illness" requiring hospitalization. After the minor child was adjudicated neglected and dependent, respondent was ordered to complete a psychological evaluation. A review order by the trial court in this matter noted that DSS had been relieved of its obligation of attempting to reunify respondent and the minor child "due to [respondent's] long-term mental instability." At the hearing to terminate respondent's parental rights, DSS argued that respondent was incapable of properly caring for her child because of her "mental issues."

Despite the numerous allegations by DSS and findings by the trial court concerning respondent's mental instability, the trial court failed to appoint a guardian ad litem to represent respondent as required under section 7B-1101. The trial court therefore erred in proceeding to terminate respondent's parental rights without first appointing a guardian ad litem. Petitioner concedes that this was error, but argues

that such error did not prejudice respondent, in that she was represented by counsel. Petitioner moreover argues that, as respondent did not request a guardian ad litem, she has failed to preserve this issue for appellate review. We disagree.

In *In re Richard v. Michna*, 110 N.C. App. 817, 431 S.E.2d 485 (1993), this Court reversed the trial court's termination of the respondent mother's parental rights. The petitioner in *Richard* alleged and the trial court found, *inter alia*, that the respondent mother was incapable, because of mental retardation and other mental conditions, of proper care and supervision of her children. *See id.* at 821, 431 S.E.2d at 488. The respondent mother did not request a guardian ad litem, however, nor did she object to the failure to have one appointed at trial. "In short the issue was never presented at the trial court level." *Id.* This Court nevertheless held that the statutory language of section 7A-289.23, now codified as section 7B-1101, expressly mandated that a guardian ad litem be appointed in cases where it is alleged that a parent is " 'incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child.' " *Id.* (quoting N.C. Gen. Stat. § 7A-289.32(7)). The mandatory language of the statute relieved the respondent of her burden of requesting appointment of a guardian ad litem and excused her failure to object at trial. The Court further held that, although there was no evidence that the respondent had been prejudiced by the failure of the trial court to appoint a guardian ad litem, "the mandate of the statute must be observed, and a guardian ad litem must be appointed." *Id.* at 822, 431 S.E.2d at 488. The Court therefore reversed the order terminating the respondent's parental rights and remanded the case to the trial court for appointment of a guardian ad litem and a new trial.

Although the *Richard* decision was filed before implementation of the current Juvenile Code, its reasoning controls the outcome of the instant case. The language of section 7B-1101 requires that the trial court appoint a guardian ad litem where "it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6)." N.C. Gen. Stat. § 7B-1101. Section 7B-1111(6) permits termination of parental rights where a parent is incapable, due to mental illness or any other similar cause or condition, of providing proper care and supervision to his or her child. In the instant case, the allegations and evidence before the trial court tended to show that respondent was incapable of providing proper care to her minor child due to mental

illness. We hold that where, as here, the allegations contained in the petition or motion to terminate parental rights tend to show that the respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian ad litem to represent the respondent at the termination hearing. We conclude that the trial court erred in failing to appoint a guardian ad litem for respondent, and we therefore reverse the order of the trial court terminating respondent's parental rights. We further remand this case for appointment of a guardian ad litem for respondent and for a new trial.

Reversed and remanded.

Judges WYNN and LEVINSON concur.

CASTLE WORLDWIDE, INC. AND COLUMBIA ASSESSMENT SERVICES, INC., PLAINTIFFS V. SOUTHTRUST BANK, SOUTHTRUST BANK, N.A., SOUTHTRUST BANK OF GEORGIA, N.A., SOUTHTRUST BANK OF NORTH CAROLINA, N.A., SOUTHTRUST BANK OF SOUTHWEST FLORIDA, INC., SOUTHTRUST OF SOUTHWEST FLORIDA, INC., SOUTHTRUST CORPORATION, FIRST UNION NATIONAL BANK, FIRST UNION NATIONAL BANK OF NORTH CAROLINA, FIRST UNION NATIONAL BANK OF DELAWARE, FIRST UNION NATIONAL BANCORP, INC., WACHOVIA BANK, NATIONAL ASSOCIATION, WACHOVIA CORPORATION, AND WACHOVIA CORPORATION OF NORTH CAROLINA, DEFENDANTS

No. COA02-872

(Filed 6 May 2003)

Banks and Banking— check cashing without proper endorsement—authority of company president

Plaintiff corporations' complaint stated a claim against defendant bank for breach of contract, breach of statutory duty and negligence where it alleged that defendant improperly charged plaintiffs' accounts for corporate checks payable to plaintiffs' customers that were presented to the bank by plaintiffs' president and either cashed or replaced with certified checks by plaintiffs' president without endorsement or with only the president's endorsement, because: (1) the complaint was not insufficient even if it attempted to allege alternate theories but stated a claim only upon one theory, N.C.G.S. § 1A-1, Rule 8(e)(2); (2) although merely exchanging a corporate check drawn on

plaintiffs' account payable to one of plaintiffs' customers for a certified check does not allege wrongdoing, the complaint also alleges that defendant cashed checks payable to third parties without requiring a proper endorsement, which constitutes a wrongdoing; and (3) although the president of plaintiff companies could issue checks and could exchange an ordinary check for a certified check, his status as president of those companies did not authorize him to cash checks payable to others.

Appeal by plaintiffs from order entered 26 March 2002 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 27 March 2003.

Lewis & Roberts, PLLC, by James A. Roberts, III, for plaintiff appellants.

Bell, Davis & Pitt, P.A., by William K. Davis and Kevin G. Williams, for defendant appellees.

McCULLOUGH, Judge.

On 11 October 2001, Castle Worldwide, Inc. (Castle) and Columbia Assessment Services, Inc. (Columbia) (a wholly-owned subsidiary of Castle) filed a complaint asserting claims for breach of contract, breach of statutory duties, and negligence against two groups of defendant banks, SouthTrust and Wachovia, as well as a claim for unfair and deceptive trade practices (UDTP) against SouthTrust. Plaintiffs' claims arose out of their banking relationships with defendants, whereby defendants allegedly improperly charged plaintiffs' accounts for corporate checks that were presented to the banks with either no endorsement or an improper endorsement.

The facts leading to plaintiffs' lawsuit are as follows: Plaintiffs maintained a commercial banking account at SouthTrust from November 1995 to November 1998. In November 1998, plaintiffs changed banks and opened a commercial banking account at Wachovia (formerly First Union), which remained active until May 1999. According to plaintiffs' complaint,

> 17. During the period November 27, 1995 through November 12, 1998, SouthTrust charged Castle's SouthTrust Account in connection with its payment of at least twenty-five (25) checks to a party or parties who presented those checks either without any endorsement, or without the proper endorsement of the

payee or which were otherwise endorsed improperly or without authorization.

18. [List of the twenty-five checks SouthTrust charged to plaintiffs' account and paid either without any endorsement or without the proper endorsement of the payee.]

19. During the period November 24, 1998 through May 21, 1999, [the Wachovia defendants] charged Castle's . . . Account in connection with its payment of at least three (3) checks to a party or parties who presented those checks without any endorsement, or without the proper endorsement of the payee, or which were otherwise endorsed improperly or without authorization.

20. [List of the three checks Wachovia charged to plaintiffs' account and paid either without any endorsement or without the proper endorsement of the payee.]

21. During the time alleged herein, 1995 through 1999, the President of Castle Worldwide was Dr. Said Hayez ("Hayez"). Hayez devised a scheme to secrete monies from Castle whereby he had the checks referenced in paragraphs 18 and 20 above (the "subject checks") issued to certain customers of Castle that were duplicate checks of prior checks issued and properly charged to Castle or were merely fictitious checks. Hayez then took the subject checks to the local branch of defendants and cashed, or replaced with a certified check, the subject checks either with no endorsement or being endorsed only by Hayez himself.

22. Upon information and belief, Hayez did not have any authority from the payees identified on the front of the subject checks to endorse or cash the checks. Hayez received the proceeds from the subject checks directly for his own use and benefit.

The twenty-five checks handled by SouthTrust totaled $2,424,329.00. The three checks handled by Wachovia totaled $665,295.00. Neither SouthTrust nor Wachovia required the endorsement of the payee on the face of the check before complying with Dr. Hayez' requests. Plaintiffs maintained that the banks did not use reasonable commercial standards when they followed Dr. Hayez' instructions and directly caused them harm by charging their accounts in the amount of the checks Dr. Hayez presented.

On 8 January 2002, the Wachovia defendants (the group of banks consisting of Wachovia and First Union) moved to dismiss plaintiffs'

complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001) for failure to state a claim upon which relief could be granted. On 26 March 2002, the trial court granted the Wachovia defendants' motion to dismiss. Plaintiffs appealed.

In their sole assignment of error, plaintiffs argue the trial court erred by granting the Wachovia defendants' motion to dismiss under Rule 12(b)(6) because their complaint sufficiently stated a claim upon which relief could be granted. For the reasons stated herein, we agree with plaintiffs' arguments and reverse the order of the trial court.

> A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.

Harris v. NCNB, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citations omitted). "In analyzing the sufficiency of the complaint, the complaint must be liberally construed." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987). Dismissal is not warranted "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Id.* However, "[w]hen the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint must be dismissed." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001).

Plaintiffs contend that their complaint alleges several valid claims against the Wachovia defendants, including breach of contract, breach of statutory duty, and negligence. They believe their claims should proceed because the Wachovia defendants' actions violated the parties' banking contract, the Uniform Commercial Code, and common law negligence principles. Plaintiffs admit that "[a]ll the circumstances surrounding the transactions at issue are not known at the present time. There are numerous different factual scenarios that may exist in which Appellees would be liable to Appellants regardless

of who presented the checks for payment." However, plaintiffs believe the case should be allowed to proceed so that the facts may be uncovered.

Additionally, plaintiffs argue that their complaint should not be dismissed simply because it alleged that Dr. Hayez was the President of Castle and Columbia. They point out that the complaint does not address the scope of Dr. Hayez' authority, duties, and powers as President. Because a determination of the scope of Dr. Hayez' authority, duties and powers would require a look at evidence outside the pleadings, plaintiffs argue the bare allegation that Dr. Hayez served as President did not constitute an "insurmountable bar to recovery" and did not justify the dismissal of their complaint. "In ruling on a motion to dismiss, a court properly may consider only evidence contained in or asserted in the pleadings." *Jacobs v. Royal Ins. Co. of America*, 128 N.C. App. 528, 530, 495 S.E.2d 185, 187 (1998).

The Wachovia defendants note that plaintiffs' complaint alleged that Dr. Hayez "cashed, or replaced with a certified check, the subject checks either with no endorsement or being endorsed only by Hayez himself." The Wachovia defendants maintain that the use of the disjunctive "or" fails to concisely and directly state either that (1) Dr. Hayez replaced the checks with certified checks; or (2) Dr. Hayez cashed the checks. Thus, because one of the two possibilities is entirely proper conduct for the bank to have engaged in, the Wachovia defendants believe plaintiffs' manner of pleading violates N.C. Gen. Stat. §§ 1A-1, Rule 8(e)(1) ("[e]ach averment of a pleading shall be simple, concise and direct[]") and Rule 11(a) (while pleading in the alternative is permissible, all statements should be "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]").

In dismissing plaintiffs' complaint, the trial court ignored Rule 8(e)(2), which allows pleading in the alternative:

> (e) *Pleading to be concise and direct; consistency.—*
>
> (2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. *When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insuffi-*

> *ciency of one or more of the alternative statements.* A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

Id. (emphasis added). While we agree with the Wachovia defendants that merely exchanging a corporate check drawn on plaintiffs' account payable to one of plaintiffs' customers for a certified check does not allege wrongdoing, the complaint also alleges that the Wachovia defendants cashed checks payable to third parties without requiring a proper endorsement, which does constitute wrongdoing.

Under Uniform Commercial Code § 4-401, codified at N.C. Gen. Stat. § 25-4-401 (2001), a bank may only charge its customers' accounts for "properly payable" items:

> (a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

A fair reading of the complaint shows that plaintiffs alleged the Wachovia defendants cashed checks payable to a third party with either no endorsement or with only Dr. Hayez' endorsement. If proven true, such items would not be properly payable. *See Knight Publishing Co. v. Chase Manhattan Bank*, 125 N.C. App. 1, 479 S.E.2d 478, *cert. denied*, 346 N.C. 280, 487 S.E.2d 548 (1997) (improperly endorsed checks are not properly payable as a matter of law). By alleging in one of its alternative theories that the Wachovia defendants cashed checks payable to a third party and turned the proceeds over to Dr. Hayez, the complaint does state at least one viable cause of action.

Lastly, the Wachovia defendants argue that Dr. Hayez, as plaintiffs' President, was their general agent and had implied power to bind the corporations. It is well settled that "persons dealing with the president or any other corporate officer can usually assume in good faith that he is empowered to exercise the customary functions of his office, in the absence of notice or circumstances indicating otherwise." Russell M. Robinson, II, *Robinson on North Carolina Corporate Law*, § 16.04(a) (6th ed. 2000). *See also Bank v. Oil Co.*,

157 N.C. 302, 73 S.E. 93 (1912). The Wachovia defendants do not allege or argue that Dr. Hayez had authority to act for the payees of the checks set forth in the complaint. Thus, Dr. Hayez could issue the checks and could exchange an ordinary check for a certified check. His status as President of Castle and Columbia did not authorize him to cash checks payable to others, as is alleged in the complaint.

Upon careful review of the record and the arguments presented by the parties, we conclude the complaint contains pleadings sufficient to state a cause of action as to the Wachovia defendants. The order of the trial court is hereby

Reversed.

Judges McGEE and LEVINSON concur.

STATE OF NORTH CAROLINA v. PAMELA JEAN McCRACKEN

No. COA02-958

(Filed 6 May 2003)

1. Drugs— trafficking—oxycodone in tablet form—weight

The tablet form of oxycodone was properly considered a mixture for purposes of a trafficking charge under N.C.G.S. § 90-95(h)(4). The word "mixture" refers to the total weight of the dosage unit rather than the actual weight of the controlled substance within the mixture under *State v. Jones*, 85 N.C. App. 56. The statutory language "or any mixture containing such substance" presents a catch-all provision and does not lead to the conclusion that the legislature did not intend to include tablets within the definition of "mixture."

2. Drugs— trafficking in oxycodone tablets—weight—no evidence of lesser offense

The trial court's failure to charge on the lesser-included offense of simple sale and possession of oxycodone in a prosecution for trafficking was not error. The weight to use when the controlled substance was in tablets was a question of law, and there was no evidence from which the court could have fashioned an instruction to a lesser offense.

3. Evidence— similar drug transactions—not remote in time—admissible

There was no abuse of discretion in the admission of other drug transactions in a prosecution for trafficking in oxycodone. The other transactions involved the sale of oxycodone at prearranged locations similar to the location at issue here and occurred within a few weeks of this transaction. The evidence was more probative than prejudicial.

On writ of certiorari to review judgments dated 12 September 2001 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 26 March 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Staples Hughes Appellate Defender by Assistant Appellate Defender Constance E. Widenhouse, for defendant appellant.

BRYANT, Judge.

Pamela Jean McCracken (defendant) petitions this Court to review upon writ of certiorari (A) judgments dated 12 September 2001 entered consistent with a jury verdict finding her guilty of (1) maintaining a vehicle to keep and sell a controlled substance (01 CRS 4297), (2) trafficking by possession of oxycodone, (3) trafficking by sale of oxycodone, and (4) trafficking by transportation of oxycodone (01 CRS 4294) and (B) a judgment dated 12 September 2001 entered consistent with defendant's no contest plea to two counts of trafficking by sale of oxycodone (01 CRS 4293/4295).[1]

On 20 June 2001, the respective trafficking indictments were issued and charged defendant with trafficking in "a mixture containing oxycodone weighing 4 grams or more but less than 14 grams" on 5 March 2001. The evidence at trial revealed defendant met Tyronne Heath, an informant for the Haywood County Sheriff's Department, at a Wal-Mart on 5 March 2001 and sold him forty tablets of the prescription drug Oxycontin. The forty tablets had a total weight of 5.4 grams, of which 1.6 grams consisted of oxycodone, a Schedule II opium derivative. Heath and another witness also testified to other occasions between 7 February and 14 March 2001, when they had met with defendant at various prearranged locations, including K-Mart,

1. The plea agreement reserved defendant's right to appeal the trial court's denial of her motion to dismiss the charges.

Time Out Market, Ingles, and a "Rec Park," to buy oxycodone. The trial court, over defendant's objections under Rules 404(b) and 403, admitted this testimony, finding that:

> [T]hose transactions [were] similar in kind and . . . involve[d] arrangements to meet by telephone, sale of the same matter . . . and . . . [are] admissible for [the] purpose of showing that . . . [d]efendant had knowledge[,] which is a necessary element of the crimes charged in this case. And that there existed in her mind a plan, scheme or system or design involving the . . . crimes charged . . . . She had the opportunity to commit the crime, it was absence of . . . mistake and absence of entrapment.

The jury was instructed accordingly.

The dispositive issues are whether: (I) a pharmaceutical drug dispensed in tablet form is a "mixture" within the meaning of N.C. Gen. Stat. § 90-95(h)(4); (II) the trial court erred in failing to submit to the jury the lesser-included offenses of simple sale and simple possession of oxycodone; and (III) the trial court abused its discretion under Rules 404(b) and 403 in admitting evidence of other drug transactions conducted by defendant.

I

[1] Defendant first argues the trial court should have allowed her motion to dismiss the trafficking charges because, of the 5.4 grams of Oxycontin sold to Heath, only 1.6 grams consisted of the controlled substance oxycodone. She contends that because the remaining ingredients in each tablet consisted of filler substances, their weight should not have counted toward the four grams or more charged in the indictment.

> N.C. Gen. Stat. § 90-95(h)(4) provides that:
>
> Any person who sells, manufactures, delivers, transports, or possesses *four grams or more of opium or opiate*, or any salt, compound, derivative, or preparation of opium or opiate . . . *or any mixture containing such substance, shall be guilty of* a felony which felony shall be known as "*trafficking* in opium or heroin" . . . .

N.C.G.S. § 90-95(h)(4) (2001) (emphasis added). This Court has previously decided whether the statute envisions use of the total weight of a mixture or the actual weight of the controlled substance within

a mixture and held: "Clearly, the legislature's use of the word 'mixture' establishes that the total weight of the dosage units . . . is sufficient basis to charge a suspect with trafficking." *State v. Jones*, 85 N.C. App. 56, 68, 354 S.E.2d 251, 258 (1987). Acknowledging the ruling in *Jones*, defendant argues prescription medication in tablet form should be treated differently because it does not constitute a mixture within the meaning of section 90-95(h). In support of her argument, defendant points to several subsections that prohibit trafficking in a specified number of "tablets, capsules, or other dosage units" of a controlled substance "or any mixture containing such substance" depending on its quantity or weight. *See* N.C.G.S. § 90-95(h)(2), (4a)-(4b) (2001). Because these subsections list both tablets and mixtures, defendant contends the Legislature could not have intended for tablets to be included in the definition of "mixture." We disagree.

The term "mixture" is not defined by statute. When, however, the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the language its plain and definite meaning. *Utilities Comm'n v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each. *Utilities Comm'n v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969).

A mixture is defined as "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." *Webster's Third New International Dictionary* 1449 (1968); *see also Ex parte Fletcher*, 718 So.2d 1132, 1134 (Ala. 1998) ("a 'mixture' consists of two or more substances blended together so that the particles of one substance are diffused among the particles of the other(s) and yet each substance retains its separate existence"). Dosage units like tablets and capsules, by their nature, contain commingled substances that are identifiable and thus regarded as retaining their separate existence. The *Jones* Court implicitly recognized this fact by treating the dosage units of Dilaudid at issue in that case, which came in tablet form, as mixtures. *See Jones*, 85 N.C. App. at 68, 354 S.E.2d at 258; *see also United States v. Young*, 992 F.2d 207, 209-10 (8th Cir. 1993) (considering a tablet to be a mixture and counting the entire tablet weight).

The statutes cited by defendant are not inconsistent with this interpretation. The terms "tablets, capsules, or other dosage units" are only used in sections in which the Legislature specified the exact

number of tablets, possession of which would amount to the felony of trafficking. N.C.G.S. § 90-95(h)(2), (4a)-(4b). In this context, the language "or any mixture containing such substance" presents a catch-all provision for any variation in form, weight, or quantity of the controlled substance and does not lead to the conclusion that the Legislature did not intend to include tablets within the definition of "mixture." We thus conclude that the trial court did not err in treating the tablets of Oxycontin in this case as mixtures and applying the holding in *Jones*. Accordingly, defendant's motion to dismiss was properly denied.

II

[2] Defendant next argues the trial court erred in failing to instruct the jury on the lesser-included offenses of simple sale and simple possession of oxycodone because, at the very least, the question of which weight to apply was a question of fact for the jury and, if the jury decided to use the controlled substance weight as opposed to the total tablet weight, the lesser-included offenses would have been warranted. This contention is without merit. As the above analysis illustrates, the question of which weight to apply is a legal one. *See Jones*, 85 N.C. App. at 68, 354 S.E.2d at 258. Pursuant to *Jones*, the jury was to consider the total weight of the tablets, which was 5.4 grams and thus within the parameters in which defendant could be found guilty of trafficking in oxycodone. *See State v. Willis*, 61 N.C. App. 23, 37-38, 300 S.E.2d 420, 429 (instruction on lesser-included offenses not warranted where the total weight of the mixture exceeded the lower weight limit even though only thirty percent of the mixture was pure heroin), *modified on other grounds and aff'd*, 309 N.C. 451, 306 S.E.2d 779 (1983). Accordingly, there was no evidence presented in this case from which the trial court could have legitimately fashioned a charge for a lesser offense. *See id.*

III

[3] Finally, defendant contends the trial court abused its discretion under Rules 404(b) and 403 in admitting evidence of other drug transactions conducted by defendant.

> 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.G.S. § 8C-1, Rule 404(b) (2001). Evidence admissible under Rule 404(b) is also subject to the balancing test of Rule 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2001).

The transcript reflects that evidence of additional drug transactions between 7 February and 14 March 2001 was offered and admitted for the purpose of establishing knowledge, plan, scheme, or design, opportunity, and absence of mistake or entrapment, proper purposes under Rule 404(b). *See* N.C.G.S. § 8C-1, Rule 404(b); *State v. Rosier*, 322 N.C. 826, 829, 370 S.E.2d 359, 361 (1988) (evidence of other offenses showing common scheme or plan to commit the offense with which defendant was charged held relevant and admissible pursuant to Rule 404(b)). "When incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of Rule 403 of the N.C. Rules of Evidence." *State v. Richardson*, 100 N.C. App. 240, 244, 395 S.E.2d 143, 146 (1990); *see also State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (because "[e]vidence which is probative of the State's case [is] necessarily . . . prejudicial" to the defendant, "the question is one of degree").

In this case, the other drug transactions involved the sale of oxycodone at prearranged locations similar to the location at which defendant had met Heath on March 5. These other transactions also occurred within a few weeks before and after that date. As such, they were sufficiently similar and not too remote in time, *see, e.g.*, *Richardson*, 100 N.C. App. at 245, 395 S.E.2d at 146 (remoteness not an issue since all of the events took place within a ten-month period), so as to make the evidence more probative than prejudicial. Thus, the trial court did not abuse its discretion in admitting the evidence.

No error.

Judges TIMMONS-GOODSON and GEER concur.

PATRICIA L. GIFFORD, PLAINTIFF v. BETH L. LINNELL, INDIVIDUALLY AND AS TRUSTEE OF THE DROFFIG FAMILY TRUST, AND WILLIAM P. GIFFORD, SR., INDIVIDUALLY AND AS TRUSTEE OF THE DROFFIG FAMILY TRUST, DEFENDANTS

No. COA02-521

(Filed 6 May 2003)

1. **Deeds— necessity of grantee—transfer to non-existent trust**

A deed was void for lack of a grantee on the date of conveyance where the deed specified that the property was being conveyed to the trustee of a trust which was not then in existence. The language of the deed made clear that the property was conveyed to the trustee only in her representative and not her individual capacity.

2. **Statutes of Limitation and Repose— fraud and misrepresentation—void deed**

Summary judgment should have been granted for defendants on fraud and misrepresentation claims based on a void deed to a trust because plaintiff failed to bring her action within the statute of limitations. A three-year statute of limitations applies to plaintiff's claims, which arose from her transfer of property to what she thought was a revocable trust, but she did not bring her action until nine years after she learned that the trust was irrevocable.

Appeal by defendants from judgment entered 13 February 2002 by Judge James R. Vosburgh in Carteret County Superior Court. Heard in the Court of Appeals 30 January 2003.

Mason & Mason, P. A., by L. Patten Mason, for plaintiff-appellee.

Bryant and Stanley, by Richard L. Stanley, for defendant-appellants.

HUNTER, Judge.

Beth L. Linnell ("defendant Linnell") and William P. Gifford, Sr. ("defendant Gifford") (collectively "defendants"), in their individual capacities and as trustees of the Droffig Family Trust, appeal the trial court's grant of summary judgment in favor of their mother, Patricia L. Gifford ("plaintiff"), after the court concluded that a deed executed

by plaintiff to defendants as trustees was void *ab initio*. We reverse the trial court for the reasons stated herein.

Plaintiff executed two deeds on 13 January 1992; one deed pertained to property located in Barnstable County, Massachusetts, and the other pertained to property located in Carteret County, North Carolina. Both deeds were a conveyance by plaintiff to defendant Linnell as "Trustee of Droffig Family Trust." On 16 January 1992, plaintiff executed a trust agreement entitled "Indenture of Trust[,] Droffig Family Trust" that appointed defendant Linnell and defendant Gifford as trustees of the Droffig Family Trust. Plaintiff signed the trust agreement and alleged that the attorney who prepared the agreement advised her that it was revocable and could be terminated by plaintiff at any time. The deed and trust agreement for the North Carolina property remained with that attorney and were recorded at the Register of Deeds of Carteret County on 14 June 1993, approximately eighteen months after their execution.

Following the conveyance, plaintiff attempted to sell the Massachusetts property. At that time, however, she learned that the trust was purportedly irrevocable. Defendants voluntarily reconveyed the Massachusetts property to plaintiff on 30 April 1992 so that plaintiff could sell her interest in the property.

At some point, plaintiff learned that the Droffig Family Trust did not actually exist until 16 January 1992, three days after the deed to the North Carolina property was executed. Plaintiff subsequently filed a complaint on 27 March 2001 alleging, *inter alia*:

> 7. Contrary to her understanding and as a result of misrepresentation and fraud, the plaintiff executed a document entitled "Droffig Family Trust" which was signed by the plaintiff on the 16th day of January, 1992.
>
> 8. At the time that the plaintiff executed the deed . . . the Droffig Family Trust did not exist and, therefore, the grantee of said deed was not a legal entity and the deed, therefore, could not operate to convey title to the defendants either individually or as trustees.
>
> . . . .
>
> 11. Since the deed above referenced conveyed property to a trust which did not exist at the time of said conveyance, the deed . . . is void ab initio.

Defendants timely answered and raised several defenses such as estoppel and the statute of limitations. Thereafter, defendants filed a motion for summary judgment on 28 December 2001, followed by plaintiff filing her own motion for summary judgment on 10 January 2002. Both parties' motions were accompanied by affidavits and other supporting documentation.

The summary judgment hearing was held on 28 January 2002. In a judgment filed 13 February 2002, the trial court granted plaintiff's motion for summary judgment after concluding the deed to the North Carolina property was "an unlawful cloud on Plaintiff's title and . . . void ad initio[.]" Defendants appeal.

The two assignments of error brought forth by defendants involve issues regarding a motion for summary judgment. On an appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Thus, when viewing the evidence in the light most favorable to the non-movant, we must determine whether the trial court properly concluded that the moving party showed, through pleadings and affidavits, that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

I.

[1] Defendants initially argue the trial court erred in granting summary judgment in favor of plaintiff because there were genuine issues of material fact as to whether the deed was delivered to them, via the attorney, and executed on the condition that the Droffig Family Trust would be executed thereafter.

"The word 'deed' ordinarily denotes an instrument in writing, signed, sealed, and delivered by the grantor, whereby an interest in realty is transferred from the grantor to the grantee." *Ballard v. Ballard*, 230 N.C. 629, 632-33, 55 S.E.2d 316, 319 (1949). North Carolina clearly recognizes that delivery of a deed can be absolute or conditional. James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 10-53, at 437 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999). One such conditional delivery occurs " '[w]hen the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction as to how he shall hold it for him, and without in

some way reserving the right to repossess it[.]' " *Buchanan v. Clark*, 164 N.C. 56, 63, 80 S.E. 424, 427 (1913). In that instance, " 'the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery[.]' " *Id.*

However, this Court has clearly held that "[t]o be operative as a conveyance, a deed must designate as grantee [a living or] a legal person[]" on the date of conveyance. *Piedmont & Western Investment Corp. v. Carnes-Miller Gear Co.*, 96 N.C. App. 105, 107, 384 S.E.2d 687, 688 (1989) (holding that where a deed attempted to convey property to a plaintiff corporation during that plaintiff's administrative suspension, the deed could not operate to convey title because the plaintiff had no legal existence on the date of the conveyance). *See also* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 10-26, at 411 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) (stating "[i]n order for a deed to be valid it must designate an existing person or legal entity as the grantee who is capable of taking title to the real property at the time of the execution of the deed" (footnote omitted)). Therefore, before determining whether delivery of a deed (conditional or otherwise) was actually effective, we must first determine whether there is a living or legal person to whom that deed could be delivered.

Here, the deed specified that the property was being conveyed to "[defendant] Linnell, Trustee of Droffig Family Trust[.]" The parties do not dispute that the trust was not in existence on the date plaintiff conveyed the property by deed. That lack of existence resulted in the deed failing to identify a valid grantee that was capable of taking title to the North Carolina property. Defendants offered no evidence that the deed's subsequent "delivery," via the attorney, was conditioned on the trust becoming a valid grantee three days after the deed was executed.

Nevertheless, defendants further contend that since the deed specified that the property was being conveyed to "[defendant] Linnell, Trustee of Droffig Family Trust[,]" defendant Linnell was designated as a valid grantee to whom that deed could be delivered because she is a "living person." Yet, the use of the words "Droffig Family Trust" following the trustee's name and the language of the trust agreement itself indicate that the property was conveyed to defendant Linnell only in her representative capacity and not in her individual capacity. *See Freeman v. Rose*, 192 N.C. 732, 135 S.E. 870 (1926). Thus, we cannot overlook the fact that defendant Linnell was

not the intended grantee at the time of the deed's execution, but was actually the representative of a non-existing legal entity.

Accordingly, the deed was void for lack of a grantee on the date of the conveyance.

II.

[2] Defendants also argue that even if the Droffig Family Trust was not a living or legal entity at the time of the conveyance, summary judgment should have been granted in their favor because plaintiff is estopped from denying the validity of the deed, and plaintiff's claim that she executed the deed "[c]ontrary to her understanding and as a result of misrepresentation and fraud[]" is barred by the statute of limitations. Since our Supreme Court has previously held that a void deed cannot be the basis of an estoppel, *see Fisher v. Fisher*, 218 N.C. 42, 9 S.E.2d 493 (1940), we need only address defendants' statute of limitations argument.

"The statute of limitations is 'inflexible and unyielding,' and the defendants are vested with the right to rely on it as a defense." *Staley v. Lingerfelt*, 134 N.C. App. 294, 299, 517 S.E.2d 392, 396 (1999) (citation omitted). In North Carolina, claims alleging fraud or mistake are governed by a three-year statute of limitations. N.C. Gen. Stat. § 1-52(9) (2001). A cause of action grounded on either "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* "The trial court has no discretion when considering whether a claim is barred by the statute of limitations." *Staley*, 134 N.C. App. at 299, 517 S.E.2d at 396.

In the case *sub judice*, defendants contend that plaintiff's claims for misrepresentation and fraud are time barred because she learned the trust was irrevocable when she attempted to sell the Massachusetts property in April of 1992, approximately nine years prior to the filing of her complaint. The evidence in the record supports defendants' contention, especially in light of plaintiff's failure to forecast evidence to the contrary. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (providing that "[o]nce a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action"). Further, plaintiff has also failed to cite, and this Court has not found, any case law or statutory authority that clearly precludes the statute of limita-

tions from being applicable in a situation where a deed is deemed void for failure to identify a valid grantee on the date of conveyance. Therefore, we conclude a three-year statute of limitations applies to plaintiff's claims for misrepresentation and fraud which results in her action being barred. To hold otherwise would result in there being no applicable statute of limitations to address the issue presented by the facts in this case.

For the aforementioned reasons, we conclude that although the trial court properly determined the deed was void, summary judgment should have been granted in favor of defendants due to plaintiff's failure to initiate her action within the prescribed statute of limitations period.

Reversed.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. MICHAEL JOSEPH WASHINGTON

No. COA02-770

(Filed 6 May 2003)

Kidnapping— second-degree—motion to dismiss—sufficiency of evidence—restraint—terrorizing—serious bodily harm

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree kidnapping under N.C.G.S. § 14-39(a) arising out of a road rage incident occurring after defendant and the victim's cars were involved in an accident, because: (1) defendant concedes and substantial evidence in the record shows the victim was restrained by defendant; (2) under the facts of this case, the restraint was separate and distinct from defendant's assault of the victim; and (3) substantial evidence exists to show that defendant acted with the purpose of terrorizing, doing serious bodily harm upon the victim, or both.

Appeal by defendant from judgment entered 5 December 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 April 2003.

Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for the State.

Terry W. Alford for defendant.

TYSON, Judge.

Michael Joseph Washington ("defendant") appeals from a conviction and judgment entered upon a jury's verdict of guilty of second-degree kidnapping. We find no error.

I. Background

On 26 September 2001 around 7:20 a.m., Michael K. Perry ("Perry") left his home in Wake Forest and drove towards a donut store to get breakfast for his family. Perry turned his vehicle south onto U.S. Highway 1 en route to the store. Perry encountered a substantial traffic jam after traveling about a mile.

Perry moved into the left-hand lane as he crawled through traffic with the other motorists. A white van was being driven by defendant and came to a stop directly in front of Perry. Perry was unsure why defendant had stopped because traffic was moving in the right-hand lane, albeit slowly. Perry waited for defendant to continue and began to wonder if defendant was experiencing car trouble. Vehicles located behind Perry began to pass both Perry's and defendant's vehicles on the right-hand and left-hand sides of the highway.

Perry decided to attempt to pass defendant on the left-hand side where there was a crossover. As Perry moved to pass defendant's van, defendant drove into the front side of Perry's vehicle, preventing Perry from driving further. Defendant exited his van and immediately approached Perry, who remained seated inside his car. Perry's driver's side window was halfway down. Defendant grabbed the window and as he began pulling on it, it shattered. Defendant appeared furious with Perry and yelled at Perry to "get out" of the car. Defendant grabbed Perry's necktie and continued to demand of Perry to "get out" of the car.

Perry released his seatbelt and unlatched his door as defendant tried to open the door from the outside. Defendant grabbed Perry by the shoulders and pushed him to the ground. Perry managed to arise to his feet. Defendant continued to hold Perry with at least one hand and told him to "get in the van."

As Perry tried to escape, defendant hit him above his eye. Perry recalled being "airborne" before landing on the hood of his car. Other motorists yelled at defendant to stop. Perry testified that defendant threatened to "pop" him and that defendant stated he had "to go back or . . . something like that." Defendant retreated to his van.

Other motorists stopped and asked Perry if he was hurt. Wake Forest Police Detective John Martin arrived upon the scene. A highway patrol trooper and another Wake Forest police officer also arrived. Perry suffered a cut over his right eye, abrasions on his face, and nicks on the palms of his hands from the incident.

On 16 October 2001, defendant was indicted for second-degree kidnapping. A trial was held 4 December 2001, and the jury returned a verdict of guilty on that charge. Defendant was sentenced in the presumptive range as a Class IV felon to an active term of 46 to 65 months. The Court recommended work release after defendant successfully completed a substance abuse treatment program. Defendant appeals.

II. Issue

Defendant assigns error to the trial court's denial of his motion to dismiss the kidnapping charge for insufficiency of the evidence.

III. Sufficiency of Evidence

In ruling on a motion to dismiss, the trial court must determine whether substantial evidence exists to support each essential element of the crime charged. *State v. Earnhardt*, 307 N.C. 62, 65, 296 S.E.2d 649, 651 (1982). "Substantial evidence" is relevant evidence that a reasonable mind might find to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-9, 265 S.E.2d 164, 169 (1980). The trial court must consider the evidence in the light most favorable to the State and allow the State any reasonable inference which can be drawn from the evidence. *State v. Davis*, 325 N.C. 693, 696, 386 S.E.2d 187, 189 (1989).

A. Kidnapping and Restraint

Kidnapping is a specific intent crime. *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). The jury is required to find that defendant unlawfully confined, restrained, or removed a victim for one of the purposes set out in the statute. *Id.* Defendant was indicted for second-degree kidnapping for restraining Perry with the purpose of terrorizing him or doing serious bodily harm upon Perry's person.

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C.G.S. § 14-39(a) (2001).

Defendant concedes and substantial evidence in the record shows that Perry was restrained by defendant. Defendant argues that the restraint here was insufficient to support a charge of kidnapping. Defendant also argues that his restraint of Perry was an inherent part of an assault and cannot be used to support kidnapping. We disagree.

"Restraint" in the kidnapping context was defined in *State v. Brayboy*, 105 N.C. App. 370, 413 S.E.2d 590, *disc. review denied*, 332 N.C. 149, 419 S.E.2d 578 (1992).

> The term "restrain" connotes restriction by force, threat or fraud with or without confinement. *State v. Moore*, 77 N.C. App. 553, 335 S.E.2d 535 (1985), *citing State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). Restraint does not have to last for an appreciable period of time and removal does not require movement for a substantial distance. *Id.* Restraint or removal of the victim for any of the purposes specified in the statute is sufficient to constitute kidnapping.

Brayboy, 105 N.C. App. at 375, 413 S.E.2d at 593.

Testimony from Perry and other witnesses at the scene tends to show that defendant grabbed Perry while he was seated inside his car, threw him to the ground, and knocked Perry onto the hood of his car. Perry could not flee from defendant because defendant contin-

ued to hold Perry while assaulting him. Additionally, Perry's car was positioned directly behind defendant's van restraining Perry from leaving via foot or car. We find no merit in defendant's assertion that more restraint than defendant's admitted actions is required to support his conviction of kidnapping.

Presuming without deciding that restraint is not an inherent part of a simple assault as defendant alleges, we hold that under the facts of this case, the restraint was separate and distinct from the assault.

B. "Terrorizing" and "Serious Bodily Harm"

Defendant argues that the State produced insufficient evidence to show that defendant had the specific intent to terrorize or to do serious bodily harm to Perry. The burden of proving the specific intent of defendant is upon the State. Specific intent can be inferred through circumstantial evidence of the actions of the defendant. *See State v. Irwin*, 304 N.C. 93, 99-100, 282 S.E.2d 439, 444 (1981).

Defendant argues that the jury did not specifically find whether defendant acted with the purpose of (1) terrorizing or (2) doing serious bodily harm upon Perry or (3) both. Substantial evidence of defendant's actions supports either or both purposes.

Terrorizing is defined as "putting [a] person in some high degree of fear, a state of intense fright or apprehension." *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986). The evidence shows that defendant yelled at Perry to "get out" of his car, shattered Perry's car window, grabbed Perry, threw him to the ground and onto the hood of his car, and ordered Perry to get into defendant's van. This evidence is sufficient for a jury to find that defendant's purpose was to terrorize Perry. Perry testified that he was scared and tried to escape from defendant. When this evidence is viewed in the light most favorable to the State, the jury could find that defendant's purpose was to terrorize Perry.

Substantial evidence also exists for the jury to infer that defendant intended to do serious bodily harm to Perry. Defendant contends that serious bodily harm was not inflicted upon Perry because he was charged with second-degree and not first-degree kidnapping. While Perry suffered a cut above his eye and several bruises, the extent of physical damage to Perry is not in issue. The question is whether defendant's actions could show a specific intent on his part to do serious bodily harm to Perry.

IV. Conclusion

Eyewitness testimony and other evidence tend to show such specific intent, when this evidence is viewed in the light most favorable to the State. Defendant initiated the contact and attacked Perry intensely and continuously in an apparent rage. We overrule defendant's assignment of error that the evidence was insufficient to support the submission of second-degree kidnapping to the jury.

No error.

Judges WYNN and STEELMAN concur.

PATRICIA S. LOMBARDI, PLAINTIFF v. DONALD C. LOMBARDI, DEFENDANT

No. COA02-474

(Filed 6 May 2003)

1. Child Support, Custody, and Visitation— foreign support order—modification—emancipation

The trial court did not err in a child support modification case by concluding that North Carolina did not require defendant father to continue his child support obligations of a foreign support order originally entered by a New Jersey court under that state's laws regarding the parties' mentally retarded daughter who was born in May 1964, because: (1) New Jersey had lost continuing, exclusive jurisdiction over the order because defendant father now lives in Maryland and plaintiff mother and the daughter reside in North Carolina; (2) contrary to New Jersey law which sets no fixed age at which the obligation to pay child support terminates but looks at the demonstrable needs of the child, N.C.G.S. § 50-13.4(c) provides that in the absence of an agreement otherwise, a parent is no longer required to pay for child support for a dependent child regardless of disability once that child reaches the age of eighteen and graduates from secondary school or until the age of twenty if still enrolled in secondary school or its equivalent; and (3) contrary to plaintiff mother's assertion, N.C.G.S. § 52C-6-611(c) does not prevent the modification of the original order since the New Jersey court's determina-

tion that the party's child was unemancipated was not a final nonmodifiable term of the order.

2. Child Support, Custody, and Visitation— foreign support order—modification—substantial change in circumstances—failure to conduct evidentiary hearing

The trial court did not err in a child support modification case by declaring the parties' mentally retarded child ineligible for continuing child support and by failing to conduct an evidentiary hearing to determine whether there had been a substantial change in circumstances since the entry of a prior New Jersey order, because: (1) in North Carolina a parent is no longer responsible for child support for a dependent child who has reached the age of eighteen and graduated from secondary school or until the age of twenty if still enrolled in secondary school or its equivalent; and (2) the North Carolina General Assembly has not established an exception for disabled children.

Appeal by plaintiff from judgment entered 30 January 2002 by Judge L.T. Hammond in Rowan County District Court. Heard in the Court of Appeals 29 January 2003.

Robert L. Inge, for plaintiff-appellant.

Mary R. Blanton, for defendant-appellee.

HUDSON, Judge.

Plaintiff Patricia S. Lombardi and defendant Donald C. Lombardi were divorced in New Jersey in 1984. As part of the divorce, the New Jersey court ordered that defendant pay a fixed sum per week for the support of the parties' daughter, who is mentally retarded. Plaintiff later moved to North Carolina, and defendant registered the child support order here and requested that his child support obligations be terminated under North Carolina law. The trial court agreed, finding that North Carolina did not require defendant to continue to support his daughter. For the reasons set forth below, we affirm the decision of the trial court.

BACKGROUND

Plaintiff and defendant were married in July 1963 and divorced by judgment of divorce filed in April 1984 in New Jersey. The parties have a daughter Corinne, born May 1964, who is mentally retarded.

The judgment of divorce required defendant to pay $50 per week for Corinne's support.

By order of the New Jersey superior court dated May 2, 1988, the court found that Corinne was unable to be employed full time and therefore was deemed unemancipated. Defendant was ordered to continue to pay $50 per week as support. On June 2, 1998, the New Jersey court increased defendant's support obligation to $150 per week. The court again indicated in its order that Corinne was unemancipated. Defendant filed a request for reconsideration, which the court denied in July 1998.

After entry of the 1998 order, plaintiff moved from New Jersey to North Carolina. Defendant moved from New Jersey to Maryland. On September 25, 2001, defendant filed in North Carolina a notice of registration of foreign support order with the New Jersey court's orders attached. He also filed a motion in the district court to terminate his child support obligation. At the hearing on January 25, 2002, the court terminated defendant's child support obligation because it found that Corinne was no longer eligible for child support under North Carolina law.

Plaintiff appeals.

ANALYSIS

A.

[1] Before us is a child support order, originally entered by a New Jersey court pursuant to that state's law. Currently, none of the parties live in New Jersey; plaintiff and Corinne live in North Carolina, and defendant lives in Maryland. Defendant has registered the support order in North Carolina and is attempting to modify it in a North Carolina court. Accordingly, we must decide whether the district court in North Carolina properly modified the order issued in New Jersey to comply with North Carolina law.

The Uniform Interstate Family Support Act ("UIFSA"), codified as Chapter 52C of the North Carolina General Statutes, sets out procedures for the interstate establishment, enforcement, and modification of child and spousal support obligations. N.C. Gen. Stat. § 52C-1-103 official commentary (2001); *Butler v. Butler*, 152 N.C. App. 74, 78, 566 S.E.2d 707, 709 (2002). UIFSA governs the proceedings involving any foreign support order registered in North Carolina after January 1, 1996, UIFSA's effective date. *Welsher v. Rager*, 127 N.C. App. 521, 527, 491 S.E.2d 661, 664 (1997).

Once a foreign child support order has been registered in North Carolina, it can be modified by a North Carolina court only if the issuing state has lost continuing, exclusive jurisdiction over the order. N.C. Gen. Stat. § 52C-2-205 and official commentary (2001). For that to occur, (1) neither the parties nor the child may still reside in the issuing state; (2) the party seeking modification must be a nonresident of North Carolina; and (3) the respondent must be subject to the personal jurisdiction of the North Carolina court. N.C. Gen. Stat. §§ 52C-2-205, 6-611. As indicated above, all three elements are met here, which means that New Jersey, the issuing tribunal, has lost its continuing, exclusive jurisdiction to modify its support order.

Once North Carolina has obtained modification jurisdiction, our courts must apply the law of the forum—with one exception. Pursuant to N.C. Gen. Stat. § 52C-6-611(c), a "tribunal of this State may not modify any aspect of a child support order that may not be modified under the law of the issuing state." In other words, subsection (c) prevents the modification of any final, nonmodifiable aspect of the original order. N.C. Gen. Stat. § 52C-6-611(c) official commentary (2001).

Here, the only aspect of the New Jersey order that plaintiff claims to be final and nonmodifiable is the New Jersey court's determination that Corinne was unemancipated. Under North Carolina law, in the absence of an agreement otherwise, a parent is no longer required to pay for child support for a dependent child, regardless of disability, once that child reaches the age of 18 and graduates from secondary school or until the age of 20 if still enrolled in secondary school or its equivalent. N.C. Gen. Stat. § 50-13.4(c).

New Jersey law, to the contrary, sets no fixed age at which the obligation to pay child support terminates. Rather, the demonstrable needs of the child, not the child's age, determine the duty of support. N.J. Stat. Ann. § 2A:34-23 (indicating that support is based on the court's determination of what the "circumstances of the parties and the nature of the case shall render fit, reasonable and just"). New Jersey recognizes that the age of majority is eighteen years. N.J. Stat. Ann. § 9:17B-3. However, the child's reaching that age has no bearing on the duration of or limitation to parents' obligations to support a child. Duration is a question of fact that hinges on the court's determination of whether or not the child is emancipated. "Whether a child is emancipated at age 18, with the correlative termination of the right to parental support, depends upon the facts of each case." *Newburgh v. Arrigo*, 88 N.J. 529, 543, 443 A.2d 1031, 1038 (1982).

We do not believe that the New Jersey court's determination that Corinne was unemancipated is a final, nonmodifiable term of the order. Our careful review of New Jersey case law reveals that New Jersey courts do not regard a finding of emancipation as permanent and instead view it as a fact-specific inquiry dependent upon the "intricacies and various operative facts of each matter." *Monmouth County Div. of Social Servs. v. C.R.*, 316 N.J. Super. 600, 616, 720 A.2d 1004, 1012 (1998). For example, in *Bishop v. Bishop*, the New Jersey court engaged in a detailed inquiry before concluding that the child, a twenty-year-old cadet enrolled at the United States Military Academy at West Point, was emancipated. 287 N.J. Super. 593, 604, 671 A.2d 644, 649 (1995). The court found that the cadet, as an active-duty member of the United States Army, owed his allegiance to the president of the United States as commander of chief of the military, not to his parents. *Id.* at 603-04, 671 A.2d at 649. The government, not the parents, provided for all the cadet's educational needs and virtually all his material requirements, such as food, housing, and medical care. *Id.* In sum, because the mother "relinquished any remaining control and responsibility over her son," by virtue of the son's enrollment at West Point, the father was held to be relieved from his support obligations for the child. *Id.* at 604, 671 A.2d at 649.

In fact, New Jersey courts have specifically held that emancipation is not an immutable concept. In *Sakovits v. Sakovits*, 178 N.J. Super. 623, 429 A.2d 1091 (1981), the court explained that "[w]hen a declaration of emancipation is entered, all a judge has before him are the facts as they exist at that time." *Id.* at 631, 720 A.2d at 1096. Accordingly, the court held that even though a child may have been declared emancipated at one time, circumstances may change, such that a previously emancipated child is no longer emancipated and the parents in a given case may be required to contribute to the college education of the child. *Id.*; see also *Balding v. Balding*, 241 N.J. Super. 414, 418, 575 A.2d 66, 68 (1990).

In sum, we conclude that since the New Jersey court's finding that Corinne was unemancipated is not a final, nonmodifiable part of the order, its determination that defendant owes support is also modifiable. Pursuant to N.C. Gen. Stat. § 52C-6-611, the North Carolina court can modify the support order to comply with North Carolina law such that defendant is no longer required to pay for Corinne's support. Further, "[o]n issuance of an order modifying a child support order issued in another state, a tribunal of this State becomes the tribunal of continuing, exclusive jurisdiction." N.C. Gen. Stat. § 52C-6-611(d).

B.

[2] Plaintiff also argues that the trial court erred when it failed to conduct an evidentiary hearing to determine whether or not there had been a substantial change in circumstances since the entry of the prior order. We disagree.

As set forth above, under UIFSA, the North Carolina court can modify the New Jersey court's determination that Corinne was unemancipated. In so doing, the court applies North Carolina law. N.C. Gen. Stat. § 52C-6-611(b) & (c). North Carolina law is clear that, absent a contrary agreement, a parent is no longer responsible for child support for a dependent child who has reached the age of 18 and graduated from secondary school or until the age of 20 if still enrolled in secondary school or its equivalent. N.C. Gen. Stat. § 50-13.4(c). The North Carolina General Assembly has established no exception for disabled children. *Id.* Accordingly, we must conclude that the trial court had no choice but to declare Corinne ineligible for continuing child support. An evidentiary hearing was not required.

CONCLUSION

For the reasons set forth above, we affirm the decision of the trial court.

Affirmed.

Judges MARTIN and STEELMAN concur.

CB&I CONSTRUCTORS, INC., PLAINTIFF v. TOWN OF WAKE FOREST, NORTH CAROLINA; AND LANDMARK STRUCTURES I, L.P., DEFENDANTS

No. COA02-1100

(Filed 6 May 2003)

1. Injunction— permanent—exceeded scope of jurisdiction

The trial court erred in an action concerning the alleged improper award of a construction contract for a proposed water tank by granting a permanent injunction and awarding affirmative injunctive relief, because the granting of the permanent injunction exceeded the jurisdiction of the court by determining the controversy on its merits when the hearing was to determine

whether the temporary restraining order should be continued as a preliminary injunction.

2. Appeal and Error— appealability—interlocutory order—issuance of preliminary injunction

An appeal from the trial court's grant of a preliminary injunction in an action concerning the alleged improper award of a construction contract for a proposed water tank is an appeal from an interlocutory order and is dismissed, because: (1) the preliminary injunction maintains the status quo and all parties remain free to fully litigate the merits of the case in the correct procedural context before the trial court to determine whether defendant company's bid was responsive to the invitation for bids; and (2) no substantial right has been shown to be implicated.

Appeal by defendant from order entered 11 July 2002 by Judge Evelyn Hill in Wake County Superior Court. Heard in the Court of Appeals 19 February 2003.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Kimila L. Wooten, and Keith E. Coltrain, for plaintiff-appellee, CB&I Constructors, Inc.

Wyrick Robbins Yates & Ponton, L.L.P., by Benjamin N. Thompson, Lee M. Whitman, and Jennifer M. Miller, for defendant-appellee, Town of Wake Forest, North Carolina.

Lewis & Roberts, P.L.L.C., by A. Graham Shirley and James A. Roberts, III, for defendant-appellant, Landmark Structures I, L.P.

CALABRIA, Judge.

This appeal arises from a Wake County Superior Court order issuing preliminary and permanent injunctive relief concerning the award of the construction of an elevated water tank needed to alleviate concerns associated with the sufficiency of the current water supply in the Town of Wake Forest ("Wake Forest"). After Wake Forest selected a site for the future water tank, a subsurface investigation evaluated site grading and foundation support considerations. The resulting report ("Geotech report") analyzed two commonly utilized foundations, shallow spread footing foundations and pile foundations, as well as the amount of settlement that could be expected from each foundation. The pile foundation, although more costly than the shal-

low spread footing foundation, benefits from lower differential settlement. Thereafter, Wake Forest employed the engineering consulting firm of Hazen and Sawyer to prepare an invitation for bids ("IFB") for the construction of the future water tower.

Wake Forest issued the IFB in January of 2002. The IFB set forth mandatory specifications for the design of the water tank, its components, and its foundation. It also included illustrative drawings and the Geotech report as an attachment. Any party submitting a bid was required to design and submit a foundation as shown in the drawings and compliant with the mandatory specifications contained in the IFB.

CB&I Constructors, Inc. ("CB&I") and Landmark Structures I, L.P. ("Landmark") are businesses engaged in the commercial construction of water tanks who both submitted bids in response to the IFB. Landmark interpreted the IFB to allow a manufacturer to design and submit a shallow spread footing foundation, while CB&I interpreted the IFB to require a pile foundation. When the bids were opened, Landmark had submitted the lowest bid.

Instead of awarding the contract to Landmark as the lowest responsive bidder, Wake Forest contacted Landmark with several concerns. These concerns included the differential settlement that could be expected if a shallow spread footing foundation, as proposed in their bid, was utilized as well as whether the bid complied with the foundation required by the specifications in the IFB. Thereafter, Landmark agreed to provide a pile foundation for the same price as the price stated in their bid, and Wake Forest voted to award the contract to Landmark.

CB&I initiated this action against Wake Forest on 31 May 2002 alleging Wake Forest improperly awarded the construction contract of the proposed water tank to Landmark. CB&I contended the bid submitted by Landmark to Wake Forest was not responsive to the mandatory foundation specifications in the IFB, that Wake Forest engaged in inappropriate post-bid negotiations with Landmark, and that CB&I should be awarded the construction contract as the lowest responsible, responsive bidder on the project pursuant to N.C. Gen. Stat. §§ 143-128, -129. CB&I sought a declaratory judgment and injunctive relief, or, in the alternative, monetary damages.

On 6 June 2002, Judge Ripley Rand entered a temporary restraining order prohibiting Wake Forest from executing a contract with

Landmark or any other contractor other than CB&I for the water tank construction project. The trial court also set a hearing on a preliminary injunction for 14 June 2002, the same day as the expiration of the temporary restraining order. On 14 June 2002, with the consent of all parties, the trial court joined Landmark as a necessary party. After the hearing, the trial court granted both preliminary and permanent injunctive relief "prohibiting the award of the Project to any entity other than CB&I . . . [and] directing [Wake Forest] to issue a notice of award for the Project to CB&I. . . ." It was the express intention of the trial court to "dispose of all claims including [CB&I's] claim for a declaratory judgment" which was made moot by the order. Landmark appeals.

[1] Before we address Landmark's assignments of error, we must determine whether the order of the trial court is properly presented to this Court. Because we find the trial court exceeded its jurisdiction with respect to the permanent injunction and the order was interlocutory with respect to the preliminary injunction, we vacate in part and remand in part for further proceedings.

I. Permanent Injunction

"A permanent injunction is an extraordinary equitable remedy and may only properly issue after a full consideration of the merits of a case." *Shishko v. Whitley*, 64 N.C. App. 668, 671, 308 S.E.2d 448, 450 (1983). "A judge conducting a hearing to determine whether a temporary restraining order should be continued as a preliminary injunction . . . has no jurisdiction to determine a controversy on its merits." *Everette v. Taylor*, 77 N.C. App. 442, 444, 335 S.E.2d 212, 214 (1985) (holding "it was error for the court to issue a permanent injunction at a hearing to show cause why a temporary restraining order should not be continued [via a preliminary injunction]"). "[Where] the judgment entered [is] beyond the jurisdiction of the judge . . ., such jurisdiction [cannot] be conferred by agreement, and objection to the jurisdiction may be made at any stage of a proceeding, even in the Supreme Court[.]" *MacRae & Co. v. Shew*, 220 N.C. 516, 518, 17 S.E.2d 664, 665 (1941).

On 14 June 2002, Judge Evelyn Hill conducted a hearing to determine whether the temporary restraining order, granted previously and set to expire on the day of the hearing, should be continued as a preliminary injunction. However, at the conclusion of the hearing, the trial court granted both a preliminary and a permanent injunction, which, by intent and effect, determined the controversy on its merits.

The granting of the permanent injunction exceeded the jurisdiction of the court. Accordingly, that portion of the order granting the permanent injunction and awarding affirmative injunctive relief is vacated.

II. Preliminary Injunction

[2] Because the portion of the order granting a permanent injunction has been vacated, the dispositive remaining question is whether the remainder of the order granting a preliminary injunction is interlocutory. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits." *State v. School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). "Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory." *Id.*, 299 N.C. at 357-58, 261 S.E.2d at 913. "As a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order 'escape appellate review before final judgment.' " *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (quoting *State v. School*, 299 N.C. at 358, 261 S.E.2d at 913). The appellant has the burden of showing that a substantial right would be prejudiced without immediate review. *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998).

Landmark asserts a substantial right is implicated because if the preliminary injunction is left in place, Wake Forest would arguably be required to award the contract to CB&I. We disagree. Paragraph 30 of the trial court's order reads as follows:

> Based on these facts, the Court hereby issues a preliminary and permanent injunction prohibiting the award of the Project to any entity other than CB&I. In addition, the Court issues affirmative injunctive relief, directing the Town to issue a notice of award for the Project to CB&I within five (5) days of the date of this Order.

As noted previously, because the affirmative injunctive relief and the portion of the order purporting to be a permanent injunction impermissibly decide the merits of the case, both exceed the jurisdiction of the trial court and have been vacated. The remaining, valid portion of paragraph 30 does not require Wake Forest to award the contract to anyone; rather, it requires merely that Wake Forest award the contract to no one other than CB&I. Wake Forest has asserted

Landmark's bid was responsive and Landmark should be awarded the contract. The purpose of issuing the temporary restraining order and preliminary injunction was to prevent Wake Forest from acting on that assertion by awarding the contract to Landmark. Accordingly, the preliminary injunction maintains the *status quo*, and all parties remain free to fully litigate the merits of the case in the correct procedural context before the trial court to determine whether Landmark's bid was responsive to the IFB. No substantial right has been shown to be implicated; therefore, the order of the trial court issuing a preliminary injunction is interlocutory, not appropriately before this Court, and the appeal from the preliminary injunction is dismissed.

In sum, the portion of the order effectively determining the controversy on its merits, including the affirmative injunctive relief and the permanent injunction, is vacated. The portion of the order issuing a preliminary injunction is interlocutory. All other claims presented by the parties await a final resolution on the merits before the trial court. The appeal is dismissed in part as interlocutory and remanded for further proceedings consistent with this opinion.

Vacated in part, dismissed in part, and remanded in part.

Judges McCULLOUGH and TYSON concur.

ARIADNE EAKETT, PLAINTIFF v. DAVID EAKETT, DEFENDANT v. GEORGE THOMAS EAKETT, INTERVENOR

No. COA02-936

(Filed 6 May 2003)

Child Support, Custody, and Visitation— custody—grandparent's motion to intervene—lack of standing

The trial court did not abuse its discretion by denying a grandparent-intervenor the right to proceed with the merits of his request for visitation with his grandson where the motion to intervene came over a year after custody was awarded to the child's mother and did not allege the absence of an intact family. N.C.G.S. § 50-13.5(j).

Appeal by intervenor from order entered 5 June 2002 by Judge Robert S. Cilley in Henderson County District Court. Heard in the Court of Appeals 14 April 2003.

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

Blanchard, Bowen, Newman and Justice, by Ronald G. Blanchard and Ronald E. Justice, for plaintiff-appellee.

EAGLES, Chief Judge.

Intervenor George Thomas Eakett appeals from the trial court's order dismissing his motion requesting visitation rights with his grandchild. Intervenor's sole argument on appeal is that the trial court abused its discretion by denying intervenor the right to proceed with the merits of his request for visitation. After careful review of the record and briefs, we affirm.

Plaintiff Ariadne Eakett married defendant David Eakett on 12 June 1996. During their marriage, plaintiff and defendant had one child, Oscar Wilde Eakett, born on 2 June 1999. Plaintiff and defendant separated on 17 August 1999. Plaintiff filed a complaint for custody of Oscar, child support and divorce from bed and board on 18 August 1999. Defendant did not appear and was not represented at the hearing on plaintiff's complaint. Plaintiff was awarded custody of Oscar by the trial court's order dated 30 September 1999.

Intervenor is Oscar's paternal grandfather and defendant's father. Intervenor cared for Oscar several days a week while plaintiff worked in Asheville. Plaintiff worked in the Asheville area after plaintiff and defendant's separation. Approximately three months after the separation, plaintiff ended her employment in Asheville. After plaintiff stopped working in Asheville, she refused to allow intervenor any contact with his grandson.

On 15 April 2002 intervenor moved to intervene and also filed a motion in the cause seeking visitation rights. The trial court granted the motion to intervene, but denied the motion in the cause on 5 June 2002. Intervenor appeals.

Intervenor argues that the trial court misapplied the law by requiring intervenor to allege and prove that plaintiff and Oscar were not an intact family or that the underlying custody controversy had become active. According to intervenor's interpretation,

G.S. § 50-13.5(j) allows grandparents to intervene and request visitation even when the custody of a minor child has been determined and no ongoing custody dispute exists. Intervenor argues that upon a showing of changed circumstances, the grandparent should be awarded visitation under G.S. § 50-13.5(j) in the discretion of the trial court. We disagree.

Intervenor argues that the trial court erred by granting the motion to dismiss for failure to allege a claim upon which relief could be granted. Dismissal of a complaint is appropriate "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985)). When a court considers a motion to dismiss, "all allegations of the complaint are deemed true." *Shaut v. Cannon*, 136 N.C. App. 834, 835, 526 S.E.2d 214, 215 (2000) (citing *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E.2d 894 (1978)). Here, intervenor's complaint did not state a cause of action even if all of the allegations in the complaint are taken as true. Accordingly, we affirm the trial court's order dismissing intervenor's motion in the cause for visitation privileges.

Four North Carolina statutes empower grandparents to request visitation rights in different circumstances. G.S. § 50-13.1(a) grants grandparents the broad privilege to institute an action for custody or visitation, as allowed in G.S. §§ 50-13.2(b1), 50-13.2A, and 50-13.5(j). G.S. § 50-13.2(b1) allows grandparents to receive visitation privileges as part of an ongoing custody dispute. G.S. § 50-13.2A permits a biological grandparent to request visitation with the grandchild if the grandchild is adopted by a stepparent or relative of the child, provided the child and grandparent have a substantial relationship.

The fourth statute, G.S. § 50-13.5(j), is at issue here. The statute reads, in pertinent part:

> In any *action in which the custody of a minor child has been determined*, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate.

G.S. § 50-13.5(j)(2001) (emphasis added). Intervenor contends that this statute allows him to intervene and petition the court for visita-

tion privileges with his grandson. Intervenor's suggested interpretation of G.S. § 50-13.5(j) does not agree with the long-standing public policy of North Carolina. Our Supreme Court held that the four aforementioned statutes only apply in very limited situations: "Under [G.S. §§ 50-13.1(a), 50-13.2(b1), 50-13.2A, and 50-13.5(j)], a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative." *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995). This public policy has been designated the "intact family" rule. *See McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002); *Price v. Breedlove*, 138 N.C. App. 149, 530 S.E.2d 559, *disc. rev. denied*, 353 N.C. 268, 546 S.E.2d 111 (2000); *Shaut v. Cannon*, 136 N.C. App. 834, 526 S.E.2d 214 (2000); *Montgomery v. Montgomery*, 136 N.C. App. 435, 524 S.E.2d 360 (2000); *Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999) and *Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998). In a case that does not involve adoption by a stepparent or other relative, a grandparent must prove that the child's family is not intact before the grandparent can intervene to request visitation with his grandchild. *See McDuffie*, 155 N.C. App. at 590, 573 S.E.2d at 608 ("[T]he statute does not grant grandparents the right to sue for visitation when no custody proceeding is ongoing *and* the minor children's family is intact.") (emphasis in original). *See also Montgomery*, 136 N.C. App. at 437, 524 S.E.2d at 362 ("[G]randparents have standing to seek visitation with their grandchildren when those children are not living in a *McIntyre* 'intact family.' ").

When grandparents initiate custody lawsuits under G.S. § 50-13.1(a), those grandparents are not required to prove the grandchild is not living in an intact family in order to gain custody. *See McDuffie; Sharp v. Sharp*, 124 N.C. App. 357, 477 S.E.2d 258 (1996). Instead, the grandparent must show that the parent is unfit or has taken action inconsistent with her parental status in order to gain custody of the child. *See Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994); *Sharp*, 124 N.C. App. 357, 477 S.E.2d 258. The requirement to show unfitness if a grandparent initiates a custody dispute is consistent with a parent's constitutionally protected right to the care, custody and control of the child. *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49 (2000); *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) and *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). The requirement to show unfitness protects the parent's right to control with whom his child associates on a daily basis.

Similarly, the intact family rule protects the parental right "to determine with whom [her] children shall associate." *Sharp*, 124 N.C. App. at 360, 477 S.E.2d at 260 (quoting *Petersen*, 337 N.C. 397, 445 S.E.2d 901 (1994)). A grandparent cannot initiate a lawsuit for visitation rights unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle. The grandparent is a third party to the parent-child relationship. Accordingly, the grandparent's rights to the care, custody and control of the child are not constitutionally protected while the parent's rights are protected. Intervenor's interpretation of the statute would authorize interference with those constitutionally protected parental rights. Under intervenor's proposed reading of G.S. § 50-13.5(j), any custody order entered by a trial court could be re-opened upon a grandparent's motion asserting that he or she was not authorized enough visitation with his or her grandchildren. Although intervenor's interpretation might produce a stronger grandparent-grandchild relationship, it would provide a mechanism by which a grandparent could disrupt a stable family where no disruption previously existed.

Intervenor contends that he was not allowed to present evidence on the question of whether his grandchild lived in an intact family. In fact, no action had been taken in reference to the child's custody for over one year before intervenor filed his complaint. The most recent court action was the order awarding custody to plaintiff. A single parent and her child can constitute an "intact family" for the purposes of this rule. *See Fisher v. Graydon*, 124 N.C. App. 442, 477 S.E.2d 251 (1996), *disc. rev. denied*, 345 N.C. 640, 483 S.E.2d 706 (1997). In his complaint, intervenor did not allege that his grandchild was not part of an "intact family." Because of this failure, intervenor's complaint failed to state a claim upon which relief could be granted. No hearing upon a change of circumstances under G.S. § 50-13.5(j) was necessary.

Intervenor's failure to allege the absence of an "intact family" in his complaint meant that intervenor lacked standing to intervene. Accordingly, that portion of the trial court's order allowing intervenor's motion to intervene is reversed. We affirm the remainder of the trial court's order, which dismissed intervenor's motion in the cause for visitation.

Affirmed in part, reversed in part.

Judges HUNTER and CALABRIA concur.

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, PLAINTIFF v. ASSOCIATED SCAFFOLDERS AND EQUIPMENT COMPANY, INC., VAN THOMAS CONTRACTOR, INC., ASSOCIATED SCAFFOLDERS AND EQUIPMENT COMPANY, INC., COMFORT ENGINEERS, INC., AND LARRY E. JACKSON, ADMINISTRATOR OF THE ESTATE OF JEREMY SCOTT JACKSON, DEFENDANTS

No. COA02-397

(Filed 6 May 2003)

Insurance— liability insurance—duty to defend—leased scaffolding—indemnity claim—breach of contract claim

Summary judgment was properly granted for Penn National in a declaratory judgment action to determine whether Penn National had a duty to defend its insured, Comfort Engineers. The complaint against Comfort alleged breach of an indemnity agreement and breach of contract, but the indemnity was void in that Associated was seeking to be indemnified for its own negligence, and the contract allegation was outside the scope of the policy.

Appeal by defendant Comfort Engineers, Inc., from summary judgment entered 28 January 2002 by Judge W. Osmond Smith in Durham County Superior Court. Heard in the Court of Appeals 27 January 2003.

Pinto Coates Kyre & Brown, P.L.L.C., by Richard L. Pinto and Nancy R. Myers, for the plaintiff appellee.

Howard Stallings From & Hutson, P.A., by John N. Hutson, Jr. for the defendant appellant.

ELMORE, Judge.

The factual background of this case is summarized in the companion case *Jackson v. Associated Scaffolders et al*, 152 N.C. App. 687, 568 S.E.2d 666 (2002) (the *Jackson* case).

In the rental contract between Associated Scaffolders and Equipment Company, Inc. (Associated) and defendant (Comfort), Associated included a provision intended to secure indemnification from Comfort in case of any negligence or equipment failure, excepting only willful misconduct. The relevant provision states:

INDEMNIFICATION: LESSEE SHALL INDEMNIFY AND DEFEND LESSOR AGAINST AND HOLD LESSOR HARMLESS FROM ANY AND ALL CLAIMS, ACTIONS, SUITS, PROCEED-

> INGS, COSTS, EXPENSES, DAMAGES AND LIABILITIES INCLUDING ATTORNEY'S FEES WHICH
>
> 1) RELATE TO INJURY OR TO DESTRUCTION OF PROPERTY, OR BODILY INJURY, ILLNESS, SICKNESS, DISEASE OR DEATH OF ANY PERSON (INCLUDING EMPLOYEES OF LESSEE) AND;
>
> 2) ARE CAUSED OR CLAIMED TO BE CAUSED IN WHOLE OR IN PART BY THE EQUIPMENT LEASED HEREIN OR BY THE LIABILITY OR CONDUCT (INCLUDING ACTIVE, PASSIVE, PRIMARY OR SECONDARY) OF LESSOR, ITS AGENTS OR EMPLOYEES OR ANYONE FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE. THE PARTIES AGREE THAT LESSOR SHALL ONLY BE LIABLE OR RESPONSIBLE FOR ACTIONS OF WILLFUL MISCONDUCT. . . .
>
> PURPOSE OF THIS CLAUSE: IT IS THE PURPOSE OF THIS CLAUSE TO SHIFT THE RISK OF ALL CLAIMS RELATING TO THE LEASED PROPERTY TO THE LESSEE DURING THE ENTIRE TERM OF THIS LEASE.

This contract in its entirety was adjudicated void by this Court in the above referenced *Jackson* case as against section 22B-1 of the General Statutes, which pertains to construction indemnity agreements.

Comfort had liability insurance through Pennsylvania National Mutual Casualty Insurance Company (Penn National), and sought reimbursement from Penn National for costs incurred in the defense of the third-party complaint filed by Associated. Penn National sought a declaratory judgment stating it had no duty to defend against a claim based on the invalid contract between Comfort and Associated.

The relevant portion of the insurance contract between Penn National and Comfort provides as follows. The insurance contract **does not** apply to:

> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> . . . assumed in a contract or agreement that is an "insured contract". . . (Sec. I.2.b.2)

"Insured contract" means:

f. that part of any other contract . . . under which you assume the tort liability of another party to pay for "bodily injury". . . to a third person or organization. (Sec. V.8.f)

So, the insurance **does** apply to liability assumed in an insured contract. Comfort contends that the complaint by Associated falls within the coverage for an insured contract. Penn National contends that not only is the complaint not within the insured contract exception, but since the rental contract is invalid under the statute it cannot effectuate an obligation of coverage.

Penn National moved for summary judgment and Comfort Engineers moved for partial summary judgment. The trial court granted Penn National's motion, and denied Comfort Engineers's motion. We agree with the ruling of the trial court.

I.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). On appeal, the standard of review is (1) whether there is a genuine issue of material fact, and (2) whether the movant is entitled to judgment as a matter of law. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). The evidence presented is viewed in the light most favorable to the non-movant. *See Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Both parties stipulate that there is no genuine issue of material fact, so this Court's review will be limited to determining whether Penn National was entitled to judgment as a matter of law. The issue on appeal is whether Penn National, as the liability insurer, had a duty to provide a defense to its insured, Comfort Engineers, against a claim based on an invalid contract.

II.

We first recognize that in construing an insurance policy, any doubts and ambiguities must be resolved in favor of the insured. *Stockton v. N.C. Farm Bureau Mut. Ins. Co.*, 139 N.C. App. 196, 199, 532 S.E.2d 566, 567-68, *disc. review denied*, 352 N.C. 683, 545 S.E.2d 727 (2000). The underlying contract has already been adjudicated

void as violative of section 22B-1 of the General Statutes. Having determined that the indemnity agreement is void on the facts of this case, we must next determine whether Penn National nonetheless has a duty to defend Comfort in the action. We recognize that an insurer's duty to defend is broader than its duty to indemnify. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998); *Couch on Insurance* 3D § 202:17 (1999).

An insurer has a duty to defend when the pleadings state facts demonstrating that the alleged injury is covered by the policy. The mere possibility the insured is liable and that the potential liability is covered may suffice to impose a duty to defend. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986); *Bruce-Terminix*, 130 N.C. App. at 735, 504 S.E.2d at 578. Any doubt as to coverage is to be resolved in favor of the insured. *Waste Management*, at 693, 340 S.E.2d at 378. *Bruce-Terminix*, at 735, 504 S.E.2d at 578.

In this case, the relevant pleading is the third party complaint filed against Comfort by Associated. If the complaint on its face alleges facts which may give rise to a claim which falls within the coverage of the Penn National policy, then Penn National has a duty to defend. The complaint includes two counts: the first for contractual indemnity, and the second for breach of contract.

The first count of the complaint was based on the indemnification clause of the rental contract. It alleged that:

> In the contract of October 27, 1997, Comfort agreed to hold harmless, defend, and indemnify Associated from all suits and actions, including attorney's fees, costs of litigation and judgments, arising out of or incidental to the performance of the contract or work performed under the contract. Comfort further agreed to indemnify Associated against all claims, actions, and liabilities related to the death of any employee of Comfort if such death *was caused or claimed to be caused by the equipment leased to Comfort or by the conduct of Associated.* Comfort also agreed to indemnify Associated for any liability resulting from noncompliance with any safety regulations.

Section 8 (emphasis added).

The bare language of this count runs afoul of section 22B-1 of the Statutes, as it seeks to enforce a contract for indemnity for

Associated's own actions and possible negligence in a building construction context. "[A] construction indemnity agreement may purport to indemnify a promisee from damages arising from negligence of the promisor, but any provision seeking to indemnify the promisee from its own negligence is void." *Bridgestone/Firestone, Inc. v. Ogden Plant Maint. Co. of N.C.*, 144 N.C. App. 503, 506, 548 S.E.2d 807, 810 (2001), *aff'd per curium* 355 N.C. 274, 559 S.E.2d 786 (2002). Although at the time of the complaint the contract had not yet been adjudicated void, an insurer will not be obligated to defend its insured when the insured has stepped outside the protective bounds of the General Statutes. An insurer may assume that its insured will contract within the law and not obligate the insurer to defend an illegal contract.

The second count alleges that Associated suffered damages because Comfort did not maintain the scaffolding in accordance with regulatory standards as agreed in the rental contract.

The Penn National policy, as excerpted above, does not cover claims for bodily injury (which includes death under the policy definitions) by reason of assumption of liability in a contract except for in an insured contract. An insured contract is defined by the policy as:

> That part of any other contract . . . under which you assume the tort liability of another party to pay for "bodily injury" . . . to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Under this provision of the policy, which is essential to Comfort's argument on appeal, no claim for breach of contract is covered. The policy clearly states that the exception which grants coverage applies to tort claims only which "would be imposed by law in the absence of any contract or agreement." This claim lies outside the policy coverage. Therefore, Penn National had no duty to defend on either count of the complaint.

We note that any insurer who denies a defense takes a significant risk that he is breaching his duty to defend. Indeed, if the claim is within the policy, a refusal to defend is unjustified even if based on an honest but mistaken belief that the claim is not covered. *Duke University v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 637, 386 S.E.2d 762, 764, *disc. review denied*, 326 N.C. 595,

393 S.E.2d 876 (1990). However, in this case, that risk was well-taken since the contract is clearly improper and the pleadings do not trigger coverage.

We hold that Penn National was entitled to judgment as a matter of law, and thus affirm the summary judgment order.

Affirmed.

Judge WYNN and Judge McCULLOUGH concur.

HUNTER-McDONALD, INC., PLAINTIFF v. EDISON FOARD, INC., DEFENDANT

No. COA02-942

(Filed 6 May 2003)

1. **Appeal and Error— appealability—partial summary judgment—certification**

   A summary judgment for defendant on one of two contract claims was immediately appealable where the trial court certified that there was no reason to delay entry of final judgment on such claim.

2. **Contracts— disputed final payment—summary judgment—burden of proof**

   The trial court erred by granting summary judgment for defendant on a contract claim where a "full and final payment" was made, but there was nothing in the record to indicate that the parties disputed the amount due when that check was submitted. Under N.C.G.S. § 25-3-311(a)(ii), the person against whom a claim is asserted must prove that the claim was unliquidated or subject to a bona fide dispute prior to submission of the instrument representing full and final payment.

Appeal by plaintiff from judgment entered 24 April 2002 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 February 2003.

Harkey Lambeth, L.L.P., by Jeffrey S. Williams-Tracy, for plaintiff-appellant.

Newitt & Bruny, by John G. Newitt, Jr., and Roger H. Bruny, for defendant-appellee.

CALABRIA, Judge.

On 4 April 2001, Hunter-McDonald Inc., ("plaintiff"), a subcontractor, filed an amended complaint against Edison Foard, Inc., ("defendant"), a general contractor, for breach of two contracts. The first contract was pursuant to a written agreement for work performed at the Charlotte/Douglas International Airport ("the airport job"). The second contract was pursuant to an oral agreement for work performed at a job site referred to as ARC International ("the ARC job"). On 17 May 2001, defendant filed an answer and counterclaim asserting plaintiff had been overpaid for work on the ARC job. On 18 March 2002, defendant motioned for summary judgment on all claims. On 24 April 2002, Judge Robert P. Johnston ("Judge Johnston") granted summary judgment for defendant on plaintiff's first claim regarding the airport job, but denied summary judgment on the remaining claim and counterclaim concerning the ARC job. Plaintiff appeals.

[1] "The order of the superior court granting the defendant's motion for summary judgment did not dispose of all the claims in the case, making it interlocutory." *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 584, 500 S.E.2d 666, 667 (1998). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999).

> Notwithstanding this cardinal tenet of appellate practice, immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when 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. [N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001)] . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' [N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2001).]

Id., 351 N.C. at 161-62, 522 S.E.2d at 579.

> When more than one claim for relief is presented in an action, . . . the court may enter a final judgment as to one or more

> but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal[.]

N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001). In the case at bar, after determining summary judgment was proper on the airport job claim, Judge Johnston stated, "[i]t appear[s] to the Court that there is no reason for delaying entry of the final judgment on the Plaintiff's First Claim for Relief." This statement certifies the judgment is subject to immediate appeal pursuant to Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b); *See also Pitt v. Williams*, 101 N.C. App. 402, 399 S.E.2d 366 (1991) (holding that where the trial court did not determine there was "no just reason for delay" no immediate right of appeal exists.)

[2] Plaintiff appeals asserting the trial court erred in granting summary judgment for defendant. "Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. . . . [T]he evidence is viewed in the light most favorable to the nonmovant." *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002).

The trial court determined summary judgment was proper because the claim was discharged pursuant to N.C. Gen. Stat. § 25-3-311 (2001). The statute provides, in pertinent part:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) . . . the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

N.C. Gen. Stat. § 25-3-311 (a)-(b)[1]. Reading these subsections together, defendant bore the burden of proving: (1) defendant in good

1. Neither subsection (c) nor subsection (d) were asserted to apply. Subsection (c) provides a claim is not discharged if the claimant is an organization and proves that

faith tendered an instrument to the claimant as full satisfaction of the claim; (2) the instrument or an accompanying written communication contained a conspicuous statement stating it was tendered as full satisfaction of the claim; (3) the claim was unliquidated or subject to a bona fine dispute; and (4) plaintiff obtained payment of the instrument.

Defendant contends it satisfied the statutory requirements by submitting to plaintiff payment for the airport job on 8 October 1999 in the form of a check for $11,500.00, with an attached stub which read as follows: "MEMO : FULL AND FINAL PAYMENT ON US AIRWAYS TRAVEL CLUB[.]" Although plaintiff admits it obtained payment by this instrument, plaintiff contends summary judgment was improper because a genuine issue of material fact remains regarding whether (1) the claim was unliquidated or subject to a bona fine dispute; (2) the instrument submitted in full satisfaction of the claim contained a conspicuous statement stating such; (3) defendant tendered the instrument in good faith. Plaintiff is correct.

First, regarding whether the claim was unliquidated or subject to a bona fide dispute as required by N.C. Gen. Stat. § 25-3-311(a)(ii). "Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute. Section (a)(ii). Other law applies to cases in which a debtor is seeking discharge of such a debt by paying less than the amount owed." N.C. Gen. Stat. § 25-3-311, Official Comment 4. Therefore, the "person against whom a claim is asserted" must prove, *inter alia*, that "the amount of the claim was unliquidated or subject to a bona fide dispute" prior to submission of the instrument representing full and final payment. N.C. Gen. Stat. § 25-3-311(a). *See also Futrelle v. Duke University*, 127 N.C. App. 244, 249-50, 488 S.E.2d 635, 639 (1997) ("[t]he requirement, that a dispute exist, is satisfied in that, *prior to payment* of this amount, the parties disputed what remedy, if any, plaintiff was entitled to receive[.]" (emphasis added)). It is not enough for defendant to demonstrate the parties presently disagree as to the amount due, but rather defendant must prove "the amount of the claim *was* unliquidated or subject to a bona fide dispute[.]" N.C. Gen. Stat. § 25-3-311(a)(ii) (emphasis added).

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within a reasonable time before the tender, the claimant sent a conspicuous statement to the defendant that any instrument tendered as full satisfaction of a debt must be sent to a designated person and this instruction was not followed. Subsection (d) provides a claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument, the claimant knew the instrument was in full satisfaction of the claim.

It is unclear from the record on appeal whether this claim was unliquidated or subject to a bona fide dispute prior to defendant's submission of the check as full and final payment. Despite sketches, invoices, bills and checks comprising the record on appeal, there is nothing in the record to indicate the parties disputed the amount due prior to 8 October 1999 when defendant submitted the check in "full and final payment" of work on the airport job. It is apparent the parties *now* disagree, as plaintiff claims defendant still owes plaintiff $34,325.00 and defendant asserts it overpaid by $15,295.00. However, defendant failed to meet its burden pursuant to N.C. Gen. Stat. § 25-3-311 to prove "the amount of the claim was unliquidated or subject to a bona fide dispute[.]" Therefore, the trial court improperly granted summary judgment as a genuine issue of material fact exists.

Defendant failed to meet its burden of proving the claim was subject to a bona fide dispute prior to submission of payment, pursuant to N.C. Gen. Stat. § 25-3-311(a)(ii). Therefore, we hold the trial court improperly granted summary judgment. Accordingly, we need not reach plaintiff's remaining assignments of error that defendant also failed to prove the instrument was tendered in good faith, as required by N.C. Gen. Stat. § 25-3-311(a)(i), and the statement on the check stub was not conspicuous, as required by N.C. Gen. Stat. § 25-3-311(b).

Reversed.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. MARYLAND FOWLER

No. COA02-995

(Filed 6 May 2003)

1. Criminal Law— statement to jury concerning custody of defendant at sheriff's department—plain error analysis

The trial court did not commit plain error in a taking indecent liberties with a child, attempted first-degree sexual offense, and first-degree statutory rape case by telling the jury that defendant was in the custody of the sheriff's department, because: (1) the evidence of defendant's guilt was overwhelming, including the

testimony of the victim daughter who testified as to the sexual acts committed by defendant father upon her and the fact that defendant admitted to police that he engaged in sexual conduct with the victim; (2) the statements by the trial court do not create the same prejudice to defendant as that raised when a defendant appears in court in shackles or prison garb; (3) the trial court was merely explaining to the jury the cause for a delay in the proceedings and there was no constant reminder of defendant's detention; and (4) the trial court instructed the jury that defendant was presumed to be innocent.

2. Sentencing— presumptive range—findings regarding aggravating and mitigating factors not required

The trial court was not required to find aggravating and mitigating factors in imposing sentences upon defendant for attempted first-degree rape, attempted first-degree sexual offense and taking indecent liberties with a minor where all of the sentences were within the presumptive range for those offenses based upon defendant's prior record level.

Appeal by defendant from judgments entered 4 April 2002 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 14 April 2003.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State

Lynne Rupp for defendant-appellant.

MARTIN, Judge.

Defendant was indicted on charges of taking indecent liberties with a child, attempted first degree sexual offense, and first degree statutory rape. He was convicted of attempted first degree rape, attempted first degree sexual offense, and taking indecent liberties with a minor. He appeals from judgments imposing consecutive sentences of imprisonment, each within the presumptive range.

The State presented evidence at trial which tended to show the following: The victim, T, is the fourteen year old daughter of the defendant. T testified that when she was twelve, defendant attempted to have anal intercourse with her. Defendant stopped when T told him it hurt. T further testified that when she was twelve, defendant also tried to have vaginal intercourse with her. Again, T told defendant it hurt and he stopped. Defendant admitted that he had sexual contact

with T to Detective William R. Smith of the Zebulon Police Department and Kenisha Moore, an investigative social worker with Wake County Human Services.

[1] Defendant first argues the trial court committed plain error and constitutional error when it told the jury during the trial that defendant was in the custody of the Wake County Sheriff's Department. Defendant contends that the judge informing the jury that he was incarcerated violated his right to a fair trial and due process. Defendant cites *Illinois v. Allen*, 397 U.S. 337, 25 L. Ed. 2d. 353, *reh'g denied*, 398 U.S. 915, 26 L. Ed. 2d 80 (1970), which recognized that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." *Id.* at 344, 25 L. Ed. 2d. at 359. Likewise, defendant contends that "when a jury has been informed by the judge that the defendant is being held in custody, there is a danger the jury will be improperly negatively influenced." We are not persuaded.

Initially, we note that to the extent that defendant argues constitutional error, defendant's failure to object at trial and properly preserve the constitutional issue for appeal requires us to review this potential constitutional error under the plain error standard of review. *State v. Lemons*, 352 N.C. 87, 530 S.E.2d 542 (2000), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001). "A plain error is one '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. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

There is no plain error here. First, the evidence of defendant's guilt was overwhelming. Defendant's daughter testified as to the sexual acts committed by defendant upon her, and defendant admitted to police that he engaged in sexual conduct with her. Second, the statements by the trial court do not create the same prejudice to the defendant as that raised when a defendant appears in court in shackles or prison garb. *See Allen*, 397 U.S. at 344, 25 L. Ed. 2d. at 359; *Estelle v. Williams*, 425 U.S. 501, 504-05, 48 L. Ed. 2d 126, 131 (1976) (compelling defendant to wear prison clothes serves as "constant reminder of the accused's condition" which may impair the presumption of innocence). In the case *sub judice*, the trial court was simply explaining to the jury the cause for the delay in the proceedings, and there was no "constant reminder" of the defendant's

detention. Furthermore, the trial court instructed the jury that the defendant was presumed to be innocent. Accordingly, the assignment of error is overruled.

[2] We next consider whether the trial court abused its discretion by failing to find mitigating factors in sentencing defendant. Defendant cites several mitigating factors, including that he had a good job history, that the victim initiated and consented to the sexual contact, that he told his daughter to cooperate with the investigating officers, and that he immediately accepted responsibility for his actions. Defendant additionally argues that the trial court erred by imposing sentences from the aggravated range of punishment without finding the existence of any aggravating factors. While defendant acknowledges that the sentences imposed by the trial court can be found both in the aggravated and presumptive ranges, he contends 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).

After careful review of the record, briefs, and contentions of the parties, we find no error. A judgment sentencing a defendant to a term of imprisonment for the commission of a felony must contain both a minimum term of imprisonment and a maximum term of imprisonment. N.C. Gen. Stat. § 15A-1340.13(c) (2001). Unless otherwise indicated, "[t]he maximum term of imprisonment applicable to each minimum term of imprisonment is . . . as specified in G.S. 15A-1340.17." *Id.* The trial court is to determine the applicable maximum term of imprisonment by utilizing the chart found in G.S. 15A-1340.17(e). "[W]here the trial court imposes sentences within the presumptive range for all offenses of which defendant was convicted, he is not obligated to make findings regarding aggravating and mitigating factors." *State v. Rich*, 132 N.C. App. 440, 452-53, 512 S.E.2d 441, 450 (1999), *affirmed*, 351 N.C. 386, 527 S.E.2d 299 (2000).

Here, defendant, with a prior record level of II, was sentenced to a minimum term of 189 months and a maximum term of 236 months for each Class B2 felony. The charts contained in 15A- 1340.17(c) and (e) show the trial court, as required by the statutes, sentenced defendant within the presumptive range of sentences for Class B2 felonies with prior record level II. This Court has stated that "the legislature intended the trial court to take into account factors in aggravation and mitigation only when deviating from the presumptive range in sentencing." *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997). (citing G.S. 15A-1340.13(e)). "Therefore, a trial

court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation." *State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). Accordingly, because the trial court sentenced defendant within the presumptive range, we conclude there was no abuse of discretion and no error.

No error.

Judges McCULLOUGH and CALABRIA concur.

STATE OF NORTH CAROLINA v. STEVEN LAMAR PARTRIDGE

No. COA02-1289

(Filed 6 May 2003)

1. **Appeal and Error— harmless error analysis—defective indictment**

Harmless error analysis is not appropriate where an indictment is fatally defective.

2. **Drugs— felonious possession of marijuana—indictment—amount not mentioned—sentencing for misdemeanor**

A conviction for felony possession of marijuana was vacated and remanded for sentencing for misdemeanor possession where the indictment did not mention the weight of the marijuana in defendant's possession, but the parties agreed during the charge conference that defendant had possessed 59.4 grams of marijuana, if any. The indictment did not charge an essential element of the crime and the court was without jurisdiction to allow the felony conviction, but the jury necessarily found all of the elements of misdemeanor possession.

Appeal by defendant from judgments dated 12 June 2002 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2003.

Attorney General Roy Cooper, by Special Deputy Attorneys General J. Allen Jernigan and William P. Hart, for the State.

William B. Gibson for defendant appellant.

BRYANT, Judge.

Steven Lamar Partridge (defendant) appeals from judgments dated 12 June 2002 entered consistent with jury verdicts finding him guilty of (1) resisting, delaying, and obstructing a public officer and (2) possession of more than forty-two grams of marijuana.[1] On 1 October 2001, a grand jury returned a true bill of indictment against defendant for "Possession with Intent to Sell or Deliver a Controlled Substance" under N.C. Gen. Stat. § 90-95(a)(1) and "Possession of Schedule VI Controlled Substances" under N.C. Gen. Stat. § 90-95(a)(3).[2] The counts of the indictment were as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 18th day of July, 2001, in Mecklenburg County, [defendant] did unlawfully, wilfully and feloniously possess with intent to sell or deliver a controlled substance, to wit: marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act.
>
> AND THE JURORS FOR THE STATE UPON THEIR OATH FURTHER PRESENT that on or about the 18th day of July, 2001, in Mecklenburg County, [defendant] did unlawfully, wilfully and feloniously possess a controlled substance, marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act.

The indictment made no mention of the weight of the marijuana defendant had in his possession. At trial, the parties agreed during the charge conference, however, that if defendant was in possession of any marijuana, he was in possession of fifty-nine point four (59.4) grams of marijuana.

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[1] The dispositive issue is whether this Court should apply harmless error review to a fatally flawed indictment.

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1. As defendant only assigns error to the felony possession of marijuana conviction, we do not address his resisting a public officer conviction. *See* N.C.R. App. P. 10.

2. The jury found defendant not guilty of possession with intent to sell or deliver a controlled substance.

Defendant argues that the weight of the marijuana is an essential element of felonious possession of marijuana. He further contends therefore that the failure of the indictment to include the amount of marijuana allegedly possessed was a fatal flaw in the indictment requiring its dismissal. The State does not deny that the amount of marijuana is an essential element of felonious possession but instead argues that omission of the weight was not jurisdictional, and accordingly, this Court should deem any error committed in the indictment to be harmless.

An indictment is "a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses." N.C.G.S. § 15A-641(a) (2001). "North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court [acquires] no jurisdiction [whatsoever], and if it assumes jurisdiction a trial and conviction are a nullity.' " *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (quoting *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)). An indictment is fatally defective "if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citation omitted) (internal quotations omitted). "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." *Id.* "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). It is generally deemed prejudicial error for a trial court to allow a defendant to be convicted on a theory unsupported by an indictment. *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980); *see also State v. Hardy*, 298 N.C. 191, 199, 257 S.E.2d 426, 431 (1979) (defendant indicted for a criminal offense may be convicted of the offense charged or of a lesser-included offense, but may not be convicted of any other offense not supported by the indictment "whatever the evidence against him may be"). Therefore, harmless error analysis is generally not appropriate in cases where the indictment is fatally defective, and we decline the State's invitation to apply it to the facts of this case. *See State v. Scott*, 150 N.C. App. 442, 453-54, 564 S.E.2d 285, 294 (2002).

[2] In this case, the jury was required, in order to convict defendant, to find that defendant was in possession of more than one and one-half ounces (or approximately 42 grams) of marijuana. *See* N.C.G.S. § 90-95(d)(4) (2001). Section 90-95(d)(4) of the North Carolina General Statutes makes it a Class 3 misdemeanor to possess marijuana but increases the punishment level to a Class 1 misdemeanor for possession of more than one-half ounce of marijuana and if the weight exceeds one and one-half ounces, the punishment level is further raised to a Class I felony. *See* N.C.G.S. § 90-95(a)(3), (d)(4) (2001). Possession of more than one and one-half ounces of marijuana is thus an essential element of the crime of felony possession of marijuana. *See State v. Gooch*, 307 N.C. 253, 256, 297 S.E.2d 599, 601 (1982). Therefore, because the indictment charging defendant failed to allege defendant was in possession of more than one and one-half ounces, the trial court was without jurisdiction to allow defendant to be convicted of felony possession of marijuana. Accordingly, we must vacate the judgment on defendant's conviction of felony possession of marijuana (01 CRS 031057).

Defendant concedes that in convicting him of felonious possession of marijuana, the jury necessarily found all the elements of Class 3 misdemeanor possession of marijuana, without regard to the amount. We agree and hereby remand this case to the trial court for the imposition of judgment and appropriate sentencing on that lesser-included offense. *See Wilson*, 128 N.C. App. at 696, 497 S.E.2d at 422 (where indictment was fatally defective as to one charge but sufficient to support a lesser-included offense, and the jury would necessarily have found all the elements of the lesser-included offense, case remanded for imposition of judgment and sentencing on the lesser-included offense); *see also State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002).

VACATED AND REMANDED for imposition of judgment and sentencing on Class 3 misdemeanor possession of marijuana.

Judges TIMMONS-GOODSON and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

BYSTRY v. NEMET No. 02-974	Lee (00CVD1072)	Affirmed
CLARK v. SANGER CLINIC, P.A. No. 02-805	Ind. Comm. (333197)	Affirmed
DRIVER v. BAGLEY No. 02-363	Wake (99CVS6431)	Reversed
DZIERZYNSKI v. DZIERZYNSKI No. 02-879	Buncombe (99CVD1842)	Affirmed
FOX v. WAL-MART STORES, INC. No. 02-832	Ind. Comm. (049692)	Affirmed
GUILFORD CTY. ex rel. COBB v. ANTHONY No. 02-1175	Guilford (89CVD989)	Reversed
HENDERSON v. HENDERSON No. 02-525	Catawba (98CVD2297)	Affirmed in part; reversed in part; and remanded in part for additional findings of fact
HUBBARD TELEPHONE CONTR'RS, INC. v. MICHIGAN MUT. INS. CO. No. 02-1090	Cherokee (99CVS96)	Affirmed
IN RE DAVIS No. 02-1189	Davidson (01J68)	Affirmed
IN RE HILTON No. 02-1108	Lee (01J80)	Appeal dismissed
IN RE HOPKINS No. 02-482	Burke (98J51)	Vacated and remanded
IN RE OXENDINE No. 02-1212	Robeson (00J29)	Affirmed
IN RE RICHARDSON No. 02-992	Caswell (01J40)	Affirmed in part; and vacated in part
IN RE WILL OF CARLSEN No. 02-463	Alamance (99E988) (00CVS665)	Reversed and remanded
JENKINS v. UCHEBO No. 02-749	Durham (01CVD3983)	Affirmed
KAPLAN COS. v. STILES MACH., INC. No. 02-530	Forsyth (01CVS3447)	Affirmed

MOORE v. CITY OF LEXINGTON No. 02-223	Ind. Comm. (816522)	Reversed and remanded
OLKOWSKI v. CARTWRIGHT No. 02-502	Pasquotank (00CVS476)	Affirmed
PHILLIPS v. DON HERR CONSTR. CO. No. 02-629	Ind. Comm. (921744)	Affirmed
SHAW v. PRICEWATERHOUSE-COOPERS, LLP No. 02-923	Guilford (02CVS4632)	Affirmed
SMITH & SONS PAVING CO. v. N.C. DEP'T OF TRANSP. No. 02-403	Wake (01CVS3264)	Affirmed
STATE v. ARMISTEAD No. 02-1291	Yadkin (99CRS2524) (99CRS3162) (99CRS3163) (99CRS3164)	Affirmed
STATE v. BARNES No. 02-236	Harnett (99CRS15492) (00CRS10990)	No error
STATE v. BENEFIELD No. 02-885	Jones (00CRS50515) (01CRS1110) (01CRS1111)	Affirmed
STATE v. BLACKBURN No. 02-489	Catawba (01CRS2060) (01CRS2061)	No error
STATE v. BURTS No. 02-914	Gaston (01CRS19554) (01CRS61796)	No error
STATE v. CALDWELL No. 02-553	Mecklenburg (98CRS51470)	No error in guilt/innocence phase. Remanded for resentencing
STATE v. CALLICUTT No. 02-251	Randolph (99CRS4122)	Affirmed
STATE v. DAVIDSON No. 02-1211	Forsyth (01CRS39122) (01CRS60865)	No error
STATE v. DAVIS No. 02-1019	New Hanover (01CRS57454) (01CRS52468)	Affirmed in part, vacated in part

STATE v. DEAL No. 02-811	Cumberland (00CRS62146)	No error
STATE v. EVANS No. 02-874	Mecklenburg (00CRS49225) (00CRS162332)	No error
STATE v. FOX No. 02-886	Henderson (00CRS55107)	No error
STATE v. GARDNER No. 02-1098	Davidson (01CRS6132)	Dismissed
STATE v. GILLIAM No. 02-1204	Hertford (00CRS50027)	No error
STATE v. GINN No. 02-1190	Haywood (02CRS244) (02CRS245)	No error
STATE v. GONZALES No. 02-1173	Mecklenburg (01CRS9675) (01CRS9676) (01CRS9677) (01CRS9678)	No error
STATE v. GOODWIN No. 02-949	Richmond (01CRS53031)	No error
STATE v. GROENEWOLD No. 02-810	Haywood (01CRS1293)	No prejudicial error
STATE v. HACKLER No. 02-1126	Buncombe (01CRS58200) (01CRS6383)	Felonious larceny: vacated. Felonious breaking or entering: no error; remanded for resentencing
STATE v. HAITH No. 02-558	Guilford (01CRS81341) (01CRS81345) (01CRS81347)	No error
STATE v. HARRIS No. 02-751	Wake (01CRS13152)	No error
STATE v. JOHNSON No. 02-1084	Forsyth (01CRS29181) (01CRS55926)	No error
STATE v. JONES No. 02-624	Caldwell (99CRS6316) (99CRS6636)	No error

STATE v. LEWIS No. 02-1017	Rowan (00CRS9716) (00CRS9717) (00CRS5308)	No error
STATE McDONALD No. 02-719	Union (01CRS4086) (01CRS4087) (01CRS4088)	No prejudicial error
STATE v. McKINNEY No. 02-1247	Mecklenburg (01CRS789) (01CRS790) (01CRS791)	No error
STATE v. McMILLIAN No. 02-854	Cabarrus (00CRS10443) (00CRS10444) (00CRS10445)	No error
STATE v. MOSER No. 02-1118	Guilford (01CRS23826) (01CRS92977)	No error
STATE v. MUHAMMAD No. 02-1052	Wake (01CRS113031)	No error
STATE v. NEWKIRK No. 02-1006	Onslow (01CRS55500)	Affirmed
STATE v. O'NEIL No. 02-927	Forsyth (02CRS50743) (02CRS50744) (02CRS50745)	Remand for correction of clerical error
STATE v. PARKER No. 02-386	Martin (00CRS999)	No error
STATE v. PEZZUTO No. 02-569	Brunswick (00CRS56300)	New trial
STATE v. PHILPOTT No. 02-852	Edgecombe (01CRS6605)	No error
STATE v. RAIFORD No. 02-1010	Wayne (01CRS53605)	No error
STATE v. ROUSE No. 02-888	Wayne (00CRS52024)	No error
STATE v. SCALES No. 02-1501	Rockingham (01CRS51537) (01CRS51538) (02CRS759) (02CRS1648) (02CRS2157)	Remanded for entry of a correction of clerical error; in all other respects, no error

	(02CRS2158) (02CRS50148) (02CRS50149) (02CRS50193) (02CRS50197)	
STATE v. SPRINKLE No. 02-970	Forsyth (00CRS58217) (00CRS58218)	No error
STATE v. TRUJILLO No. 02-862	Wayne (01CRS50854)	No error
STATE v. WATTS No. 02-844	Gaston (01CRS7797)	No error
STATE v. WILLIAMS No. 02-1334	Halifax (97CRS3533)	No error
STATE v. WOOTEN No. 02-1286	Edgecombe (00CRS7410)	No error
TRANTHAM v. VOLVO CONSTR. EQUIP. No. 02-836	Ind. Comm. (918613)	Appeal dismissed

PIEDMONT INSTITUTE OF PAIN MANAGEMENT, T. STUART MELOY, M.D., NANCY T. FALLER, D.O., AND WILLIAM JOSEPH MARTIN, D.O., PLAINTIFFS v. STATON FOUNDATION AND PHILLIP A.R. STATON, IN HIS INDIVIDUAL CAPACITY AND IN HIS REPRESENTATIVE CAPACITY AS TRUSTEE OF THE STATON FOUNDATION, DEFENDANTS

PIEDMONT INSTITUTE OF PAIN MANAGEMENT, T. STUART MELOY, M.D., NANCY T. FALLER, D.O., AND WILLIAM JOSEPH MARTIN, D.O., PLAINTIFFS v. CENTURA BANK, POYNER & SPRUILL, AND POYNER & SPRUILL, L.L.P., DEFENDANTS

No. COA02-147

(Filed 20 May 2003)

1. Compromise and Settlement— breach of funding agreement—settlement agreement—validity—breach of fiduciary duty—fraud—negligent misrepresentation

A settlement agreement entered in an action by plaintiff pain clinic and its doctors against defendant charitable trust and foundation and its trustee for breach of contract to fund the pain clinic was not executed by plaintiffs as a result of breach of fiduciary duty, fraud or negligent misrepresentation and was binding and enforceable, because: (1) even if a fiduciary duty did exist between defendant trustee and plaintiffs, this fiduciary duty had been repudiated before settlement negotiations began, the parties were adversaries and all were represented by counsel, and defendant trustee had no duty to disclose to plaintiffs the existence of any documentation, including powers of attorney signed by him, that supported plaintiffs' claims to funding; (2) plaintiffs' fraud claim was barred by the statute of limitations because it was filed more than three years after they had the capacity and opportunity to discover the alleged fraud and they failed to exercise due diligence as a matter of law; (3) the trial court's ruling that plaintiffs' breach of contract action was barred by the statute of limitations is the law of the case since plaintiffs abandoned this assignment of error on appeal; and (4) plaintiffs' claim for negligent misrepresentation must fail because the relationship between plaintiffs and defendant trustee was adversarial, defendant trustee owed no duty of care to plaintiffs, and plaintiffs could not have justifiably relied on defendant trustee for accurate information. Furthermore, plaintiffs' appeal is moot because plaintiffs abandoned their assignment of error relating to the trial court's decision to dismiss the breach of contract claim as barred by the statute of limitations, and the remaining claims are contingent on the viability of plaintiffs' underlying claim for breach of contract.

2. Damages and Remedies— loss of funding—damages not reasonably ascertainable—settlement agreement—failure to allege tort damages

The trial court properly entered summary judgment for defendant bank and defendant law firm in an action by plaintiff nonprofit pain clinic and its doctors to recover loss of funding damages allegedly caused by defendant's acts of negligence and fraud in causing the clinic to lose twenty years of annual funding by a charitable foundation because: (1) the clinic's damages were not ascertainable to a reasonable degree of certainty because they were contingent upon the clinic remaining tax exempt, the clinic's submission of annual grant requests, and the foundation having the funds available; (2) the clinic was completely compensated for such loss in a settlement agreement with the foundation and may not obtain recovery for the same loss against the bank and the law firm; and (3) the doctors have failed to allege any individual pecuniary loss measured by the difference between the benefit promised and the benefit received.

Appeal by plaintiff from judgment entered 31 May 2001 by Judge Ben F. Tennille in Superior Court, Forsyth County. Heard in the Court of Appeals 15 April 2003.

Elliot Pishko Morgan, P.A., by Robert M. Elliot for plaintiffs-appellants the PIPM Parties.

Adams Kleemeier Hagan Hannah & Fouts, by Daniel W. Fouts for defendant-appellee Centura Bank.

Smith Helms Mulliss & Moore L.L.P., by Larry B. Sitton, Manning A. Connors, and Jonathan P. Heyl, for defendants-appellee Poyner & Spruill, L.L.P.

Bell, Davis & Pitt, P.A., by William K. Davis, James R. Fox, and Kevin G. Williams, for defendants-appellees Phillip A. R. Staton and the Staton Foundation.

WYNN, Judge.

This appeal arises from a determination: (1) that a settlement agreement ("Settlement") between the Piedmont Institute of Pain Management ("the Piedmont Clinic"), the doctors employed by the Piedmont Clinic ("Doctors") (collectively "The Piedmont Parties"), Phillip Staton, and the Staton Foundation ("Foundation") was binding

and enforceable, and (2) that the Settlement released the law firm of Poyner & Spruill and Centura Bank "to the extent that [the Piedmont Parties'] damages . . . [did] not exceed $365,000."

On appeal, the Piedmont Parties argue that the negligent, fraudulent, and deceptive actions of Phillip Staton, and his agents, proximately resulted in the Piedmont Parties' decision to execute that Settlement. Accordingly, the Piedmont Parties seek to set aside the Settlement in order to pursue damages against Phillip Staton and the Foundation arising under the original breach of contract. Furthermore, the Piedmont Parties concede that their damages, excluding those arising from the Settlement's termination of the Foundation's contractual obligations to fund Piedmont ("loss of funding damages"), do not exceed $365,000. However, the Piedmont Parties argue that the trial court erred by not permitting the Piedmont Parties to pursue loss of funding damages against Centura Bank and Poyner & Spruill under causes of action sounding in tort. After carefully reviewing the record and relevant case law, we affirm the trial courts' summary judgment order.

I. Facts

The summary judgment order of Judge Tennille sets out the complex factual background culminating in the five consolidated cases presently before this Court and decided herein. We summarize the facts relevant to this case as follows.

Albert Staton founded the Pan American Beverage Company ("Panamco"). In the late 1980s, upon Albert Staton's passing, his son, Phillip Staton, his daughter, Ingeborg Staton, and his wife, Mercedes Staton ("the Statons"), inherited Albert Staton's interest in Panamco. On 8 June 1993, the Statons entered into a Purchase Agreement to sell their stock in Panamco for approximately $119,000,000.00. On that date, Mercedes and Ingeborg Staton appointed Phillip Staton as the sellers' agent. On 25 June 1993, Phillip Staton executed a power of attorney naming Tom and Jerri Brame as his agents to act in his place and stead "with particular regard to the receipt and disbursement of [the Panamco] funds to be wired to Centura Bank on [his] behalf."[1] Pursuant to this authority, the Brames opened an account for Phillip,

1. The trial court noted the existence of substantial evidence that in the "Brames' management of these various accounts, tens of millions of dollars were lost, and substantial sums were transferred by the Brames for their own benefit." As a result, Tom Brame asserted his Fifth Amendment privilege and refused to testify in the civil proceedings below.

Ingeborg, and Mercedes Staton, for the receipt of the Panamco funds at Centura Bank in Winston-Salem, North Carolina. On 16 July 1993, the proceeds of the Panamco stock sale were wired to Centura Bank.

In August 1993, Tom Brame discussed with Dr. Stuart Meloy the possibility of financing a pain clinic in order to create a tax shelter for the proceeds of the Panamco sale. In September 1993, Dr. Meloy sent Tom Brame a proposal for the establishment of the Piedmont Clinic. On 1 November 1993, Tom Brame met with three Centura Bank trust officers to discuss the creation of a charitable trust and foundation to fund the Piedmont Clinic. The parties selected the law firm of Poyner & Spruill to prepare the necessary documents. After reviewing documentary material, Poyner & Spruill questioned whether the existing power of attorney authorized Tom Brame to make charitable gifts. To resolve this problem, Poyner & Spruill drafted a new durable power of attorney specifically authorizing charitable gifts. Despite the specific request by Poyner & Spruill that the Statons personally sign their respective durable power of attorney, Phillip Staton signed for Ingeborg and Mercedes Staton as their attorney-in-fact.

On 1 February 1995, the Piedmont Clinic opened and began accepting patients. Shortly thereafter, on 29 March 1996, the Statons informed the Piedmont Parties, Centura Bank, and Poyner & Spruill, that they did not authorize the funding framework for the Piedmont Clinic, wanted to terminate the Foundation, and wanted to retrieve their monies from the charitable trusts funding the Foundation and the Piedmont Clinic. For Poyner & Spruill this revelation created a potential conflict between their legal representation of Centura Bank and the Piedmont Parties. Consequently, immediately after the meeting, Mary Beth Johnston, an attorney for Poyner & Spruill, informed the Doctors that Poyner & Spruill would not be able to represent the Piedmont Parties without a conflict waiver from Centura Bank. On 30 March 1996, William West, then representing the legal interest of Ingeborg and Mercedes Staton, contacted Drs. Meloy and Martin and recommended that the Piedmont Parties hire his former law partner, Edward Powell. On that same date, the Piedmont Parties consulted with and hired Powell.

On 16 April 1996, a settlement agreement was completed. The Piedmont Parties, represented by Powell, agreed to "release, acquit and forever discharge the Foundation, Phillip [Staton], individually and as Trustee of the Foundation, [and] Ingeborg [Staton]" in exchange for the Foundation's payment of $365,000 to the Pied-

mont Parties. The Settlement expressly provided that the $365,000 "shall be in full, complete, and final satisfaction of any and all claims . . . actions, causes of actions, and rights arising under or in connection with the [contract and] . . . the Foundation's funding of [the Piedmont Clinic]."

II. The Settlement Agreement (00 CVS 2178)

On 25 February 2000, the Piedmont Parties filed a complaint contending that the Settlement should be set aside because the Piedmont Parties executed the agreement "under duress as a direct result of the fraud, threats, undue influence, mutual mistakes of fact and law, and other improper actions of the Statons' agents." The Piedmont Parties alleged:

(a) Centura Bank and Poyner & Spruill now represent, contrary to indications conveyed to plaintiffs at the meeting at Centura Bank in March, 1996, that the creation and funding of the [charitable trusts] were properly authorized by the Statons, and that therefore, the grants to plaintiffs were valid.

(b) Phillip Staton has testified under oath in a deposition that he was aware of the creation of his trusts at the time it was created in 1993, as well as the amount of his funds committed thereto; that he executed durable powers of attorney in favor of Tom and Jerri Brame on behalf of himself and Ingeborg Staton. . . .

(c) Ingeborg Staton had given to Phillip Staton a general power of attorney in 1992 to act as her attorney-in-fact, and Phillip Staton had given a copy of this 1992 power of attorney to [his attorney] immediately prior to the negotiations which led to the purported settlement agreement. . . .

(d) Ingeborg Staton has testified in depositions to actions which she took ratifying or acquiescing in numerous transactions handled by Tom or Jerri Brame.

Based on these allegations, the Piedmont Parties alleged that the Statons "conspired to misrepresent the facts concerning the validity of the trusts to induce [the Piedmont Parties] to release their interests in continued funding as promised in the grants." Accordingly, the Piedmont Parties asked the trial court to rescind the Settlement.

On 5 February 2001, the Statons and the Foundation filed a motion for summary judgment on all claims asserted by the Piedmont

Parties. In his 31 May 2001 summary judgment order, Judge Tennille succinctly framed the issue in noting that "the heart of each cause of action is the premise that [the Piedmont Parties] did not know that Phillip Staton had signed the 1993 Durable Power in his own name and the knowledge of that fact might have kept [the Piedmont Parties] from signing the Settlement, thereby releasing their contract claims against the Foundation." After reviewing the evidence, and detailing the undisputed facts, Judge Tennille granted the Foundation's summary judgment motion and concluded that the Settlement was binding and enforceable. From this determination, the Piedmont Parties appeal and assign error.

A. Standard of Review

Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2002). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "The moving party bears the burden of establishing the lack of a triable issue of fact." *Sykes v. Keiltex Industries, Inc.*, 123 N.C. App. 482, 484-85, 473 S.E.2d 341, 343 (1996) (citation omitted). Furthermore, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted).

B. Breach of Fiduciary Duty

[1] In ruling that the Settlement was binding and enforceable, Judge Tennille addressed each of the Piedmont Parties' allegations challenging the validity of the Settlement's execution. First, Judge Tennille concluded that, even if a fiduciary duty did exist between Phillip Staton and the Piedmont Parties, this fiduciary duty was repudiated before the settlement negotiations.

> {85} [The Piedmont Parties] claim[] that Phillip as trustee to the Foundation owed a fiduciary duty to [the Piedmont Parties] to affirmatively disclose the existence of the powers of

attorney signed by Phillip that were used to establish the Foundation and the [charitable trusts]. . . .

{86} Even if Phillip did owe a fiduciary duty to [the Piedmont Parties], this duty ended when Phillip, through his lawyer, told the parties that he would no longer fund the Foundation or [the Piedmont Clinic]. (citation omitted). Hence, Phillip repudiated the fiduciary relationship, and his duty to disclose the existence of any powers of attorney ended at that time. . . .

On appeal, the Piedmont Parties challenge this conclusion by arguing that "the Statons were only adversarial in the sense that they had stated that they would no longer permit funding of [the Piedmont Clinic]." Based on this limited repudiation, the Piedmont Parties argue that they "had no evidence to indicate that Phillip, in particular, was misrepresenting the facts . . . that his [power of attorney] to Tom [Brame] was not valid." Accordingly, the Piedmont Parties contend it was error for the trial court to conclude that a fiduciary duty did not compel Phillip Staton to disclose the existence of any documentation supporting the Piedmont Clinic's claims to funding.

After reviewing the record and relevant case law, we disagree. In *Lancaster v. Lancaster*, 138 N.C. App. 459, 530 S.E.2d 82 (2000), for instance, this Court held that "while a husband and wife generally share a confidential relationship . . . It is well established that when one party to a marriage hires an attorney to begin divorce proceedings, the confidential relationship is usually over." *Id.* at 463, 530 S.E.2d at 85; *see also Small v. Dorset*, 223 N.C. 754, 761, 28 S.E.2d 514, 518 (1944) (noting that a trust relationship continues until repudiated). In the case *sub judice*, the Piedmont Parties concede that at the time of the settlement negotiations both parties were represented by counsel, both parties were negotiating for the termination of legal rights, and that, as of March 1996, Phillip Staton had repudiated his fiduciary duties.[2] The Piedmont Parties have not presented any evi-

2. These sentiments are echoed in the trial court's unchallenged ruling that the Settlement was not the product of undue influence.

{92} [The Piedmont Parties'] claim of undue influence in connection with the Settlement also fails for lack of any evidence supporting such claim. . . . [The Piedmont Parties] retained its own experienced counsel. . . . [The Piedmont Parties] were [not] in any immediate physical or financial danger . . . .

{93} Phillip's counsel clearly put [the Piedmont Parties] on notice that Phillip was contesting the creation of the [charitable trusts] and the Foundation. That fact was true. Legal grounds for Phillip's challenge existed. Whether or not

dence creating a genuine issue of material fact with respect to the absence of the adversarial nature of their relationship with Phillip Staton during the relevant time. As case law indicates, in such an adversarial setting, Phillip Staton did not have an affirmative duty to disclose unfavorable facts. *See e.g.*, *supra*, Lancaster, 138 N.C. App. at 463, 530 S.E.2d at 85; *Small*, 223 N.C. at 761, 28 S.E.2d at 518. Absent a fiduciary duty, the Piedmont Parties' claim for breach of fiduciary duty is untenable. Accordingly, we affirm the trial court's decision to grant summary judgment on the Piedmont Parties' claim for breach of fiduciary duty.

C. Fraud

After disposing of the Piedmont Parties' breach of fiduciary duty claim, Judge Tennille addressed the Piedmont Parties' claim for fraud.

> {90} The statute of limitations for fraud [is] three years after the fraud is discovered or should have been discovered. . . . [The Piedmont Parties] admit[] in [their] brief that Phillip, "in March 1996 . . . refused to pay the grant monies due and repudiated his fiduciary duties." . . . . In light of this repudiation, [the Piedmont Parties were] put on notice in March 1996 to use due diligence to investigate and discover whether fraud existed before signing the settlement agreement; the statute limitation began to accrue in March 1996 and ran out in March 1999. If [the Piedmont Parties] had requested at that time a copy of the very documents at issue, it could have discovered any alleged fraudulent behavior by defendant. [The Piedmont Parties] did not ask for any documents as it entered into settlement negotiations. . . . This action was not filed until February 2000. Although the parties signed a tolling agreement it too was signed outside the statute of limitations period on April 14, 1999. The statute of limitations bars [the Piedmont Parties'] fraud claims against Phillip.

Accordingly, Judge Tennille dismissed the Piedmont Parties' fraud claim as barred by the statute of limitations.

On appeal, the Piedmont Parties' contend that they "did not obtain information establishing Phillip Staton's fraud until his deposi-

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he would have prevailed on his claims at trial was the risk he and [the Piedmont Parties] faced in April 1996 and on which they negotiated and compromised. . . . There was no misrepresentation.

tion in January, 1997." Relying on our decision in *Spears v. Moore*, 145 N.C. App. 706, 55 S.E.2d 483 (2001), the Piedmont Parties argue that "when there is a dispute as to a material fact regarding when the plaintiff should have discovered the fraud, summary judgment is inappropriate, and it is for the jury to decide if the plaintiff should have discovered the fraud." *Id.* at 708, 55 S.E.2d at 485. The *Spears* Court, however, also held that: "Failure to exercise due diligence may be determined as a matter of law . . . where it is 'clear that there was both capacity and opportunity to discover the mistake.' " *Id.* at 708-09, 55 S.E.2d at 485.

In the case *sub judice*, Judge Tennille ruled, and we affirm his ruling, that the Piedmont Parties failed to exercise due diligence in uncovering the alleged fraud as a matter of law. The trial court's order noted that on 4 April 1996 Poyner & Spruill "sent a fax memo to Edward Powell[,counsel for the Piedmont Parties,] . . . offering to provide copies of documents from [the] file." This file contained Phillip Staton's 1993 durable power of attorney, and other documents relied upon by the Piedmont Parties in their fraud claim. Although given the opportunity, neither counsel nor the Piedmont Parties requested access to this file before entering into the Settlement. Under our decision in *Spears*, as relied upon by the Piedmont Parties, "it is clear that [the Piedmont Parties had] both capacity and opportunity to discover" Phillip Staton's alleged fraud in March 1996. Accordingly, the Piedmont Parties' fraud claim began to accrue in March 1996 and expired in March 1999. The Piedmont Parties did not file their action alleging fraud until February 2000. Therefore, the Piedmont Parties' action is barred by the statute of limitations; accordingly, we affirm the decision of the trial court.[3]

D. Breach of Contract

Next, Judge Tennille ruled that the Piedmont Parties' breach of contract claim against Phillip Staton was also barred by the statute of limitations. Judge Tennille reasoned that:

> {95} The statute of limitations on [the Piedmont Parties'] breach of contract claim filed in 00-CVS-2178 has also run. As indi-

3. During oral argument, the Piedmont Parties argued that access to the documents was contingent on the consent of all parties and, therefore, they did not, in a literal sense, have the opportunity and capacity to obtain the 1993 durable power of attorney. Despite this argument, one critical fact remains: Poyner & Spruill offered the Piedmont Parties an opportunity to view the materials which are the basis for this fraud claim, and the Piedmont Parties did not diligently pursue this opportunity.

> cated above, Phillip had both breached his contract with [the Piedmont Parties] in 1995 and repudiated any continuing obligations in March 1996. The statute of limitations for breach of contract is three years. . . . This action was not filed until February 2000 . . . . Thus, the claim for breach was filed outside the limitations period.

Although the Piedmont Parties assigned error to this conclusion, the Piedmont Parties have abandoned this assignment of error on appeal. Under well settled principles, the Piedmont Parties' decision to abandon this assignment of error renders the trial court's decision to dismiss the breach of contract claim, as barred by the statute of limitations, "the law of the case on that issue, and it is *res judicata* and binding upon the court in the second trial." *Duffer v. Royal Dodge, Inc.*, 51 N.C. App. 129, 130, 275 S.E.2d 206, 207 (1981).

E. Negligent Misrepresentation

On appeal, the Piedmont Parties also assign error to the trial court's decision to grant summary judgment on the pleadings with respect to the Piedmont Parties' claim for negligent misrepresentation against the Foundation and the Statons.[4] As essential elements of negligent misrepresentation, the Piedmont Parties must prove that (1) Phillip Staton owed a duty of care to the Piedmont Parties, and (2) that the Piedmont Parties justifiably relied on Phillip Staton for accurate information. *Jordan v. Earthgrains Cos.*, 155 N.C. App. 762, 766, 576 S.E.2d 336 (2003). However, as noted in our discussion of the Piedmont Parties' breach of fiduciary duty claim, during the settlement negotiations Phillip Staton and the Piedmont Parties were adverse. Accordingly, Phillip Staton neither owed a duty to the Piedmont Parties nor could the Piedmont Parties have justifiably relied upon him. Consequently, we affirm the trial court's judgment and overrule this assignment of error.

We have reviewed the Piedmont Parties remaining assignments of error relating to Phillip Staton, Ingeborg Staton, and the Foundation,

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4. On 1 August 2000, the Piedmont Parties' claims against the Foundation and Phillip Staton for interference with contract, breach of duty of good faith, mutual mistake of fact, duress, and negligent misrepresentation were disposed of by the Honorable L. Todd Burke on a 12(c) Motion for Judgment on the Pleadings. We note, that "[t]he standard of review for a Rule 12(c) motion is whether the moving party has shown that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment." *Affordable Care v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002).

and find them to be without merit. Therefore, we affirm the trial court's summary judgment order.[5]

F. Mootness

Furthermore, as an alternative ground for affirming the trial court's summary judgment order, we hold that the Piedmont Parties' appeal is fatally defective with respect to the Foundation and the Statons. Although the Piedmont Parties initially assigned error to the trial court's decision to grant summary judgment on the underlying breach of contract claim, they abandoned this assignment of error by failing to brief it on appeal. *See* N.C. R. App. Proc. 28(a); *State v. Prevatte*, 356 N.C. 178, 214, 570 S.E.2d 440, 460 (2002). As noted, under well settled principles, the Piedmont Parties' decision to abandon this assignment of error renders the trial court's decision to dismiss the breach of contract claim, as barred by the statute of limitations, "the law of the case on that issue, and it is *res judicata* and binding upon the court in the second trial." *Duffer*, 51 N.C. App. at 130, 275 S.E.2d at 207.

The Piedmont Parties assignments of error relating to breach of fiduciary duty, negligent misrepresentation, and fraud, are contingent on the viability of the Piedmont Parties' claims arising from an alleged breach of contract.[6] Consequently, even if this Court were to

5. As noted, the present action before this Court is actually five consolidated cases for the purposes of appeal. In three of these cases, 96 CVS 1409, 96 CVS 7224, and 99 CVS 5156, the Piedmont Parties assign error to the trial court's approval of a confidential settlement ("Settlement II") in which Centura Bank, Phillip Staton, individually and as trustee of the Foundation, Ingeborg Staton, and Poyner & Spruill, agreed to terminate the charitable trusts and dissolve the Foundation. In addition to assigning error, the Piedmont Parties have filed a petition for a writ of certiorari—anticipating that this Court would likely conclude that they lacked standing to challenge Settlement II to which they were not a party. Herein, we decline to address the Piedmont Parties' assignments of error, and deny their petition for a writ of certiorari, because by the express terms of the first Settlement:

> 8. It [was] agree[d] that [the Piedmont Parties] . . . [would not] oppose any effort by Phillip to dissolve the Foundation or his alleged charitable trusts that have funded the Foundation.

By affirming the trial court's decision that the Settlement is binding and enforceable, the Piedmont Parties released any right, if any, to oppose Settlement II which dissolved the trusts and the Foundation.

6. For instance, in its claim to set aside the Settlement on the basis of fraud, the Piedmont Parties allege that "statements made by [the Foundation, the Statons, and the Statons' agents] . . . were made with the intent to induce, coerce, and mislead [the Piedmont Parties] into releasing valuable contractual rights." In the Piedmont Parties' claim to set aside the Settlement on the basis of negligent misrepresentation, the

set aside the Settlement on the basis of fraud, negligent misrepresentation, or breach of fiduciary duty, the statute of limitations forever bars the Piedmont Parties' claims arising from the Foundation's and the Statons' alleged breach of contract. "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). In the case *sub judice*, the questions originally in controversy between the Piedmont Parties, the Foundation, and the Statons—namely, damages arising from the alleged breach of contract—are no longer at issue. Accordingly, as an alternative ground for affirming the trial court's summary judgment order, we find that the Piedmont Parties' collateral attack of the Settlement is moot by virtue of the trial court's unchallenged ruling that the underlying breach of contract claim is barred by the statute of limitations.

III. Poyner & Spruill and Centura Bank (96 CVS 7140)

[2] On 14 May 1996, the Piedmont Parties filed an amended complaint alleging numerous claims against Centura Bank and Poyner & Spruill including breach of fiduciary duty, fraud, constructive fraud, negligent misrepresentation, professional negligence, breach of rules of professional conduct, and unfair and deceptive trade practices. In these claims, the Piedmont Clinic and the Doctors, in their individual capacities, sought to recover loss of funding damages proximately caused by the alleged negligence of defendants. On 5 February 2001, Centura Bank and Poyner & Spruill filed motions for summary judgment on all claims asserted by the Piedmont Parties. On 31 May 2001, the trial court granted summary judgment with respect to all claims, except for professional negligence and negligent misrepresentation. On appeal, the Piedmont Parties contend the trial court erred in granting summary judgment on their claims against Poyner & Spruill and Centura Bank. After carefully reviewing the record, we disagree.

Piedmont Parties allege that "[the Statons' agents] negligently or recklessly misrepresented facts concerning the Statons' authorization of the funding of [the Piedmont Clinic] and other facts concerning the validity of the [contract]." In the Piedmont Parties' claim to set aside the Settlement on the basis of breach of fiduciary duty, the Piedmont Parties allege that the Foundation and the Statons "obtained potential benefits from their wrongful acts in the purported release of them from their ongoing contractual obligations."

The trial court dismissed the Piedmont Parties' claims on numerous grounds. Judge Tennille addressed "the damages issues first because the measure of damages permeates the liability issues." Judge Tennille realized that "the heart of the dispute between [the Piedmont Parties, Poyner & Spruill] and Centura Bank is the measure of damages under any cause of action" asserted by the Piedmont Parties. We agree.

In his summary judgment order, Judge Tennille framed the damages issue by concluding that "the damages recoverable by [the Piedmont Parties] . . . [are] limited to damages in excess of [those] recovered by [the Piedmont Parties] in the Settlement agreement." Furthermore, the trial court provided that "if [the Piedmont Parties'] claims for damages other than loss of funding do not exceed $365,000, [Poyner & Spruill] and Centura Bank are entitled to summary judgment, and this order would constitute a final order on all claims." In order to certify that the trial court's summary judgment was a final order, and immediately appealable, the Piedmont Parties "stipulated . . . that [their] damages, other than those relating to the loss of funding, [did] not exceed the amount of $365,000." On appeal, the Piedmont Parties argue the trial court erred because "under standard tort damage principles [they are] entitled to recover . . . the loss of [] funding" proximately caused by the negligent and fraudulent acts of Centura Bank and Poyner & Spruill.

A. Standard of Review

As noted, under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). Furthermore, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577 (citation omitted).

A party is entitled to judgment as a matter of law if the non-movant fails to forecast evidence with respect to an essential element of a claim. *Murray v. Justice*, 96 N.C. App. 169, 174, 385 S.E.2d 195, 199 (1989). "Certain torts require as an essential element . . . that plaintiff incur actual damage." *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991). Relevant to the present case, these torts include: (1) negligent misrepresentation, *Simms v.*

Prudential Life Ins. Co. of Am., 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000); (2) breach of fiduciary duty, *Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 8, 550 S.E.2d 179, 186 (2001); (3) fraud, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988); (4) constructive fraud, *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 600, 534 S.E.2d 233, 236 (2000); and (5) unfair and deceptive trade practices, N.C. Gen. Stat. § 75-1.1 (2002).

Accordingly, the trial court properly granted summary judgment with respect to all claims if (1) the non-profit Piedmont Clinic failed to forecast evidence of actual damage proximately caused by the negligent, fraudulent, and deceptive practices of Centura Bank or Poyner & Spruill, and (2) the Doctors, in their individual capacities, failed to forecast evidence of actual damage.

B. The Piedmont Clinic's Loss of Funding Damages

The Piedmont Clinic and the Doctors concede that they "received an amount in excess of [their] non-funding losses" in the Settlement. However, the Piedmont Clinic argues that the trial court erred by denying it the opportunity to seek loss of funding damages against Centura Bank and Poyner & Spruill which exceeded $365,000. After carefully reviewing the record and relevant case law, we hold that the Piedmont Clinic may not seek loss of funding damages against Poyner & Spruill or Centura Bank because the Piedmont Clinic was completely compensated for these losses in the Settlement.

We note, at the onset of our analysis, that a search of legal databases for the term "loss of funding damages" does not return one case in the annals of the state or federal judiciary in the past two hundred years. Furthermore, during oral argument the Piedmont Clinic conceded that it was not aware of one case where a non-profit organization was awarded damages, or even alleged damages, on the basis of lost funding. Nevertheless, the Piedmont Clinic argues that they should be able to recover damages, measured by their lost funding attendant to the grant letter with the Foundation, through tort actions against Poyner & Spruill and Centura Bank. Although, for the reasons stated herein, it is unnecessary for this Court to decide whether or not loss of funding damages are available in North Carolina, we note that a claim to such damages is tenuous, at best.

The Piedmont Clinic relies on our decision in *Leftwich v. Gaines*, 134 N.C. App. 502, 521 S.E.2d 717 (1999), for the proposition that loss of funding damages are available in North Carolina tort actions. In

Leftwich, we held that "a plaintiff may recover loss of bargain damages in a tort action if she establishes (1) that the damages are the natural and probable result of the tortfeasor's misconduct and (2) that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." The Piedmont Clinic's reliance on *Leftwich* is misplaced. Despite its broad language, *Leftwich* does not stand for the proposition that loss of bargain damages, let alone loss of funding damages, are available in all tort actions in North Carolina. *See e.g.*, *Middleton v. Russell Group*, 126 N.C. App. 1, 483 S.E.2d 727 (1997).

Moreover, even assuming that *Leftwich* controls, the Piedmont Clinic has failed to present any evidence to satisfy the requirement in *Leftwich* "that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." The Piedmont Clinic's loss of funding claims arise from a 21 October 1994 grant letter which provided:

> [T]he Foundation agrees that it will provide additional funding to [the Piedmont Clinic] in an amount of approximately $900,000 per year for a period of twenty years . . . . [H]owever, this agreement for long-term funding is expressly conditional upon the Foundation itself having such funds available . . . . [Additionally the Piedmont Clinic] must renew its grant request annually in writing. . . . [Moreover,] in the event that [the Piedmont Clinic's] tax-exempt status is revoked, [the Piedmont Clinic] shall return to the Foundation any funds not expended or committed at such time, and the Foundation will suspend its financial support of [the Piedmont Clinic].

Consequently, the Piedmont Clinic's theory of damages requires the finder of fact to speculate, in contravention of *Leftwich*, as to whether (1) the Piedmont Clinic would have remained tax-exempt for twenty years, (2) the Piedmont Clinic would have continued to submit annual grant requests for twenty years, and (3) the Foundation would have had funds available for twenty years. Given these contingencies, it can not be said that the Piedmont Clinic's alleged damages could have been ascertained to a "reasonable certainty." Accordingly, the Piedmont Clinic can not rely on *Leftwich* for the proposition that they are entitled to loss of funding damages.

Notwithstanding the Piedmont Clinic's misplaced reliance on *Leftwich*, we need not fully address the issue of whether loss of funding damages are available in North Carolina, as this issue is resolved

on more narrow grounds. In the Settlement, the Piedmont Clinic agreed to "release, acquit and forever discharge the Foundation" in exchange for $365,000 which was to be considered a "full, complete, and final satisfaction of any and all claims [the Piedmont Clinic had] with respect to . . . any claims, actions, causes of actions, and rights arising under" the contract including "the Foundation's funding" of the Piedmont Clinic. By settling its alleged "loss of funding damages" with the Foundation and the Statons, the Piedmont Clinic is barred, as a matter of law, from obtaining "double recovery" for the same loss or injury from Centura Bank and Poyner & Spruill. This result is required by this Court's decision in *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 535 S.E.2d 594 (2000), where we held that a plaintiff, who had previously entered into a settlement fully compensating plaintiff, could not recover against its board of directors, or its Certified Public Accountants ("CPAs"), for the same injury. *See also Kogut v. Rosenfield*, 157 N.C. App. —, —, — S.E.2d —, — (2003).

"In *Chemimetals*, the plaintiff sued its corporate president for breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices arising from the president's scheme to divert money to himself. Before the case proceeded to trial, the parties entered into a 'Settlement Agreement and Mutual Release.' In consideration for the settlement, plaintiff dismissed the complaint. Plaintiff then initiated a second lawsuit against the board of directors and accountants alleging that they conspired to present financial statements which overstated the assets for three fiscal years. The trial court entered summary judgment for the board of directors and accountants." *Kogut*, 157 N.C. App. at —, — S.E.2d at — (citations omitted).

"The plaintiff in *Chemimetals* appealed the order of summary judgment arguing that the release entered in the first action did not preclude the claims brought in the second action against the board of directors and accountants. This Court acknowledged that although the plain terms of the release did not bar the second action, the plaintiff could not assert a second action against the board of directors and accountants to collect for the same losses recovered in the first action against its president. Our Court asserted that:"

> [The plaintiff] has suffered but one injury in this case—monetary loss due to the purported diversion of profits and labor from [the plaintiff] by [the plaintiff's president]. Under the facts as alleged by [the plaintiff], all actions in the course of events leading to

> financial demise of [the company] were concurrent. [The plaintiff's] monetary loss, which was the injury created by [the president's] scheme, is the same injury caused by the alleged failure of the board of directors and CPAs to notice [the president's] unlawful acts. That only one injury occurred is in no way altered by the fact that the board of directors and CPAs may have been guilty of separate wrongdoing. . . . [Plaintiff] may not assert a second action seeking to collect for those losses against the board of directors and CPAs.

"The *Chemimetals* court held that by entering into the settlement agreement in the first action, plaintiff had been compensated for the company's decline in income and could not seek to recover for those same losses from the board of directors and CPAs." *Kogut*, 157 N.C. App. at —, — S.E.2d at — (citations omitted).

In concluding that our decision in *Chemimetals* was a bar to the Piedmont Parties' claims against Poyner & Spruill and Centura Bank, Judge Tennille noted:

> The facts in *Chemimetals* are strikingly similar to those in the case at bar. Like *Chemimetals,* the losses [the Piedmont Parties] seek[] to recover for damages resulting from the creation and termination of the [charitable trusts] and Foundation are the same losses that were compensated by the Settlement with Phillip and the Foundation. Thus, from this event, [the Piedmont Parties] may only recover once for its damages.[7]

On appeal, the Piedmont Clinic argues that the Settlement did not fully compensate them for their non-funding losses. However, the clear terms of the Settlement provide that the $365,000 payment "shall be in full, complete, and final satisfaction of any and all claims [the Piedmont Parties have] with respect to the [contract] . . . .

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7. As an alternative ground for denying the Piedmont Parties loss of funding damages, Judge Tennille also noted that the settlement "further deprive[d] [the Piedmont Parties] of any claim for damages they would have recovered from any party under its contract, including Centura Bank and [Poyner & Spruill], because [the Piedmont Parties] released their contractual rights in return for a cash payment." Accordingly, Judge Tennille reasoned:

> {114} The Settlement itself acts as a bar to any claim for loss of funding. [The Piedmont Parties] had a contract with the Foundation. The Settlement released the Foundation from that contract, thus terminating it in exchange for cash. Having terminated the contract, [the Piedmont] Parties may not now sue [Poyner & Spruill] and Centura Bank for the loss of funding the contract provided.

[including] the Foundation's funding of [the Piedmont Clinic]."[8] The Piedmont Clinic did not present any evidence which, when viewed in the light most favorable to the Piedmont Clinic, created a genuine issue of material fact concerning the measure of damages.

In sum, we affirm the trial court's summary judgment order dismissing the Piedmont Clinic's remaining claims against Centura Bank and Poyner & Spruill because (1) the Piedmont Clinic concedes that its non-funding damages do not exceed $365,000, (2) the Piedmont Clinic was fully compensated for its loss of funding damages, if any, in the Settlement, and (3) the Piedmont Clinic has not alleged any other damages.

C. Doctor's Loss of Funding Damages

The Doctors, in their individual capacities as employees of the Piedmont Clinic, have asserted claims identical to those asserted by the Piedmont Clinic against Centura Bank and Poyner & Spruill. Although certainly not clear in their complaint, seemingly, the Doctors seek an amount equal to their contemplated annual salaries at the Piedmont Clinic multiplied by twenty years. The trial court limited the Doctors' recovery to damages based upon reliance and change of circumstance in procuring alternative employment. On appeal, the Doctors claim entitlement to twenty years of anticipated damage flowing from the negligent acts and omissions of Poyner & Spruill and Centura Bank which resulted in the Doctors' decision to forego their rights to an annual salary paid by the Piedmont Clinic's lost funding. Therefore, the Doctors assign error to this ruling.

After carefully reviewing the record, we hold that the related assignments of error and arguments are fatally undermined by the Doctors' multiple stipulations in the trial court and on appeal. On 25 October 2000, the Doctors made the following pertinent stipulations:

> 2. . . . Any fluctuation (increases or decreases between the years) in the doctors' annual compensation from [Piedmont

8 Although the Settlement expressly provided that it "in no way shall . . . operate as a release of any claims . . . against Centura Bank [or] Poyner & Spruill," this language does not provide the Piedmont Parties with a right, or a forum in which, to seek double recovery. Furthermore, the settlement agreement construed by this Court in *Chemimetals* contained a similar provision. Notwithstanding this provision, we held "the plain language of the release . . . [did] not end our inquiry." Instead, we determined that "only one injury occurred" despite the existence of "separate wrongdoing." Because plaintiff had already obtained a "full recovery" for that injury, as in the case *sub judice*, we held that "Chemimetals may not assert a second action seeking to collect for those [same] losses. . . ." *Chemimetals*, 140 N.C. App. at 138, 535 S.E.2d at 597.

Anesthesia and Pain Consultants, P.A.] since 1997 is not caused by or attributable to [Poyner & Spruill].

3. Had Dr. Stuart Meloy remained with Winston-Salem Anesthesia Associates and not begun working for the Piedmont Clinic in 1995, he would have earned compensation from [the Winston-Salem Anesthesia Associates] ranging between $317,120.03 (his 1994 compensation from [the Winston-Salem Anesthesia Associates]) and $317,279.04 (his 1997 compensation from [Piedmont Anesthesia and Pain Consultants]).

4. Had Drs. William J. Martin and Nancy Faller remained with the Medical University of South Carolina and not moved to North Carolina in 1995 [to work at the Piedmont Clinic], they each would have earned less compensation since 1995 than they actually earned from [the Piedmont Clinic] and [the Piedmont Anesthesia and Pain Consultants].

Furthermore, on 7 June 2001, the Doctors, in their individual capacities, stipulated and agreed that their "damages, other than those relating to the loss of funding, [did] not exceed the amount of $365,000." As noted, the Piedmont Parties' settled their claims against the Foundation and the Statons for $365,000.

The damages that the Doctors now seek against Poyner & Spruill and Centura Bank, based upon various negligence, fraud, and breach of fiduciary duty claims are not properly termed "loss of funding damages" under North Carolina law. Instead, damages in such actions are measured by the difference between the benefit received—the Doctors' current and reasonably certain annual salaries over the next twenty years—and the benefit promised—the Doctors' reasonably certain annual salaries at the Piedmont Clinic over the next twenty years. *See e.g.*, *River Birch Assoc. v. Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 556 (1988) ("The measure of damages for fraud . . . is the difference between the value of what was received and the value of what was promised."); *Middleton v. Russell Group*, 126 N.C. App. 1, 29, 483 S.E.2d 727, 743 (1996) ("The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss . . . ."); *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 233, 314 S.E.2d 582, 585 (1984) (Prior to trebling damages in an unfair and deceptive trade practices case, "[t]he measure of damages . . . is [intended] 'to restore the victim to his original condition . . . .").

Consequently, the Doctors' alleged damages are not based on or measured by the Piedmont Clinic's "loss of funding," rather the Doctors' damages, if any, are limited to individual pecuniary loss measured by the difference between the benefit promised and the benefit received. However, based upon the Doctor's own stipulations, they have not suffered any damages, other than "loss of funding" damages. Accordingly, the Doctors have failed to allege damages under any tort theory, and, therefore, their claims against Poyner & Spruill and Centura Bank were properly dismissed for failing to allege as damage an essential element of each cause of action.

Affirmed.

Judges TYSON and STEELMAN concur.

DR. JOHN A. SMITH, D/B/A HIGHWOOD CHIROPRACTIC, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. COA02-544

(Filed 20 May 2003)

1. Liens— medical services—settlement proceed monies

The trial court erred by denying plaintiff chiropractor's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict in an action against defendant insurance company for its failure to retain sufficient funds from settlement proceeds received by a pro se injured party to satisfy plaintiff's lien for medical services provided under N.C.G.S. §§ 44-49 and 44-50, because: (1) an insurer's actual notice of the medical expenses incurred by an injured party creates a lien against future settlement proceeds even when notice is provided to the insurer by the pro se injured party rather than by the medical provider or the injured party's attorney; and (2) the injured party's submission to the insurer of a health insurance claim form was sufficient under the facts of this case to place the insurer on notice of the medical provider's lien against settlement proceeds.

2. Costs— attorney fees—lien on settlement proceeds for medical services

The trial court did not err by denying plaintiff chiropractor's motion for attorney fees under N.C.G.S. § 6-21.1, because: (1) plaintiff did not bring his suit under a policy issued by defendant insurance company, but instead alleged that defendant breached its duty to plaintiff under N.C.G.S. §§ 44-49 and 44-50 by failing to retain sufficient funds from the settlement proceeds to satisfy plaintiff's lien for medical services; and (2) N.C.G.S. § 6-21.1 was inapplicable since plaintiff was not the beneficiary of the insurance policy relevant to this lawsuit.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by plaintiff from orders entered 1 August 2001 and 30 January 2002 by Judge James R. Fullwood in Wake County District Court. Appeal by defendant from orders entered 2 November 2000 and 12 February 2001, and from judgment entered 15 February 2001 by Judge James R. Fullwood in Wake County District Court. Heard in the Court of Appeals 29 January 2003.

E. Gregory Stott for plaintiff appellee-appellant.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid, for defendant appellee-appellant.

TIMMONS-GOODSON, Judge.

Dr. John A. Smith ("plaintiff") appeals from orders of the trial court denying his motion for attorneys' fees in his action against State Farm Mutual Automobile Insurance Company ("defendant"). Defendant appeals from orders of the trial court denying its motions for summary judgment and for directed verdict, as well as from the judgment entered against it. For the reasons set forth herein, we affirm in part and reverse in part the judgment and orders of the trial court.

The relevant facts of the instant appeal are as follows: On 20 November 1998, plaintiff filed a complaint against defendant in Wake County District Court alleging that defendant had failed to retain out of certain settlement proceeds monies allegedly owed to plaintiff under a valid lien. On 1 November 2000, the trial court denied motions by plaintiff and defendant for summary judgment.

The case came for hearing before a jury on 12 February 2001, at which time the evidence presented tended to show the following: In 1996, plaintiff rendered health care services totaling $1,991.00 to Johnny Wayne Wynne ("Wynne"), who sought treatment with plaintiff for injuries suffered in an automobile accident. Wynne thereafter retained counsel to bring suit against Theobald Materu, an insured of defendant, to recover damages associated with the accident. Accordingly, plaintiff submitted a health insurance claim form ("the HCFA form") to Wynne's counsel, setting out the amount that Wynne owed plaintiff for services rendered in connection with the accident, as well as an irrevocable assignment of benefits to plaintiff executed by Wynne on 10 June 1996. Wynne, however, subsequently discharged his attorney and, acting *pro se*, settled the case directly with defendant. Prior to settling the case, Wynne provided defendant with the HCFA form and a copy of plaintiff's bill for services. After defendant settled the case with Wynne, it disbursed all of the proceeds of the settlement directly to Wynne. Wynne failed to pay plaintiff out of the settlement funds, and in November of 1998, plaintiff obtained judgment against Wynne for $1,991.00, the amount Wynne owed plaintiff for medical services rendered in connection with the accident.

Upon consideration of the evidence, the jury found that submission to defendant of the HCFA form by Wynne put defendant on notice of the lien asserted by plaintiff. The trial court accordingly entered judgment for plaintiff in the amount of $1,991.00, plus interest. Defendant now appeals from the trial court's denial of its motion for summary judgment, the denial of its motion for directed verdict, and from the judgment rendered in the case.

On 1 August 2001, the trial court denied plaintiff's motion for award of attorneys' fees. The trial court further denied, by order entered 30 January 2002, a motion by plaintiff pursuant to Rule 52 of the North Carolina Rules of Civil Procedure requesting the trial court to make findings of fact and conclusions of law in support of its 1 August 2001 order denying plaintiff's motion for attorneys' fees, as well as plaintiff's motion, pursuant to Rules 59 and 60, to set aside the 1 August 2001 order. Plaintiff now appeals from the denial of his motions.

The primary issue presented by defendant on appeal is whether an insurer's actual notice of the medical expenses incurred by an injured party creates a lien against future settlement proceeds, where such notice is provided to the insurer by the *pro se* injured party

rather than by the medical provider or the injured party's attorney. For the reasons stated herein, we conclude that the injured party's submission to the insurer of a health insurance claim form was sufficient, under the facts of this case, to place the insurer on notice of the medical provider's lien against settlement proceeds, thus triggering the insurer's obligations under section 44-50 of the North Carolina General Statutes.

The primary issue presented by plaintiff on appeal is whether he was entitled to an award of attorneys' fees under section 6-21.1 of the General Statutes. We conclude that section 6-21.1 is inapplicable to the present case and affirm the orders of the trial court denying plaintiff attorneys' fees. We now address defendant's and plaintiff's appeals in turn.

I. Defendant's Appeal

[1] Defendant asserts that the trial court erred in denying its motions for summary judgment and for a directed verdict, and in entering judgment against it. Defendant first argues that the trial court erred by submitting the issue of the existence of a lien to the jury as a question of fact. Defendant contends that the facts were undisputed and that the issue presented was a question of law. We agree.

The parties do not contest the authenticity of the documents submitted in the record. Nor do they contest the following salient facts: Wynne suffered injuries in a motor vehicle accident, for which he sought treatment with plaintiff; Wynne incurred a medical bill of $1,991.00 for this treatment; Wynne sued the other driver, who was represented by defendant-insurer; Wynne discharged his counsel and settled the case *pro se* with defendant; Wynne submitted an HCFA health insurance claim form to defendant before the settlement; defendant disbursed the settlement funds directly to Wynne.

The parties disagree only as to whether Wynne's submission of the HCFA form to defendant triggered defendant's statutory duty to retain sufficient funds from the settlement monies to pay plaintiff for medical services provided to Wynne. Because resolution of this issue presents only questions of law, the case is appropriate for entry of summary judgment, provided the undisputed facts establish that one of the parties is entitled to judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *N.C. Baptist Hosps., Inc. v. Crowson*, 155 N.C. App. 746, 573 S.E.2d 922, 923 (2003) (determining that there were no genuine issues of material fact presented by the parties' dispute over proper interpretation of sections 44-49 and 44-50 of the North

Carolina General Statutes); *Alaimo Family Chiropractic v. Allstate Ins. Co.*, 155 N.C. App. 194, 574 S.E.2d 496, 499 (2002) (concluding that summary judgment was appropriate to resolve an issue of validity of assignment of benefits for payment to a chiropractor for medical services rendered in connection with an automobile accident), *disc. review denied*, 356 N.C. 667, —— S.E.2d —— (2003). We conclude that the trial court erred by submitting this case to a jury.

Because the trial court erred in submitting this case to the jury, the judgment entered in favor of plaintiff upon the jury verdict must be reversed. We next consider whether, on the facts presented by the instant case, "any party [was] entitled to a judgment as a matter of law" at the summary judgment stage. N.C. Gen. Stat. § 1A-1, Rule 56(c). We note that, although defendant appealed from the order of the trial court denying summary judgment, plaintiff appealed only from the orders of the trial court denying attorneys' fees. We nevertheless elect to treat plaintiff's appeal as a petition for certiorari and review the trial court's order denying plaintiff's motion for summary judgment pursuant to our supervisory authority under section 7A-32(c) of the North Carolina General Statutes and North Carolina Appellate Rule 21. *See* N.C. Gen. Stat. § 7A-32(c) (2001); N.C.R. App. P. 21 (2002). We therefore consider whether the trial court properly denied summary judgment to plaintiff and defendant.

Defendant argues that the trial court erred in denying summary judgment because the HCFA form was insufficient notice to create a medical lien, and defendant therefore had no duty to retain settlement funds. Plaintiff asserts that the claim form was adequate to notify defendant of the medical debt incurred for Wynne's treatment. We turn to the governing statutes for resolution of this issue. Sections 44-49 and 44-50 of the North Carolina General Statutes provide for the creation of medical provider liens upon recoveries for personal injuries. Section 44-49 provides, in pertinent part, as follows:

> (a) From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State. This lien is in favor of any person, corporation, State entity, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for any drugs, medical supplies, ambulance services, services rendered by any physician . . . or services rendered in connection with the injury in compensation for which the damages have been recovered. . . .

> (b) Notwithstanding subsection (a) of this section, no lien provided for under subsection (a) of this section is valid with respect to any claims whatsoever unless the physician, dentist, nurse, hospital, corporation, or other person entitled to the lien furnishes . . . upon request to the attorney representing the person in whose behalf the claim for personal injury is made, an itemized statement, hospital record, or medical report for the use of the attorney in the negotiation, settlement, or trial of the claim arising by reason of the personal injury, and a written notice to the attorney of the lien claimed.

N.C. Gen. Stat. § 44-49 (2001). Section 44-49 applies only to recoveries in a contested lawsuit, *see Johnston County v. McCormick*, 65 N.C. App. 63, 65 n.1, 308 S.E.2d 872, 873 n.1 (1983), and should be read in conjunction with section 44-50. *See Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co.*, 340 N.C. 88, 90, 455 S.E.2d 655, 657 (1995). Section 44-50 provides for the creation of a lien against settlement proceeds in relevant part as follows:

> A lien as provided under G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the injuries, whether in litigation or otherwise. If an attorney represents the injured person, the lien is perfected as provided under G.S. 44-49. Before their disbursement, any person that receives those funds shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for any . . . services rendered by any physician . . . after having received notice of those claims.

N.C. Gen. Stat. § 44-50 (2001).

In the instant case, although plaintiff forwarded the relevant information to Wynne's attorney pursuant to section 44-49(b), because Wynne thereafter settled his claim *pro se*, the attorney did not communicate with defendant or participate in the disbursement of funds. Although section 44-50 contemplates situations in which the injured person is not represented by counsel, *see id.* (providing that, "[i]f an attorney represents the injured person, the lien is perfected as provided under G.S. 44-49"), neither section 44-49 nor section 44-50 sets forth procedures or formalities required for "perfection" of the lien by a *pro se* injured party. Section 44-50 simply states that a lien "as provided under G.S. 44-49 *shall also attach*" upon settlement proceeds for medical bills for "services rendered by any physician[,]" provided the insurer has "received notice of those claims." *Id.*

(emphasis added). Section 44-49, referenced in section 44-50, states that a lien "is hereby created" on relevant medical debts.[1] The question therefore becomes whether or not a valid lien may arise under sections 44-49 and 44-50 where the injured party is not represented by counsel.

"The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002). "[C]onstruction of a statute which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without doing violence to the legislative language." *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 532-33, 374 S.E.2d 844, 846-47 (1988) (adopting the "interpretation of N.C.G.S. § 44-50 [which] increases the likelihood that such health care providers will receive . . . compensation as a result of their patient having prevailed in an action for the personal injury for which the care was provided"). An examination of sections 44-49 and 44-50 satisfies us that "[t]he obvious intent of the hospital lien statute is to protect hospitals that provide medical services to an injured person who may not be able to pay but who may later receive compensation for such injuries which includes the cost of the medical services provided." *Rose Medical v. State Farm*, 903 P.2d 15, 16 (Colo. App. 1994) (discussing similar Colorado statute). Moreover, this Court is not authorized to read into the statute additional restrictions and procedures not found therein. "[I]t is within the province of the legislature, and not this Court, to place any new or additional restrictions on the distribution of funds to medical service provider lien holders not mandated by sections 44-49 and 44-50." *N.C. Baptist Hosps., Inc.*, 155 N.C. App. at 750, 573 S.E.2d at 924; *see also Liberty Mut. Ins. Co.*, 356 N.C. at 575, 573 S.E.2d at 121 (concluding that, because the "statute does not prescribe the type of notice, the content of the notice, or the method by which it is to be executed" and lacked "any particulars as to the time within which notice to the insurer must be provided," the statute of limitations was not applicable to the notice requirement at issue).

Upon consideration of both the language and purpose of the statutes, we conclude that under sections 44-49 and 44-50, a lien

1. We note that section 44-49 was amended effective 1 October 2001, to remove the restriction previously in the statute that "no lien . . . shall be valid with respect to any claims whatsoever unless the person or corporation entitled to the lien therein provided for shall file a claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action[.]" 2001 N.C. Sess. Laws ch. 377, § 1.

against the settlement proceeds received by a *pro se* injured party arises by operation of law, and is perfected when the insurer has "received notice" of the "just and bona fide claims" of the medical service provider. We must therefore determine, under the facts of the instant case, whether defendant "received notice" of plaintiff's "just and bona fide" claim for medical services.

The HCFA insurance claim form provided to defendant by Wynne recites the medical procedures employed, the date treatment was provided, the amount owed, and the name, address, and phone number of the injured party and the medical provider. Both Wynne and plaintiff signed the form. We conclude that the HCFA form was sufficient to place defendant on notice of the existence of the debt Wynne owed plaintiff for medical services incurred for treatment of his accident-related injuries, and that Wynne's submission to defendant of this form created a lien against his settlement proceeds in the amount of the stated debt.

The parties present arguments regarding the significance of the following language located directly above the injured party's signature: "I authorize payment of medical benefits to the undersigned physician . . . for services described below." Plaintiff and defendant disagree as to whether this language assigning the right to payment of medical benefits is sufficient to assign the right to recovery of settlement proceeds. We conclude that the language and Wynne's signature thereto acknowledge the fact that the medical debt at issue is a "just and bona fide claim[]" as stated in section 44-50. The legitimacy of the claim form is underscored by the fact that Wynne submitted the form to defendant. Although it might have been preferable for the form to include an express assignment of the right to recovery of settlement proceeds, under the facts of this case, the absence of such language does not defeat plaintiff's right to recovery, as the lien was created by operation of law upon notice to the insurer of the medical claim. We further reject defendant's argument that no lien is created against the settlement proceeds unless the insurer is informed as to "whether the bill is outstanding or has been paid by the patient or the patient's health insurance company." An insurer does not have an affirmative duty to investigate the billing arrangements underlying a facially valid medical bill. The lien on settlement proceeds arose by the injured party's submission of the claim form to defendant. Indeed, defendant acknowledges that "State Farm would have been under a duty to honor and protect the lien if *the Plaintiff* had sent a *valid notice* of the lien to State Farm."

Sections 44-49 and 44-50 do not provide for a different result depending on who provides the insurer with notice of the medical bill, nor do they require any particular formalities for "valid notice" of the lien. In short, defendant was required to honor the lien and was entitled to rely upon it absent any information modifying the amount owed; further redistribution of the settlement proceeds would be between plaintiff and the injured party.

We conclude that, under the facts of this case, the submission of the health insurance claim form to defendant was sufficient to validate the medical service provider lien asserted by plaintiff.

We now turn to plaintiff's appeal.

II. Plaintiff's Appeal

[2] Plaintiff argues that the trial court erred by denying his motion for attorneys' fees. Plaintiff asserts that the provisions of section 6-21.1 of the North Carolina General Statutes are applicable to the instant case, and that the trial court erred in concluding otherwise. Section 6-21.1 of the General Statutes provides in pertinent part as follows:

> 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, . . . 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. Gen. Stat. § 6-21.1 (2001). Plaintiff contends that his suit comes within the ambit of the statute as a "suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff." We disagree.

"The words of a statute must be construed in accordance with their ordinary and common meaning *unless* they have acquired a technical meaning or unless a definite meaning is apparent or indicated by the context of the words." *Raleigh Place Assoc. v. City of Raleigh*, 95 N.C. App. 217, 219, 382 S.E.2d 441, 442 (1989) (emphasis added); *see also Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371-72 (1997) (stating that, "when technical terms or terms of art are used in a statute, they are presumed to be used with their technical meaning in mind, likewise absent legislative intent to the contrary.").

Here, plaintiff did not bring his suit "under a policy issued by the defendant insurance company." Rather, plaintiff alleged that defendant breached its duty to plaintiff under sections 44-49 and 44-50 of the North Carolina General Statutes by failing to retain sufficient funds from the settlement proceeds to satisfy plaintiff's lien. Further, plaintiff is not the "beneficiary" of the insurance policy relevant to this lawsuit. Plaintiff urges this Court to apply to section 6-21.1's term "beneficiary" the generalized definition of "one who benefits from something." The term "beneficiary," however, appears here in the context of the phrase "under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff[.]" In the technical context of section 6.21.1, a more appropriate definition of beneficiary is "[a] person who is designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.) [or] one designated to receive something as a result of a legal arrangement or instrument." *Black's Law Dictionary* 149 (7th ed. 1999). As plaintiff was not a beneficiary of the policy issued by defendant, the trial court correctly determined that section 6-21.1 was inapplicable, and properly declined to award attorneys' fees pursuant to this section. We therefore overrule plaintiff's assignment of error.

For the reasons discussed above, we conclude that the trial court erred by denying plaintiff's motion for summary judgment and in submitting this case to the jury. The judgment of the trial court entered upon the jury verdict in favor of plaintiff must therefore be reversed. We affirm the orders of the trial court denying plaintiff's motion for attorneys' fees. We remand this case to the trial court for entry of an order vacating the judgment entered upon the jury verdict and for entry of an order granting summary judgment to plaintiff. Each party shall bear its own costs incurred in this Court.

Affirmed in part, reversed in part, and remanded with instructions.

Judges TYSON concurs.

Judge LEVINSON concurs in part and dissents in part.

LEVINSON, Judge concurring in part and dissenting in part.

Because I believe that defendant's receipt of the HCFA form was insufficient to give notice of a claim of a lien against settlement proceeds in the amount of the stated debt, I respectfully dissent.

I agree with the majority that: (1) the existence of a lien was a question of law for the trial court, and thus it was error to submit this case to the jury; (2) a valid lien against settlement proceeds may arise by operation of law under N.C.G.S. § § 44-49 and 44-50 (2001) when the injured party is not represented by counsel; (3) the operation of § § 44-49 and 44-50 may be triggered when notice of a claim is communicated to an insurance carrier by someone other than the medical provider; and (4) N.C.G.S. § 6.21.1 (2001) does not permit plaintiff's recovery of attorney fees. I disagree, however, with the majority's interpretation and application of G.S. § § 44-49 and 44-50 to the facts of the instant case. The majority essentially holds that the "notice of . . . claims" in G.S. § 44-50 means "notice of a bill or debt for medical services."[2] The majority reasons that the defendant-carrier's actual notice of plaintiff's services and bill was sufficient to satisfy the provisions of G.S. §§ 44-49 and 44-50. This position is untenable for several reasons.

First, the majority's holding ignores the General Assembly's apparent awareness that the personal injury settlement practice is often informal. Not only did the General Assembly obviate the necessity of filing a lien with the clerk of court, it also permitted physicians and others to perfect a lien by complying with G.S. § 44-49(b). These examples illustrate an intention to foster informal means of perfecting liens and settling disputes. However, the logical implication of the majority opinion, which does not account for this reality involving settlement procedures, may be that every bill or document shared by a *pro se* claimant during litigation would give rise to notice of a claim for purposes of a lien.

Second, in holding that receipt of this HCFA form constitutes "notice" under G.S. § 44-50, the majority adopts *less* stringent requirements on medical providers to assert a lien under G.S. § 44-50 when the injured party is unrepresented by counsel than when he has counsel. G.S. § 44-49(b) requires, *inter alia*, that physicians provide a "written notice to the attorney of the lien claimed," in addition to providing "an itemized statement[.]" (emphasis added). Thus, the General Assembly has, through G.S. § 44-49(b), enabled medical providers to share information with attorneys without *necessarily*

2. I disagree with the majority's assessment that the issue is "whether defendant 'received notice' of plaintiff's 'just and bona fide' claim for medical services." (emphasis added). Whether the insurance carrier receives notice of plaintiff's medical services is different from whether it receives notice of a medical provider's affirmative claim to settlement monies pursuant to § § 44-49 and 44-50.

giving rise to a claim of a lien. Reading G.S. §§ 44-49 and 44-50 *in pari materia*, I conclude that the General Assembly intended the same result with regards to the circumstances surrounding settlement practices when injured persons have no legal representation. Moreover, the "obvious intent" of these lien statutes, the compensation of medical providers for the services provided to injured persons, *Rose Medical v. State Farm*, 903 P.2d 15, 16 (1994 Colo. App), is not lost by requiring a medical provider, such as the plaintiff herein, to provide the insurance carrier with an assignment of rights or some other express documentation that he is asserting a claim under G.S. §§ 44-49 and 44-50.

Third, although neither G.S. § 44-49 nor § 44-50 defines what constitutes a "claim" for purposes of creating a lien against settlement proceeds, the term, "claim," is defined in Black's Law Dictionary as "2. The *assertion* of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional. . . ." BLACKS LAW DICTIONARY 240 (7th ed. 1999) (emphasis added). Thus, there is no reason to assume that a "claim" is established whenever there is evidence of a "bill" or "statement of services" or something similar. Merely because a medical provider creates and shares documents evidencing his services and charges does not, *ipso facto*, suggest he wishes to "assert" a claim of lien. For example, an unrepresented injured may pay the outstanding balances due to medical providers, yet request documentation to support an effort to secure a settlement from an insurance carrier. Applying the majority's logic, the carrier is required to withhold settlement monies since it came into possession of bills or other indicia of medical services. Another common factual situation is that of the medical provider who has "written off" as an uncollectible bad debt an injured's medical bills. If the doctor, who had no intention of asserting a claim against settlement proceeds, later receives a check from a carrier as a result of the carrier's duty under the majority's reasoning, he might then be required to amend tax returns or make some other unexpected financial adjustment.

Fourth, neither the purpose of the HCFA form, nor its express language, indicates that it gave defendant "notice" that plaintiff was asserting a "claim" against settlement proceeds or was otherwise asserting a lien pursuant to G.S. §§ 44-49 and 44-50. I agree that the HCFA form provides an insurance carrier with appropriate evidence of treatment and the associated costs, which presumably assisted the settlement between the unrepresented injured person and defendant here. Attorneys' general use of a variety of documents with insurance

carriers, to catalog their clients' bills for medical services, is not unlike the unrepresented party's use of the HCFA form here. The HCFA form is specifically designed to permit access by medical providers to benefits under, *e.g.*, Medicaid, Medicare, or Group Health. The plaintiff, who had no direct contact with defendant insurance carrier before the settlement proceeds were distributed, did not provide an assignment of the insured's rights to the carrier. Nor did the injured person's signature in box thirteen (13) of the HCFA form, which authorized the "payment of medical benefits," constitute such an assignment. Settlement proceeds from defendant-insurance carrier are not the same as "payment of medical benefits." In short, the use of the HCFA form did not automatically put the carrier on "notice" that the plaintiff necessarily wished to assert a lien under G.S. §§ 44-49 and 44-50 simply because the form documented plaintiff's treatment and associated costs.

Finally, there is little import to the fact that plaintiff complied with the terms of G.S. § 44-49(b) and perfected its lien with the attorney who formerly represented the injured person. Given the attorney's subsequent release, no settlement monies were disbursed to the attorney, and the lien with respect to the attorney was ineffective as to defendant-insurance carrier.

I would hold that when an insurance carrier settles directly with an unrepresented injured party, the carrier does not have valid "notice" of a "just and bona fide claim" pursuant to G.S. § 44-50 unless it receives documentation that (1) constitutes a valid assignment of rights signed by the injured; or (2) contains unambiguous language that the medical provider is asserting a lien under the provisions of G.S. §§ 44-49 and 44-50, or language asserting an interest in or claim to settlement proceeds.

I am unpersuaded that such a ruling would place an unreasonable burden on medical providers to determine whether a patient is represented by counsel. Medical providers routinely take steps to collect charges for their services. The provisions in G.S. §§ 44-49 and 44-50 afford plaintiff and other medical providers lien remedies irrespective of whether the patient has legal counsel. A holding consistent with this dissent would not negate these remedies.

Like the majority, I agree the judgment entered on the jury verdict must be vacated, and the order denying plaintiff attorney fees affirmed. Unlike the majority, however, I would reverse and remand

with instructions for the trial court to enter summary judgment in favor of defendant.

IN THE MATTER OF: TRAVIS RAY BUTTS

No. COA02-531

(Filed 20 May 2003)

1. Confessions and Incriminating Statements— juvenile—motion to suppress—statement obtained in absence of parent

The trial court erred in a case adjudicating respondent juvenile a delinquent for commission of first-degree sexual offense by denying respondent's motion to suppress under N.C.G.S. § 7B-2101 his statement obtained by a detective after respondent's father voluntarily left the room and by failing to determine whether respondent was in custody when he signed the statement, because: (1) N.C.G.S. § 7B-2101 allows a juvenile a right to the presence of a parent, guardian, custodian, or attorney and to be informed of this right while he is in custody, and that right cannot be waived by a parent on the juvenile's behalf; (2) respondent's statement that "it happened" was insufficient, without more detail, to constitute the equivalent of a full confession to first-degree sex offense so as to render the later admission of his written statement harmless; and (3) absent the signed confession, the evidence would have presented a much closer case when there was no physical evidence or eyewitnesses and the only basis for the factfinder to determine the truth was to weigh the credibility of respondent and the alleged victim.

2. Evidence— expert testimony—sexual abuse

The trial court did not commit plain error in a case adjudicating respondent juvenile a delinquent for commission of first-degree sexual offense by allowing a pediatrician to testify under N.C.G.S. § 8C-1, Rule 702 that her physical examination of the victim was consistent with the interview in which the victim told the pediatrician about the incident involving respondent even though the exam failed to show any physical injury because the pediatrician did not testify that the allegations in the juvenile petition

were accurate, but only that her examination of the alleged victim was consistent with her interview of him.

3. Probation and Parole— juvenile delinquency—admission of guilt as a condition of probation

The trial court erred in a case adjudicating respondent juvenile a delinquent for commission of first-degree sexual offense by specifically conditioning respondent's probation on his express admission of the underlying offense after he had testified at trial and denied guilt, because the record contains no indication that respondent was granted use immunity or protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.

Judge WYNN concurring in part and dissenting in part.

Appeal by respondent from adjudication entered 2 August 2001 by Judge Joseph E. Setzer, Jr. and from disposition entered 27 September 2001 by Judge David B. Brantley in Wayne County District Court. Heard in the Court of Appeals 12 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Marjorie S. Canaday for respondent-appellant.

LEVINSON, Judge.

Respondent appeals from adjudication of delinquency for commission of a first degree sex offense. The juvenile charges arose from an incident occurring between respondent and C.C. (the prosecuting witness's initials are used to preserve his privacy). The two boys were seventh grade classmates in a self-contained special education class. On 16 March 2001, C.C. spent the night with respondent, who lived with his father. During the evening, the boys watched movies in respondent's room while his father, Willie Butts, watched TV in the living room. Butts owned several guns, including a .357 magnum, which he usually kept near him, or in a holster. Both boys acknowledge that at some point during the night they engaged in sexual activity. However, their testimony conflicted sharply regarding the nature of the sexual contact.

At the hearing, C.C. testified that after the boys watched a movie, respondent took him to his father's bedroom and showed him his

father's .357 magnum gun. When they returned to respondent's bedroom, respondent warned C.C. that if he "told anybody what was about to happen, he'd shoot [him]." C.C. put on his pajamas and got ready for bed, while respondent tried to convince him to experiment with sexual activity, saying "it'll be fun." When C.C. refused, respondent became upset and pinned C.C. down on the bed. He performed an act of oral sex on C.C. in which he bit his penis, and then had anal intercourse with C.C. After respondent stopped, he threatened to kill C.C. if he told anyone. The State presented several other witnesses whose testimony generally corroborated C.C.'s account of the events in question. C.C.'s mother testified that her son was in a special education class, and took medications for depression and "anger control." Two weeks after he spent the night with respondent, C.C. told his mother that respondent had "pinned him down" and forced him to engage in sexual acts. Dr. Mary Lou Cooke, a pediatrician, testified that C.C. had given her an account of the incident consistent with his trial testimony. She also testified that, notwithstanding the absence of physical or medical indicators of abuse, she considered C.C.'s physical examination to be "consistent" with his interview. Detective Robin Carrasquillo testified regarding her investigation of the charges. She first interviewed C.C. and his mother, and obtained a statement from C.C. She then interviewed respondent at the law enforcement center, where respondent signed a statement admitting the allegation in the petition.

Respondent testified at the hearing and denied all charges. He testified that after the two boys watched a movie, they played video games and then went to sleep. When he awoke later in the night, C.C. was penetrating him from behind, and refused to stop. Respondent "throwed [sic] him off" and went to sleep in the living room. Respondent denied threatening C.C. with a gun, or performing anal or oral sex on C.C. Respondent's testimony in this regard conflicted with his admissions in a signed confession obtained by Carrasquillo and introduced over respondent's objection. Ellen Jones, the primary teacher for both boys, testified that C.C. had "difficulty getting along" with other children and "conflict[ed] with all the students in the classroom." Jones also testified that C.C. often told lies at school. Mr. Butts, respondent's father, testified that his son had no access to any of his guns, which were in a locked cabinet, and that he had noticed nothing unusual the night that C.C. stayed over. Other evidence will be discussed as necessary to resolve the issues presented herein.

I.

[1] Respondent raises four arguments on appeal. In two of these, respondent contends that the trial court erred by denying his motion to suppress the statement obtained by Detective Carrasquillo.

"[I]n a suppression hearing, the State has the burden to demonstrate the admissibility of the challenged evidence." *State v. Tarlton*, 146 N.C. App. 417, 420, 553 S.E.2d 50, 53 (2001) (citing *State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E.2d 857, 859 (1985)). In the instant case, respondent argues that his statement was procured in violation of his rights under N.C.G.S. § 7B-2101, which provides in relevant part that:

> (a) Any juvenile in custody must be advised prior to questioning:
>
> . . . .
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> . . . .
>
> (b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney.

N.C.G.S. § 7B-2101(a)(3) and (b) (2001). Respondent notes that the waiver form he signed did not include any notification that he had the right to the presence of "a parent, guardian, or custodian . . . during questioning." Moreover, it is undisputed that respondent was under 14 years old at the time, and that only Detective Carrasquillo and another officer were present when much of respondent's statement was obtained. Therefore, if respondent's confession was obtained during a custodial interrogation, it would be inadmissible.

The rights protected by N.C.G.S. § 7B-2101 apply only to custodial interrogations. *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) (statute "pertains only to statements obtained from a juvenile defendant as the result of custodial interrogation"). Thus, the threshold inquiry for a court ruling on a suppression motion based on G.S. § 7B-2101, is whether the respondent was in custody when the statement was obtained. "[I]n

determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Buchanan*, 353 N.C. 332, 338, 543 S.E.2d 823, 827 (2001) (quoting *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405). This requires the trial court to apply " 'an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.' " *State v. Sanders*, 122 N.C. App. 691, 693, 471 S.E.2d 641, 642 (1996) (quoting *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)).

In the instant case, respondent argued to the trial court that he was in custody when his statement was taken, thus invoking his rights under G.S. § 7B-2101 to the presence of a parent, guardian, custodian, or attorney and to be informed of this right. Respondent also argued that the express terms of the statute did not allow for any exceptions to the bar on confessions taken from a child of 13 in the absence of a parent, guardian, custodian, or attorney. G.S. § 7B-2101 ("no in-custody . . . confession . . . may be admitted into evidence unless . . . made in the presence of" parent, etc.). However, the trial court did not rule on this issue. Instead, following arguments of counsel for respondent and the State on whether respondent was in custody, the court ruled as follows:

> MR. GURLEY (respondent's attorney): . . . I filed the motion to suppress . . . in regards to North Carolina General Statute 7B-2101(a)(3) and (b), "that *no in-custody admission or confession . . . may be admitted.* . . . I would be objecting to admitting into evidence based upon the . . . Statute sections we just cited. . . .
>
> PROSECUTOR: Your Honor, *he was not in custody* at the time. . . .
>
> THE COURT: Well, *that's not really the issue*, but I'm going to *OVERRULE the OBJECTION on the grounds that Mr. Butts voluntarily left the interrogation room.*

(emphasis added). Detective Carrasquillo continued testifying about her interview of respondent, until respondent again objected:

> MR. GURLEY: Your honor, . . . I would OBJECT because I think it's obvious now that [respondent] is not free to leave . . . therefore, *he would be in custody.*

> THE COURT: OVERRULED. Again, *that's not the issue.* The Miranda rights were read, *Mr. Butts voluntarily left the room* during the interrogation. There [were] no violations.

(emphasis added). The trial court overruled respondent's objection on the basis that, inasmuch as Mr. Butts left the interview room of his own free will after respondent and Butts were apprised of their rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the issue of whether respondent was in custody was rendered moot.

The trial court's ruling was predicated on the assumption that if respondent's *father* voluntarily absented himself from the room, there would be no violation of G.S. § 7B-2101. However, the statute protects the rights of the juvenile, which his parent cannot waive on his behalf. In *State v. Branham*, 153 N.C. App. 91, 98, 569 S.E.2d 24, 28 (2002), "[t]he trial court made findings . . . that defendant's mother refused to see him." This Court held:

> These . . . findings do not support the conclusion that the defendant's waiver and statement complied with N.C.G.S. § 7B-2101. Even if we assume that defendant's mother did not want to be present during defendant's interrogation, *she did not have the ability to, in effect, waive his right to have her present during interrogation.*

Id. at 98, 569 S.E.2d at 29 (emphasis added) (citation omitted); *see also In re Ewing*, 83 N.C. App. 535, 537, 350 S.E.2d 887, 888 (1986) ("finding that respondent's mother . . . waived respondent's juvenile rights is not equivalent to a finding that respondent knowingly and understandingly waived his rights. Furthermore, 'a parent, guardian, or custodian may not waive *any* right on behalf of the juvenile.' ") (quoting N.C.G.S. § 7A-595(b)). We conclude the trial court erred by failing to determine whether respondent was in custody when he signed the statement.

The trial court's error was not harmless in light of the facts of this case. N.C.G.S. § 15A-1443 provides in part:

> A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (2001). "When a case turns on the credibility of the witnesses it is difficult to hold . . . an admission harmless." *State v. Wilson*, 118 N.C. App. 616, 621, 456 S.E.2d 870, 873 (1995) (citing *State v. Rowland*, 89 N.C. App. 372, 366 S.E.2d 550 (1988)). In the instant case, the transcript does not establish that respondent confessed to committing a first degree sex offense while Mr. Butts was in the interrogation room. In this regard, Detective Carrasquillo testified in pertinent part as follows:

> DETECTIVE CARRASQUILLO: I began speaking with them about the allegations. I explained to Mr. Butts and to [respondent] the allegations, what [C.C.] had told me, and basically I asked [respondent] if any of this happened. [Respondent] denied that anything had happened. I began explaining in a little bit more detail to [respondent] in the fact that it was important that the truth be told regardless of the situation. [Respondent] then told me that it may have happened but he was. . . .
>
> QUESTION: [Respondent] told you what?
>
> DETECTIVE CARRASQUILLO: [Respondent] then told me it may have happened but he was asleep. Mr. Butts then—and I quote—stated, "Damn it, boy, you know whether it happened or not." At the time [respondent] said, "Yes, it happened." Mr. Butts became upset and left the room.

Detective Carrasquillo's testimony indicates that when respondent admitted that "it might have happened" but that he "was asleep," his father scolded him to make a definite statement one way or the other, at which point respondent stated "yes, it happened" rather than "it *might have* happened." While this statement may fairly be regarded as an admission that there was sexual contact between the boys, it is far from a confession to commission of a first degree sexual offense. There is nothing in this dialogue that constitutes a disavowal of respondent's initial contention that he was sleeping when the sexual contact began, much less an admission that he employed force or the use of a deadly weapon to sexually assault C.C. Further, while Detective Carrasquillo testified that before respondent made a statement, she had generally "explained to . . . [respondent] the allegations, what [C.C.] had told me[,]" Detective Carrasquillo's testimony did not establish that her explanation included a recitation of all of the elements of first degree sex offense. We conclude that respondent's statement that "it happened" is insufficient, without more detail, to constitute the equivalent of a full confession to first

degree sex offense, so as to render the later admission of his written statement harmless.

Moreover, absent the signed confession, the evidence would have presented a much closer case. Without physical evidence or eyewitnesses, the only basis for the fact-finder to determine the truth of the matter was to weigh the credibility of C.C. and respondent. In this regard, C.C.'s account was supported by testimony from his mother, Dr. Cooke, and Detective Carrasquillo, whose testimony attested to the consistency of C.C.'s accounts of the events in question. On the other hand, respondent's father testified that respondent had no access to Mr. Butt's firearms, and that he noticed nothing unusual when C.C. spent the night. Moreover, Ms. Jones, who taught both boys in a special education class and is unrelated to either party, testified that it was C.C. who lied frequently, and who had social adjustment problems. In this context we conclude that without a signed confession "there is a reasonable possibility that . . . a different result would have been reached[.]" N.C.G.S. § 15A-1443(a) (2001).

We conclude the trial court's failure to properly determine whether respondent was in custody before admitting his statement to law enforcement officers constituted "reversible error which denied the [respondent] a fair trial conducted in accordance with law." N.C.G.S. § 15A-1447(a) (2001). Accordingly, respondent is entitled to a new adjudication hearing at which the admissibility of respondent's statement to Detective Carrasquillo will be determined in accordance with the provisions of G.S. § 7B-2101.

II.

[2] Although we have determined that a new adjudication hearing is required, we elect to review respondent's other assignment of error because the same issues may arise on remand. Respondent next argues the trial court committed plain error by allowing Dr. Cooke to testify that her physical examination of C.C. was "consistent" with the interview in which he told Dr. Cooke about the incident involving respondent. We conclude that admission of this testimony was not plain error.

Plain error is " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or . . . 'grave error which amounts to a denial of a fundamental right of the accused[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002

(4th Cir. 1982)). "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (quoting *State v. Jones*, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704 (2000)).

In the instant case, Dr. Cooke testified on direct examination regarding C.C.'s account of the assault by respondent. Her physical examination did not reveal physical injury, abnormalities, or evidence of sexually transmitted disease. When asked to evaluate the exam together with the interview, Dr. Cooke testified as follows:

> [PROSECUTOR]: And how did your findings on the physical exam compare with the interview that you had with [C.C.]
>
> [DR. COOKE]: Its consistent because there—often times physical evidence and history do not collaborate. So lots of times you don't find physical evidence even if there has been some penetration unless you can—I mean, sometimes you will see tears and you will see scars and you will see some increase in anal tone, but that's not necessarily a given.

Respondent did not object to the introduction of this testimony. He argues on appeal that, by declaring the interview to be "consistent" with an exam that failed to show injury, Dr. Cooke's testimony "had the effect of vouching for [C.C.'s] credibility. . . ." We disagree.

Under N.C.G.S. § 8C-1, Rule 702 (2001), "[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." An expert witness may not attest to the victim's credibility, as he or she is in no better position than the jury to assess credibility. *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) ("the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible"). However, otherwise admissible expert testimony is not rendered inadmissible merely because it enhances a witness's credibility. *State v. Dick*, 126 N.C. App. 312, 315, S.E.2d 88, 89 (1997) ("testimony based on the witness's examination of the child witness and expert knowledge . . . is not objectionable because it supports the credibility of the witness . . ."). An expert's opinion that sexual abuse definitely occurred is inadmissible absent a foundation

showing that "the opinion expressed by [the expert] was really based upon [the expert's] special expertise, or stated differently, that [the expert] was in a better position than the jury to have an opinion on the subject. . . ." *State v. Trent*, 320 N.C. 610, 614, 359 S.E.2d 463, 465 (1987). Therefore, an expert may not testify that a child "*was* sexually abused" when the expert's opinion rests entirely on the child's statements, unsupported by physical or other evidence. *State v. Grover*, 142 N.C. App. 411, 417, 543 S.E.2d 179, 183, *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001).

However, our appellate courts have generally upheld the admission of testimony from a medical expert in a sexual abuse case that her observations are "consistent with sexual abuse." *State v. Brothers*, 151 N.C. App. 71, 77-78, 564 S.E.2d 603, 607-08 (2002) (physician properly permitted to testify that witness had vaginal scarring which the physician concluded was "consistent with sexual abuse"); *see also State v. Aguallo*, 322 N.C. 818, 820, 370 S.E.2d 676, 678 (1988) (doctor's testimony that physical examination was "consistent with" victim's earlier statements held "vastly different from" comments on victim's credibility). The North Carolina Supreme Court recently delineated the distinction between admissible expert testimony and opinions that simply attest to the witness's credibility. In *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002), the Court ruled:

> In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

(citations omitted) (citing *Stater v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992); *Aguallo*, 322 N.C. at 822-23, 370 S.E.2d at 678; *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987)).

In the present case, Dr. Cooke did not testify that the allegations in the juvenile petition were accurate, but only that her examination of C.C. was "consistent" with her interview of him. We conclude that the admission of this testimony was neither error nor plain error. This assignment of error is overruled.

III.

[3] Finally, respondent argues the trial court committed reversible error by imposing a condition of probation that required him to admit guilt for the underlying offense, after he had testified at trial and denied guilt. Respondent contends this condition of probation violates his Fifth Amendment right to be free from self-incrimination. *See* U.S. Const. amd. V. Because respondent did not object at the time disposition was entered, the State urges us to apply plain error analysis to this issue. However, we note that N.C.G.S. § 15A-1446 provides in relevant part as follows:

> (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
>
> . . . .
>
> (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C.G.S. § 15A-1446(d)(18) (2001). We conclude that respondent's argument raises the issue of whether his sentence "was illegally imposed, or is otherwise invalid as a matter of law." *In re Allison*, 143 N.C. App. 586, 592, 547 S.E.2d 169, 172 (2001) (citing G.S. § 15A-1446(d)(18)). Accordingly, the issue is properly before us, notwithstanding respondent's failure to object at the dispositional hearing. *Id.* (noting that "certain errors may be reviewed on appeal despite the absence of an objection, exception or motion made in the trial court").

> As a condition of probation, the trial court required the following:
>
> 27. That the juvenile participate in and successfully complete sexual offender specific evaluation/treatment program. *Participation is defined as* attendance at all meetings, *admission of responsibility for offense* and progress toward reasonable treatment goals.

(emphasis added). During the disposition hearing, the trial court underscored this point:

> THE COURT: All right, at this point then, I'm going to place [respondent] on supervised probation for 12 months initially. I

> order that he not have any contact with [C. C.] . . . [and that] he also participate in and complete the sex offender specific evaluation and treatment program by the Wayne County Mental Health Center. And *participation is defined as* attendance of all meetings, *admission of responsibility for offense* and progress toward reasonable treatment goals.

(emphasis added). After the court stated the other probationary conditions, the Court Counselor asked to be heard:

> MR. PERRY: May I ask something, Your Honor?
>
> THE COURT: Yes, sir.
>
> MR. PERRY: *I just think it's important that [respondent]* and his father *understand that one violation* he can end up back here *and the recommendation will be training school.* . . . He needs to be at every meeting and everything needs to be done. . . .

(emphasis added).

The Fifth Amendment provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amd. V. Likewise, the North Carolina Constitution protects "every person charged with crime" from being "compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. The privilege against self-incrimination extends to juveniles charged with delinquency. See N.C.G.S. § 7B-2405(4) (2001).

The U.S. Supreme Court's decision in *Minnesota v. Murphy*, 465 U.S. 420, 79 L. Ed. 2d 409 (1984), the leading relevant case, "makes clear that the state cannot make waiver of the privilege against self-incrimination a condition of probation." *State v. Eccles*, 877 P.2d 799, 800 (Ariz. 1994). However, neither the United States Supreme Court nor the North Carolina Supreme Court has addressed the precise issue before this Court: whether a court can condition probation on the probationer's admitting guilt of the offense for which he was convicted, when the offender has testified at trial and denied culpability.

Some courts have held that probation requirements like the one in this case place respondent in a "classic penalty" situation. *See, e.g., State ex rel. Tate v. Schwarz*, 654 N.W.2d 438, 441 (Wis. 2002) (probation revoked for "failure to cooperate with sex offender treatment" based on defendant's "resistance to admitting sexual misconduct with the victim": Court holds that "defendant . . . cannot be subjected to probation revocation for refusing to admit to the crime of conviction,

unless he is first offered the protection of use and derivative use immunity"); *State v. Imlay*, 813 P.2d 979, 985 (Mont. 1991) (stating "it is clear . . . the defendant is being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt"), *cert. granted sub nom. Montana v. Imlay*, 503 U.S. 905, 117 L. Ed. 2d 489, *cert. dismissed*, 506 U.S. 5, 121 L. Ed. 2d 310 (1992); *compare Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991) (probation revocation impermissible where defendant pled guilty to reduced sexual assault but refused to admit to aggravated sexual behavior on which original charge was based). The "classic penalty" argument sometimes is supported by concerns that a confession obtained during therapy would be admissible if the defendant were retried for the same offense, or could be the basis for a later prosecution for perjury. *See, e.g.*, Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. Crim. L. & Criminology 347, 348-49 (Fall, 1998) (discussing, *inter alia,* differing Fifth Amendment implications based upon whether offender pleads guilty, and contrasting the difference in Fifth Amendment implications between penalty contexts and ineligibility for privileges circumstances); Brendan J. Shevlin, *"Between the Devil and the Deep Blue Sea": A Look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt*, 88 Ky. L.J. 485 (Winter, 1999-2000).

Convincing arguments can also be advanced that a sentencing court may require the convicted to admit guilt as a condition of probation, without an associated constitutional violation. At least one court has held that, in the context of a prison sex offender treatment program, benefits can be denied to a prisoner who "refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege." *McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997). *See State v. Carter*, 772 A.2d 326, 328 (N.H. 2001) (where participation in sex offender therapy for prisoners is voluntary, court holds that "the defendant is not being compelled to incriminate himself: he may choose not to participate and thus not admit any guilt. . . . Such a tactical choice does not rise to the level of compulsion required for a Fifth Amendment violation."); *see also Gollaher v. United States*, 419 F. 2d 520 (9th Cir. 1969), *cert. denied*, 396 U.S. 960, 24 L. Ed. 2d 424 (State interest in rehabilitation can override compulsory self-incrimination). We conclude, however, that *Murphy* controls the outcome of the instant case, and does not afford such an option: "[A] State may validly insist on answers to even

incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding [so that]. . . . a probationer's 'right to immunity as a result of his compelled testimony would not be at stake.' " *Murphy*, 465 U.S. at 435, 79 L. Ed. 2d at 425 (quoting *Sanitation Men v. Comm'r of Sanitation*, 392 U.S. 280, 284, 20 L. Ed. 2d 1089, 1093 (1968)).

Moreover, since the time of the trial court's entry of a disposition order, this Court decided *In re Lineberry*, 154 N.C. App. 246, 572 S.E.2d 229 (2002). In *Lineberry*, as in the instant case, the juvenile respondent was charged with commission of a sexual offense and adjudicated delinquent following a hearing at which respondent testified and denied his guilt. *Id.* The disposition, like that before us, required the respondent to participate in, and cooperate with, a treatment program for sex offenders. *Id.* Following a subsequent motion for review, the juvenile was ordered held in secure custody, in part because of his refusal during sex-offender treatment to admit guilt of the underlying offense. *Id.* at 255, 572 S.E.2d at 231. This Court held:

> In finding that juvenile's refusal to admit to the offenses was a factor justifying his continued custody pending appeal, the trial court exposed juvenile to the classic penalty situation of choosing between the privilege against self-incrimination and prolonged confinement. . . . Thus, the trial court's conclusion that juvenile should remain in custody pending appeal based on juvenile's refusal to admit to the offense for which he was adjudicated delinquent violated juvenile's constitutional right against self-incrimination.

Id. at 255, 572 S.E.2d at 236. We find *Lineberry's* holding functionally indistinguishable from the instant case and are therefore bound by it. Accordingly, we hold that, on the specific facts of this case, the trial court erred by specifically conditioning respondent's probation on his express admission of the underlying offense.

We are not unmindful of the therapeutic benefits that may be obtained by accepting responsibility for one's actions. We recognize, too, the trial court's need for flexibility in fashioning appropriate dispositions for offenders. This need can be especially compelling in the context of our juvenile courts. Our holding does not prevent a court from revoking probation based upon a probationer's overall failure to participate in a validly required program simply because one aspect

of the probationer's refusal to cooperate is an unwillingness to admit responsibility for his offense. The trial court may require a juvenile to cooperate with his supervising court counselor and, if counseling or psychological treatment is a part of the disposition, the trial court may require a juvenile to complete a treatment regimen and generally engage honestly in the counseling process, without violating the U.S. Constitution. *See, e.g., Murphy* at 436, 79 L. Ed. 2d at 425, (probationer could be required "to appear and give testimony about matters relevant to his probationary status" provided the State "did not attempt to take the extra, impermissible step" of requiring him "to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent"). Moreover, if respondent were granted use immunity or "protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant", *id.* at 426, 79 L. Ed. 2d at 418 (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 78, 38 L. Ed. 2d 274, 282 (1973)), this would obviate the Fifth Amendment violation. In the case *sub judice*, the record contains no indication that such immunity was offered, or that respondent's admissions would be excluded from a subsequent hearing. *See Razor v. Com.*, 960 S.W.2d 472, 474 (Ky. App. 1997) (no threat of prosecution posed by probationer's admission of guilt where State statute provided "[a]ll information obtained in the discharge of an official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court").

In summary, this case is reversed and remanded for a new adjudication hearing at which the admissibility of respondent's statement to a law enforcement officers will be properly determined.

Reversed and remanded.

Judge WYNN concurring in part, dissenting in part.

Judge TIMMONS-GOODSON concurs.

WYNN, Judge, concurring in part, dissenting in part.

I agree with majority's well-reasoned opinion; however, I am compelled to dissent and allow the State an opportunity to appeal to our Supreme Court the issue of whether the ultimate disposition of awarding a new trial in this matter overrules our earlier case of *State*

v. Pugh, 138 N.C. App. 60, 530 S.E.2d 328 (2000) (Timmons-Goodson, J., dissenting).[1]

In *Pugh*, this Court upon holding that the trial court erred in determining that the child was not competent to testify based on an inadequate inquiry, stated:

> We remand to the juvenile court, for a determination consistent with this opinion, the issue of D.R.'s competency to testify. If, after conducting an appropriate *voir dire* of D.R., the juvenile court determines that D.R. is incompetent to testify, the adjudicatory and dispositional order filed 23 March 1999 is affirmed. If, however, after proper inquiry, the juvenile court determines that D.R. is competent to testify, the juvenile shall be entitled to a new adjudicatory hearing.

Pugh, 138 N.C. App. at 68, 538 S.E.2d at 333.

In this case, upon determining that the trial court erred by admitting the juvenile's confession without taking evidence and ruling on whether the juvenile was in custody when he made the statement, the majority awards a new trial rather than remanding the matter to the trial court for a determination of whether respondent was in custody at the time he signed an admission of guilt. Since an apparent conflict exists in the mandate of this case and that in *Pugh*, I dissent to allow the State the opportunity to certify this issue to our Supreme Court for a resolution of the two conflicting opinions.

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1. In dissent, Judge Timmons-Goodson stated that the error could not be cured by conducting a new competency hearing. Instead, she opined that "the juvenile is entitled to a new trial on the charges . . . ." *Id.* at 68. Since the juvenile did not appeal, as a matter of right under N.C. Gen. Stat. § 7A-30 (1999), the majority opinion was not reviewed by our Supreme Court.

PALMER v. JACKSON

[157 N.C. App. 625 (2003)]

MARIA TERESA PALMER, GUARDIAN AD LITEM FOR J. CARMEN FUENTES, EMPLOYEE-PLAINTIFF v. W. BRENT JACKSON D/B/A JACKSON'S FARMING COMPANY, EMPLOYER, AND COMPANION PROPERTY AND CASUALTY, CARRIER, DEFENDANTS

No. COA02-1

(Filed 20 May 2003)

Costs— attorney fees—workers' compensation—incurred medical compensation

The trial court erred in a workers' compensation case by awarding attorney fees under N.C.G.S. § 97-90(c) based on incurred medical compensation procured for the medical providers rather than solely on the indemnity compensation awarded to plaintiff employee when the trial court's order effectively reduced the award of medical compensation to the hospitals, because: (1) medical compensation is solely in the realm of the Industrial Commission and N.C.G.S. § 97-90(c) does not give authority to the superior court to adjust such an award under the guise of attorney fees; (2) while the Industrial Commission recognizes that there may be unusual hardship cases that warrant higher medical compensation in I.C. Rule 407, no such rule has been promulgated as to exceptional legal services; and (3) upon the proper findings of fact on remand as to the work and the special nature of the case, the trial court could order that defendant carrier should further pay an amount based upon a percentage of the medical compensation.

Appeal by defendants and the University of North Carolina from orders entered 10 July and 24 July 2001 by Judge Russell J. Lanier, Jr., in Sampson County Superior Court. Heard in the Court of Appeals 21 January 2003.

White & Allen, P.A., by Thomas J. White, III; and Massengill & Bricio, PLLC, by Francisco J. Bricio, for plaintiff appellees.

Morris York Williams Surles & Barringer, LLP, by John F. Morris and Keith B. Nichols, for defendant appellants.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the University of North Carolina Hospitals and the University of North Carolina at Chapel Hill, appellants.

Turner Enochs & Lloyd, P.A., by Melanie M. Hamilton and Wendell H. Ott, for Amicus Curiae Duke University Medical Center, Memorial Mission Hospital, Inc., Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center, Moses H. Cone Memorial Hospital, The North Carolina Baptist Hospitals, Incorporated, Wake Medical Center, The North Carolina Hospital Association, and The North Carolina Medical Society.

Legal Aid of North Carolina, by Lori Elmer, Amicus Curiae.

McCULLOUGH, Judge.

Defendants W. Brent Jackson, d/b/a Jackson's Farming Company and Companion Property and Casualty, along with the University of North Carolina, for and on behalf of the University of North Carolina Hospitals and the University of North Carolina at Chapel Hill, appeal from the 10 July 2001 Order and the 24 July 2001 Supplemental Order granting appellees, the law firms of Massengill & Bricio, P.L.L.C., and White Law Offices, P.A., attorneys' fees based on incurred medical compensation recovered for their client, J. Carmen Fuentes, in his claim for workers' compensation.

The facts leading to this appeal include Mr. J. Carmen Fuentes' coming to work for defendant Jackson's Farming Company in the summer of 1998 as part of a federal program. As per the program, Jackson's Farming Company provided workers' compensation insurance for the workers on its farms. On 10 July 1998, Mr. Fuentes became overheated while working in the fields picking tomatoes. He was not given immediate medical attention and his condition worsened. By the end of the day, he was unconscious and taken by emergency personnel to Sampson Regional Medical Center, then to University of North Carolina Hospitals. It was determined that Mr. Fuentes suffered a heatstroke. The heatstroke was so severe that he is now permanently disabled and in a persistent vegetative state.

Mr. Fuentes incurred substantial medical bills amounting to $363,307.29 to the University of North Carolina Hospitals and $44,256.00 to University of North Carolina Physicians and Associates.

Attorneys from the above-mentioned appellee law firms were approached by the Fuentes family about representing their interests on behalf of Mr. Fuentes in his workers' compensation claim, as the claim had been denied by appellants. The appellee law firms accepted

the case on the premise that they would be reasonably compensated by the Industrial Commission under provisions of the Workers' Compensation Act, as the Fuentes family was not in a position to pay a fee.

After exerting much time, money and expertise, the attorneys representing Mr. Fuentes were successful in proving to the Deputy Commissioner and the Full Commission that Mr. Fuentes' heatstroke was compensable as an occupational disease. Mr. Fuentes was also awarded a 10% penalty by the Deputy as defendant had violated OSHA safety requirements. As part of the award, defendants were to pay for the medical expenses incurred by Mr. Fuentes (past and future). As these payments were past due by the time the Full Commission heard the matter, another 10% was added on pursuant to N.C. Gen. Stat. § 97-18(e) and (g) (2001). These rulings have not been appealed.

The subject of this appeal is the issue of attorneys' fees. The Deputy Commissioner awarded attorneys' fees to Mr. Fuentes' attorneys in the amount of 25% of the indemnity award (compensation due Mr. Fuentes for his loss of earning capacity). In addition, the Deputy Commissioner found that defendant-carrier had acted in bad faith in initially denying the claim, and thus defendant-carrier was ordered to pay the attorneys' fees owed to Mr. Fuentes' attorneys pursuant to N.C. Gen. Stat. § 97-88.1 (2001). The Full Commission affirmed this ruling.

What is in dispute is the request of Mr. Fuentes' attorneys to receive an additional award of attorneys' fees based upon the amount of medical compensation they procured for the medical providers. The attorneys made motions before both the Deputy and the Full Commission, asking for such an award. Both denied the respective motions. The Full Commission noted that " '[t]he approval of attorneys' fees based on a percentage of the compensation paid to plaintiff is limited to indemnity compensation and penalties and sanctions added to such compensation, but does not include expenses related to medical care and treatment,' citing *Hyler v. GTE Prod. Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993)."

The appellee attorneys are pursuing the additional fee award because they expended an abnormal amount of time and money in the preparation and litigation of the claim. They claim that a fee award based on a percentage of the indemnity award is inadequate to compensate them for their performance as this case is extraordinary in

that the indemnity award was very low when compared to the very high amounts of incurred medical expenses. Further, this was a very difficult case to litigate, as claimant had to prove that heatstroke was compensable as an occupational disease. Making matters worse was Mr. Fuentes' being in a permanent vegetative state, and Mr. Fuentes' location, he and his family being in Mexico.

Thus, Mr. Fuentes' attorneys appealed to the Superior Court of Sampson County pursuant to N.C. Gen. Stat. § 97-90(c) (2001) from the Full Commission's decision not to allow attorneys' fees based on a percentage of the awarded medical compensation.

The matter was heard before The Honorable Russell J. Lanier, Jr. The trial court filed a very detailed order on 10 July 2001. The order held that:

> It appearing to the Court that this appeal involves the exercise of the Court's discretion under G.S. 97-90(c) to determine what is a reasonable attorneys' fee to be allowed in this cause, wherein plaintiff's counsel had no fee agreement with their incompetent client but had informed his family that if they were successful they would be entitled to receive a reasonable fee under the Workers[']' Compensation Act for their services in recovering denied wage and medical compensation, including consideration of the appropriateness of counsel's contention that under all the facts and circumstances, they should be awarded a reasonable fee out of the successful recovery by them of the denied medical care expenses incurred by plaintiff as well as out of the wage indemnity recovered[.]

The trial court made numerous findings of fact as to the extensive efforts of appellees. According to the trial court, the final tally of medical compensation already incurred was as follows: $363,307.92 to University of North Carolina Hospitals; $44,256.00 to University of North Carolina Physicians; $3,000.00 to Sampson Regional Medical Center. It further noted that these amounts, totaling around $410,000.00, were far in excess of the accrued indemnity compensation, which totaled around $24,000.00. The trial court also noted that University of North Carolina Hospitals had actually received from the insurance company far in excess of the amount they had expected to recover in this matter.

The trial court apparently distinguished the *Hyler* case cited by the Full Commission, and proceeded to employ an inherent fairness

analysis. Basically, it appears from the order that it was the trial court's position that the hospitals would have recovered little but for the extraordinary efforts of the appellees, and thus the hospitals should be ordered to forfeit some of their recovery to appellees.

We note the following conclusions of law by the trial court:

> 3. Because compensability is not disputed in most workers' compensation claims and medical compensation is routinely paid without great dispute in cases of accepted compensability, attorneys' fees are usually based only upon the amount of the wage/disability compensation component, not the undisputed and accepted medical component. Here, however, by far the greater portion of the amount in controversy respecting the claim of plaintiff's counsel for reasonable attorneys' fees is the amount of accrued medical care expenses plaintiff incurred at Sampson Regional Medical Center, UNC Hospitals and UNC Physicians and Associates.
>
> 4. Plaintiff's attorneys have rendered valuable legal services to plaintiff's medical care providers as much as they have to plaintiff, in that but for the efforts of plaintiff's counsel, the medical care providers would not have been paid anything in this denied claim, as plaintiff had no health care insurance, no assets of any consequence and no prospect of future earnings.
>
> 5. The Industrial Commission erred in not considering the factors enumerated and required by G.S. 97-90(c) in determining reasonable fees, especially the time the attorneys invested, the amount of the accrued medical compensation involved, the exceptional results achieved, the experience and skill level of counsel and the nature of their services in an unusual claim involving complex legal and medical issues stubbornly defended by the defendants, and the risk of no fee at all if not successful in this denied claim.
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> . . . .
>
> 7. G.S. 97-90 and its sub-parts do not limit approval of attorneys' fees to a percentage only of indemnity compensation to the exclusion of medical care compensation recovered by attorneys in denied claims. This Court has reviewed the record and the documentation submitted of plaintiff's counsels' service and considered those factors enumerated by G.S. 97-90(c) and others as mentioned in the Court's findings of fact and conclusions of law,

> and has determined in its discretion that plaintiffs' counsel should be awarded a reasonable fee based upon both of the components of the compensation they have recovered, wage indemnity and medical expenses, in the amounts hereinafter set forth.

The trial court set the percentage at 25% and awarded that percentage of both the wage indemnity and the medical compensation, either already paid or still outstanding, to appellees. Notably, in its award the trial court stated:

> 2. That to the extent that the Carrier-Defendant, despite its knowledge of the pendency of this appeal (which continued at issue the previously-asserted claim of plaintiff's counsel), has already unilaterally paid any such amounts to said providers, then, in that event, Companion Property and Casualty, the Carrier-Defendant herein, shall nonetheless make payment of the amounts herein awarded directly to plaintiff's counsel, *but may collect on its own, reimbursement to that extent from such provider(s), who shall be entitled, by the terms of this Order and Award of attorneys' fees, only to the net amount after allowance of the attorneys' fees*[.]

(Emphasis added.) Defendants appeal.

Defendants claim that the trial court did not have authority pursuant to N.C. Gen. Stat. § 97-90(c), any other section of the Workers' Compensation Act, or case law to award appellees attorneys' fees out of the reimbursement to be paid the medical providers. We agree.

The trial court's order effectively reduced the award of medical compensation to the hospitals. As can be gleaned from the order, the trial court determined that appellees had done the hospitals a great service, and therefore felt that the deduction was justified in the interest of fairness and equity.

The hearing before the trial court was authorized pursuant to N.C. Gen. Stat. § 97-90(c). That statute "sets out the process through which counsel fees are approved by the Commission and also the procedure for disputing the Commission's decision on such matters." *Creel v. Town of Dover*, 126 N.C. App. 547, 551, 486 S.E.2d 478, 480 (1997). It provides in pertinent part:

> In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the

full Commission *with respect to attorneys' fees*, appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides; and upon such appeal said judge shall consider the matter of such fee and determine *in his discretion* the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action. In any case in which an attorney appeals to the superior court on the question of attorneys' fees, the appealing attorney shall notify the Commission and the employee of any and all proceedings before the superior court on the appeal, and either or both may appear and be represented at such proceedings.

The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

In making the allowance of attorneys' fees, the Commission shall, upon its own motion or that of an interested party, set forth findings sufficient to support the amount approved.

N.C. Gen. Stat. § 97-90(c) (emphasis added). The trial court noted in conclusion of law #5 that the Full Commission did not make findings as required by the statute as to attorneys' fees with regard to the medical compensation. This is presumably because the Full Commission felt as a matter of law that such an award was untenable, as evidenced by their citation of the *Hyler* case. We note that it appears from the record that appellees complied with the notice requirements of N.C. Gen. Stat. § 97-90(c).

The focus here is the scope of the trial court's authority under this section with respect to the award by the Full Commission.

As we have seen, the focus of the statute itself is solely upon attorneys' fees. It appears to grant the trial court broad discretion

without explicit limitations. Defendant Hospitals contend that it was beyond the scope of authority granted to the trial court by § 97-90(c) to alter the Opinion and Award with respect to the medical compensation award. They bolster this with the fact that § 97-90(c) was enacted to rectify the specific problem of the trial court not having jurisdiction over attorneys' fees in a workers' compensation cases. *See Brice v. Salvage Co.*, 249 N.C. 74, 83, 105 S.E.2d 439, 446 (1958); *Priddy v. Cab Co.*, 2 N.C. App. 331, 335-36, 163 S.E.2d 20, 23 (1968).

Appellees contend that § 97-90(c) does not limit approval of attorneys' fees to a percentage only of indemnity compensation to the exclusion of medical compensation. Further appellees point out that this Court has recognized that, under certain circumstances, it is proper to base the attorneys' fees upon an item other than the indemnity compensation award. *See Church v. Baxter Travenol Laboratories*, 104 N.C. App. 411, 409 S.E.2d 715 (1991); *Cole v. Triangle Brick*, 136 N.C. App. 401, 524 S.E.2d 79 (2000). The analysis in *Church* was as follows:

> Defendants' final contention is that the Commission had no authority to reduce the 100% credit for disability payments to 75%, and to award the remaining 25% to plaintiff as attorney's fees. The thrust of defendants' contention is that plaintiff's case is controlled by *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987). *Foster* concerned a situation in which an injured employee was awarded $7,598.16 from her employer's private insurer. Later the Industrial Commission entered a worker's compensation award in the amount of $6,741.96 and denied the employer *any* credit for the prior payment of $7,598.16. In reversing the Commission's conclusion our Supreme Court stated:
>
> > [P]olicy considerations dictate that an employer such as defendant in this case, who has paid an employee's wage-replacement benefits at the time of that employee's greatest need, should not be penalized by being denied full credit for the amount paid as against the amount which was subsequently determined to be due the employee under workers' compensation.
>
> *Id.* at 117, 357 S.E.2d at 673. We recognize *Foster*'s mandate, however, when *Foster* is read in view of G.S. 97-42 and policy considerations, the decision of the Commission must stand.

G.S. 97-42 dictates that any payments made by an employer to the injured employee during the period of her disability which were not due and payable when made, may, *subject to the approval* of the Industrial Commission, be deducted from the amount to be paid as workers' compensation. *Foster* recognized that the Commission must not make a complete denial of the credit to the employer; however, that is not the situation here. In the instant case, the Commission decided to award a credit to the defendant-employer, albeit not a full 100% credit.

The Commission's justification for not awarding the full credit was more than adequate. Baxter Travenol's private insurer paid the plaintiff only $2,797.44; the Commission later awarded $3,769.79 to plaintiff. The difference between these awards was less than $1,000—a very small amount for any plaintiff to contest. In order to award attorney's fees of any significance, the Commission correctly calculated the fees on the basis of the total award instead of the $1,000 difference. As the Commission recognized, in contested workers' compensation cases today, access to competent legal counsel is a virtual necessity. If attorney's fees were allowed to be calculated from only the difference between the workers' compensation award and the private insurer's payment, then almost no attorney could afford to take a contested case where voluntary payments had already been made. Leaving injured employees without the representation they need to obtain the complete and total amount of their workers' compensation award would defeat the purposes of the Act. In fact, employers would be encouraged to contest liability and meanwhile make voluntary payments less than that required by the Workers' Compensation Act.

The Commission's award in its discretion of a 75% credit to defendant for payments made through its private insurer and the award of the remaining 25% to plaintiff to fund attorney's fees based upon the full workers' compensation award is well within the Commission's discretionary authority. The Commission's action compensated plaintiff's counsel for his essential legal services, and the award was within the Commission's authority to approve fee payments pursuant to G.S. 97-90(c).

Church, 104 N.C. App. at 415-17, 409 S.E.2d at 717-18.

While *Church* is no doubt instructive as to policy, it is distinguishable from the case at bar. The main difference is the type of

money being discussed. The present case does not involve money that went to the employee as in *Church*, but money that goes to the hospitals that provided care to the employee. The Workers' Compensation Act addresses medical payments in several provisions, which appear to provide implicit limitations upon the discretion of the trial court under § 97-90(c). *See* N.C. Gen. Stat. § 97-59 (2001) (stating "[m]edical compensation *shall* be paid by the employer in cases in which awards are made for disability or damage to organs as a result of an occupational disease after bills for same have been approved by the Industrial Commission"). *Id.* (emphasis added). The clearest mandate of the Act is under N.C. Gen. Stat. § 97-26(a) & (b) (2001). Section (a) commands that the Commission shall adopt a fee schedule for medical compensation to determine how much reimbursement goes to providers and states that

> fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

Id. Following this, section (b) states:

> Each hospital subject to the provisions of this subsection *shall be reimbursed* the amount provided for in this subsection unless it has agreed under contract with the insurer, managed care organization, employer . . . to accept a different amount or reimbursement methodology.
>
> Except as otherwise provided herein, payment for medical treatment and services rendered to workers' compensation patients by a hospital shall be a reasonable fee determined by the Commission.

Id. (emphasis added).

Further, § 97-90(a) and § 97-91 put the approval of medical fees squarely before the Commission. *See Hansen v. Crystal Ford-Mercury, Inc.*, 138 N.C. App. 369, 376, 531 S.E.2d 867, 871 (2000).

> [T]he North Carolina Supreme Court has . . . held that the jurisdiction of the Industrial Commission, under N.C. Gen. Stat. § 97-91,
>
> > is not limited . . . solely to questions arising out of an employer-employee relationship or in the determination of

> rights asserted by or on behalf of an injured employee. *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E.2d 354, did not so hold. On the contrary the North Carolina Supreme Court has held in *Worsley v. Pipes*, 229 N.C. 465, 50 S.E.2d 504, and in *Macros v. Owen*, 229 N.C. 472, 50 S.E.2d 509, that the sole remedy of a physician to recover for services rendered to an injured employee in cases where the employee and his employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with the Act, with right of appeal to the courts for review, and that this remedy is exclusive. These decisions are equally applicable to charges for hospital services rendered to employees in Workmen's Compensation cases.
>
> *Wake County Hospital v. Industrial Comm.*, 8 N.C. App. 259, 261, 174 S.E.2d 292, 293 (1970), *overruled on other grounds by Charlotte-Mecklenburg Hospital Authority v. Industrial Comm.*, 336 N.C. 200, 211, 443 S.E.2d 716, 723 (1994).

Hansen, 138 N.C. App. at 375-76, 531 S.E.2d at 871.

The Industrial Commission has recognized that unusual cases may warrant fees higher than that allowed under the fee schedule. The Industrial Commission's Rule 407 provides in part:

> However, in *special hardship cases* where sufficient reason is demonstrated to the Industrial Commission, fees in excess of those so published may be allowed. Persons who disagree with the allowance of such fees in any case may make application for and obtain a full review of the matter before the Industrial Commission as in all other cases provided.

Workers' Comp. R. of N.C. Indus. Comm'n 407(1), 2003 Ann. R. (N.C.) 829, 829 (emphasis added).

Thus, medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority to the superior court to adjust such an award under the guise of attorneys' fees. *But see Charlotte-Mecklenburg Hospital Authority v. Industrial Comm.*, 336 N.C. at 211, 443 S.E.2d at 723 (While individual compensation issues are within the purview of the Industrial Commission, wholesale challenges to the fee schedules and the like are proper subjects of Declaratory Judgment actions in the superior court.). Doing so constitutes an improper invasion of the province of the Industrial Commission, and constitutes an abuse of discretion.

While the Industrial Commission recognizes that there may well be unusual "hardship" cases that warrant higher medical compensation in Rule 407, no such rule has been promulgated as to exceptional legal services. We have seen the Industrial Commission use its discretion to increase compensation to attorneys in *Church*. It focused on the concern that absent an increase in compensation, counsel would have no incentive to take such cases in the future. This result would leave deserving claimants uncompensated.

In the case at bar, the trial court was attempting to respond to a hardship scenario by increasing the attorneys' fees in light of the extraordinary job done despite a low indemnity recovery. Yet, the trial court's justification that the hospitals owed the attorneys for their performance is untenable.

Additionally, the trial court was apparently under the impression that defendant carrier was attempting to circumscribe the trial court's discretion by making payments to the hospitals while the § 97-90 appeal was pending. In actuality, the payments to the hospitals were required pursuant to N.C. Gen. Stat. § 97-18 (2001).

While we have held that the trial court cannot reduce the amount of medical compensation by diverting a portion of such compensation to attorneys' fees, that does not mean that it has no authority to review the adequacy of the Industrial Commission's decision regarding legal fees.

In determining the meaning of N.C. Gen. Stat. § 97-90(c), we follow traditional rules of statutory construction:

> "Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently."

Haler, 333 N.C. at 262, 425 S.E.2d at 701 (quoting *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986)).

The legislature has placed no limitation on the superior court's discretion in awarding fees pursuant to § 97-90(c). It has merely provided the Industrial Commission and the trial court with guidance as to the factors to be considered when an attorneys' fees award is being

decided. The trial court, pursuant to its discretion under § 97-90, appears to have the authority to fashion an attorneys' fees award that would take into account the special circumstances of a case such as the one at bar as the workers' compensation rules provide for doctors in the medical compensation realm. When an insurance carrier is responsible for attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1, the trial court may award attorneys an amount based on a percentage of the medical compensation recovered to be paid by the bad faith carrier over and above what they have already been ordered to pay to the medical providers and the claimant. For example, the facts in the present case were that the Industrial Commission awarded claimant indemnity compensation (including penalties). Further, it ordered that the medical providers be compensated for their bills, totaling approximately $410,000.00. Both of these amounts were to be paid by defendant carrier. The Commission then awarded appellees attorneys' fees in an amount equal to 25% of the indemnity award. This amount was also to be paid by the defendant carrier as it had violated § 97-88.1. On appeal from the Industrial Commission, the trial court, in its discretion pursuant to § 97-90(c), could determine that the appellees should be further compensated. Upon the proper findings of fact as to the work and the special nature of the case, the trial court could order that the defendant carrier should further pay appellees an amount based upon a percentage (be it 1%, 5%, 10% or so on) of the $410,000.00 medical compensation. This amount would be over and above what was ordered by the Industrial Commission to be paid by defendant carrier. Such a result appears to be within the power of the trial court as prescribed by § 97-90(c) and reviewable only for an abuse of discretion.

This matter is therefore vacated and remanded to the trial court for a determination of an appropriate attorney fee. The trial court is not prohibited from utilizing a percentage of the medical compensation as a basis for a fee. The trial court may not, however, reduce the compensation paid to medical providers in order to fund the fee award. In making its determination, the trial court should be guided by the factors set forth in the N.C. Gen. Stat. § 97-90(c).

Vacated and remanded.

Chief Judge EAGLES and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. JOHN LITTLETON THOMPSON

No. COA02-1220

(Filed 20 May 2003)

1. **Threats— misdemeanor stalking—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of misdemeanor stalking under N.C.G.S. § 14-277.3, because there was sufficient evidence from which the jury could find that defendant followed or was in the presence of the victim on more than one occasion without legal purpose and with the intent to cause her emotional distress by placing her in fear of death or bodily injury.

2. **Threats— communicating threats—motion to dismiss—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: (1) N.C.G.S. § 14-277.1 prohibits both direct and indirect threats communicated to the victim; and (2) the fact that defendant utilized a third person to communicate his threats as part of his "psychological warfare" against the victim does not negate the criminality of defendant's behavior.

Appeal by defendant from judgment entered 8 May 2002 by Judge W. Allen Cobb, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 16 April 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Thomas R. Sallenger for defendant appellant.

TIMMONS-GOODSON, Judge.

John Littleton Thompson ("defendant") appeals from his conviction and resulting sentence entered upon jury verdicts finding him guilty of misdemeanor stalking and communicating threats. For the reasons stated herein, we uphold defendant's conviction.

The evidence before the trial court tended to show the following: Adolph Bomba ("Bomba") testified for the State. Bomba stated that he was a resident of Emerald Isle, North Carolina, and was

acquainted with defendant as well as the alleged victim, Saundra Wood ("Wood"). At the time of the alleged events, Wood worked with Ashley Denton ("Denton") at the Bogue Inlet Pier ("the pier"), which was owned and operated by Mike Stanley ("Stanley").

Bomba explained that he had known defendant on a casual basis for several years and often encountered him while walking on the beach. During one of their encounters, defendant informed Bomba that he had been born at Camp Lejeune, North Carolina, and that "the government had planted a microchip in him to keep track of him when he was a baby." Bomba testified that he avoided further conversations with defendant after this disclosure. On 18 November 2001, defendant approached Bomba on the beach, stating, "I have to talk to you today." Defendant then informed Bomba that

> Emerald Isle police were harassing him and that actually Ashley [Denton] had turned him in for stalking and he had to go to court for that and he felt the officials were harassing him and that's why, and Mike Stanley had told him that he couldn't come to the pier anymore because he used to park at the pier and walk. So he wasn't allowed up there, and that he was going to get all of these people and that he had something wrong up here. He tapped his head and he was going to get disability and when he got disability he was going to go out and buy two guns, and he was going to blow away some Emerald Isle police that had been harassing him, Mike Stanley, Saundra [Wood] and Ashley [Denton] and burn the pier down.

When Bomba warned defendant that he could "get in serious trouble . . . making threats," defendant responded that, "There's nothing anybody can do to me. The judge can't do anything, the police can't do anything, and I'm going to do it." Defendant then repeated his threat to purchase weapons and shoot various persons. Following his conversation with defendant, Bomba walked to the pier and related defendant's threats to Stanley, Wood, and Denton. Bomba testified that he did not want to "be involved" but felt that, "considering the events that have been happening in the last year, [he would not be] doing the proper thing by not telling them."

Saundra Wood gave further evidence for the State. Wood testified that she had been acquainted with defendant for several years, because he often visited the pier where she worked. Wood often observed defendant at the pier's parking lot, where "he would stretch

like he was running or walking, exercising on the beach." According to Wood, defendant frequented the pier more often in April of 2001, after Stanley hired nineteen-year-old Denton, in whom defendant developed a romantic interest. Wood stated that, once Denton began working, she observed defendant at the pier "at least five times a week." Wood confirmed, however, that her relationship with defendant remained limited to a casual acquaintance, and that she did not even know his last name.

During the summer of 2001, Wood's relationship with defendant changed when he appeared unexpectedly at her residence. Defendant departed after Wood informed him that she was not interested in smoking marijuana with him. Wood testified that she resided "on a dead-end [dirt] road" in Onslow County, and that she had never informed defendant of her address. According to Wood, there was "nothing on [her] road," and she knew that defendant resided in another county approximately thirty miles from her home.

In August of 2001, Wood had a further unpleasant encounter with defendant at the pier during which he "threw a pack of cigarettes at [her] and [she] picked them up and threw them back at him and told him that [Denton] didn't want anything to do with him." Defendant responded by "storm[ing] out of the pier and he yelled back and he said, 'Women are not allowed to talk to men in that tone of voice and you will be sorry.' " The following morning, defendant telephoned Wood and told her again that she "had better never speak to him like that again; that women could not talk to men like that and [she] would live to regret it."

Following this incident, Wood contacted law enforcement about defendant's behavior. Stanley, Wood's employer, also informed defendant that he was no longer welcome on the pier property. Shortly thereafter, Wood observed defendant "going up and down [the] road [leading to her residence]" at least five or six times. When she inquired among her neighbors about his presence, they informed Wood that, although they did not know him, defendant "was telling people 'Don't let me catch you going to [or leaving] her house.' " Because of defendant's behavior, law enforcement officers informed Wood that "it probably wouldn't be safe for [her] to stay home by [herself]." Frightened, Wood left her residence and lived at a friend's house for two weeks. She also purchased a firearm for personal protection. Wood testified that, although she disliked guns, she felt the purchase was necessary

> Because I had no idea what [defendant] was going to do. He kept threatening to shoot me and burn my house down, the pier down, shoot other people, and I had no idea what he would do after all of this stuff had happened, you know, to other people in other parts of the country. You know, you don't know.

On 20 November 2001, Wood summoned law enforcement when she observed defendant standing on the steps of the pier where she worked, in apparent violation of a restraining order. According to Wood, the restraining order mandated that defendant remain at a distance of at least five hundred feet from Wood. Responding law enforcement officers took defendant into custody when they arrived.

Emerald Isle police officer Chris Cox ("Officer Cox") testified for the State and stated that he took defendant into custody on 20 November 2001. While in custody, defendant informed Officer Cox that he had "not tried to hurt anyone, but I am using psychological warfare against the people that are trying to hurt me." Defendant confirmed that Wood was "one of the people trying to hurt him." During cross-examination, Cox confirmed that the restraining order against defendant was signed on 6 September 2001 and restricted defendant's proximity to the pier to a distance of one hundred feet. Cox stated that, when he arrested him, defendant was approximately seventy-five feet away from the pier.

Defendant testified on his own behalf. Defendant characterized his statements to Bomba concerning a government-implanted microchip as "a joke." Defendant further denied that he threatened Wood or anyone else, but rather had told Bomba

> that they [Wood, Denton and Stanley] were being mean to me, and that if I wanted to be mean to them I could go down there and shoot the whole bunch and burn the bleeding pier down, except I used a different word, and then the next sentence, I said but I couldn't do that because God had a'hold [sic] of me, and I, you know, I couldn't do that.

Defendant further explained that he was self-employed as a handyman, and that Wood had asked him to visit her house in order to give her an estimate for repairing her roof. Defendant denied driving on the road leading to Wood's residence at any other time. According to defendant, Wood was jealous because of his romantic interest in Denton, and that she had once "mentioned something to me about

coming over to her house when her boyfriend was gone or something, but I wasn't interested in her." Defendant denied stalking or threatening Wood.

Upon considering the evidence, the jury found defendant guilty of stalking and communicating threats, for which the trial court imposed a suspended sentence of forty-five days' imprisonment and placed defendant on supervised probation. From his conviction and resulting sentence, defendant appeals.

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[1] On appeal, defendant argues that the trial court erred in (1) denying his motion to dismiss the charge of misdemeanor stalking; and (2) denying his motion to dismiss the misdemeanor charge of communicating threats. Defendant asserts that there was insufficient evidence to convict him of these charges. For the reasons stated herein, we conclude that there was sufficient evidence from which the jury could find defendant guilty of stalking and communicating threats, and we therefore find no error in the judgment of the trial court.

Upon a motion to dismiss in a criminal action, the trial court must view all of the evidence in the light most favorable to the State. *See State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 588 (1997). Contradictions or discrepancies in the evidence must be resolved by the jury, and the State should be given the benefit of any reasonable inference. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The trial court must then decide whether there is substantial evidence of each element of the offense charged. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E.2d at 169.

At the time of the alleged events, the offense of stalking occurred

> if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose and with the intent to cause death or bodily injury or with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury.

N.C. Gen. Stat. § 14-277.3(a) (1999).[1] Defendant argues that the State failed to present sufficient evidence that (1) he willfully on more than one occasion followed or was in the victim's presence without legal

1. Section 14-277.3 has since been amended with an effective date of 1 March 2002. It presently defines the offense of stalking as occurring

purpose and (2) that he had the necessary intent to cause Wood emotional distress. We disagree.

The State presented evidence tending to show that, in August of 2001, defendant and Wood were involved in an altercation during which defendant informed Wood that "women are not allowed to talk to men in that tone of voice and you will be sorry." Defendant telephoned Wood the following morning and warned her that she "had better never speak to him like that again" and she "would live to regret it." Stanley then informed defendant that he was no longer allowed on pier property, and Wood contacted law enforcement concerning defendant. After these express warnings that his presence was not welcome, defendant thereafter drove up and down the isolated, dead-end dirt road leading to Wood's residence and told her neighbors that he had better not "catch [them] going to [or leaving] [Wood's] house." There were no businesses or other establishments on the road, and none of Wood's neighbors was acquainted with defendant. On 20 November 2001, defendant appeared on the steps of the pier where Wood worked despite a restraining order ordering him to remain either five hundred or one hundred feet away from the pier or Wood. Defendant told Cox that he was engaged in "psychological warfare" against Wood and told Bomba that he intended to "buy two guns, and . . . blow away some Emerald Isle police that had been harassing him, Mike Stanley, Saundra [Wood] and Ashley [Denton] and burn the pier down."

We conclude that there was sufficient evidence from which the jury could find that defendant followed or was in the presence of

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if the person willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:

(1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.

(2) Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment, and that in fact causes that person substantial emotional distress.

N.C. Gen. Stat. § 14-277.3(a) (2001). The statute further defines the term "harasses" or "harassment" as

knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C. Gen. Stat. § 14-277.3(c) (2001).

Wood on more than one occasion without legal purpose and with the intent to cause her emotional distress by placing her in fear of death or bodily injury. We therefore overrule defendant's first assignment of error.

[2] Defendant further assigns error to the trial court's denial of his motion to dismiss the charge of communicating threats. A person is guilty of communicating threats if without lawful authority:

> (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
>
> (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.

N.C. Gen. Stat. § 14-277.1(a) (2001). Defendant asserts that there was insufficient evidence of this offense in that there was no evidence that he directly communicated his threats to Wood. Rather, the evidence tended to show that after being banned from the pier by Stanley and the restraining order, defendant told Bomba that "he was going to go out and buy two guns, and he was going to blow away some Emerald Isle police that had been harassing him, Mike Stanley, Saundra [Wood] and Ashley [Denton] and burn the pier down." When warned that he could "get into serious trouble [by] making threats," defendant responded that, "There's nothing anybody can do to me. The judge can't do anything, the police can't do anything, and I'm going to do it." Concerned, Bomba walked directly to the pier and relayed defendant's threats to Wood, Stanley and Denton. Defendant argues that, as he did not make these statements directly to Wood, he cannot be found guilty of communicating threats. We disagree.

Statutes should be construed to ensure that the purpose of the legislature is accomplished. *See Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991); *State v. Hines*, 122 N.C. App. 545, 550, 471 S.E.2d 109, 112 (1996), *disc. review improvidently allowed*, 345 N.C. 627, 481 S.E.2d 85 (1997). Additionally, in construing a statute, undefined words should be given their plain meaning if it is reason-

able to do so. *See Woodson*, 329 N.C. at 338, 407 S.E.2d at 227. We first note that, on its face, section 14-277.1 contains no language requiring that a threat be directly communicated to a victim by the perpetrator. Defendant nevertheless urges this Court to adopt such a requirement by interpreting the words of section 14-277.1(a)(2)—"the threat is communicated"—to encompass only direct communication between the perpetrator and the victim. Defendant cites no authority supporting his interpretation of the statute, nor have we discovered any North Carolina cases dealing directly with this issue. We therefore examine the language of the statute and the apparent intent of the General Assembly in consideration of defendant's argument.

The offense of communicating threats is codified in Article 35, entitled "Offenses Against the Public Peace," of Chapter 14 of the General Statutes. As an offense against the public peace, the gravamen of communicating threats is the making and communicating of a threat, and thus there is no requirement in section 14-277.1 that the threat actually be carried out. *See State v. Roberson*, 37 N.C. App. 714, 715, 247 S.E.2d 8, 9 (1978). Even conditional threats, if made and communicated by a defendant in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out, can constitute a violation of section 14-277.1, if the victim in fact believed the threat would be carried out. *See id.* at 715-16, 247 S.E.2d at 9-10. The word "communicate" is not defined under the statute. The ordinary meaning of the word "communicate" is "to make known; impart." *The American Heritage Dictionary* 299 (2nd ed. 1982). In apparent recognition of the numerous methods of communication that might be employed to relate a threat, section 14-277.1 allows a threat to be communicated "orally, in writing, or *by any other means*." N.C. Gen. Stat. § 14-277.1(a)(2) (emphasis added). This broad language, permitting a threat to be communicated by any means, strongly rebuts defendant's position that the legislature intended only direct threats to be punishable as an offense against the public peace.[2]

Defendant's argument concerning the viability of an indirect threat more reasonably relates to the statute's other essential elements, namely, the requirements that the threat be made in a manner

2. It is also notable, if not conclusive, that the legislature drafted 14-277.1(a)(2) utilizing the passive rather than the active voice. The use of the passive language for this element—"the threat is communicated"—rather than active language, such as "defendant communicates the threat," further weakens defendant's position that an offender must communicate directly with a victim in order to violate the statute.

and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out, and that the person threatened believes that the threat will be carried out. Indeed, it is precisely such fear on the part of a victim that offends the public peace and that the statute is designed to prevent. *See Roberson*, 37 N.C. App. at 715, 247 S.E.2d at 9 (noting that there is no requirement that a threat be carried out, merely that the person threatened believes that the threat will be carried out). Other jurisdictions construing similar statutes have concluded that indirect threats are functionally indistinguishable from direct threats, and that "[t]he rationale for imposing criminal liability for such indirect threats is especially strong where . . . the defendant is prohibited from contacting the victim and therefore may resort to other means of communicating the threat." *State v. Warsop*, 124 N.M. 683, 687, 954 P.2d 748, 752 (1997) (affirming conviction of retaliation against a witness where, upon being granted parole, the defendant told a correctional officer he intended to kill a witness who testified against him), *cert. denied*, 124 N.M. 589, 953 P.2d 1087 (1998); *State v. Lance*, 222 Mont. 92, 108, 721 P.2d 1258, 1269 (1986) (affirming the defendant's conviction of intimidation based on indirect threats and reasoning that, if only direct threats were punishable, "an individual could contact the news media threatening to take the life of a hostage if the Governor does not meet his demands, and he could not be convicted under this statute. But it is this very situation which the statute is aimed at outlawing."). We conclude that section 14-277.1 prohibits both direct and indirect threats communicated to the victim.

In the present case, defendant was prohibited by the restraining order from contacting Wood directly at the time he made his threat against her. Defendant threatened to purchase weapons, "blow away" Wood, and burn down the pier where she worked. Wood took these threats seriously, abandoning her home and purchasing a firearm for her protection. Defendant admitted that he was engaged in "psychological warfare" against Wood. The fact that defendant utilized a third person to communicate his threats as part of that "psychological warfare" does not negate the criminality of defendant's behavior. We conclude that there was sufficient evidence from which the jury could find defendant guilty of communicating threats. We therefore overrule this assignment of error.

In conclusion, we hold that the trial court did not err in denying defendant's motion to dismiss the charges against him. In the judgment of the trial court, we find

No error.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. MARK TITUS HARRIS

No. COA02-233

(Filed 20 May 2003)

1. Drugs— maintaining and keeping a dwelling for keeping or selling a controlled substance—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of maintaining and keeping a dwelling for keeping or selling a controlled substance under N.C.G.S. § 90-108(a)(7), because: (1) the State only presented evidence that defendant was seen at the house several times over a period of two months and that an officer had spoken to defendant twice during that time; (2) there was no other evidence linking defendant to the house apart from personal property of defendant found in the bedroom; and (3) the State offered no evidence that defendant owned the property, bore any expense of renting or maintaining the property, or took any other responsibility for the property.

2. Confessions and Incriminating Statements— statement inquiring about keys to truck—custodial interrogation—cocaine—inevitable discovery doctrine

Assuming that a detective's inquiry about whether defendant had keys to an old truck amounted to custodial interrogation without Miranda warnings, defendant's response that he had the keys and cocaine found in the truck's tool box by use of the keys were properly admitted in a prosecution for trafficking in and possession of cocaine because: (1) there was no reasonable possibility that the exclusion of defendant's statement that he had keys would have resulted in a different verdict when the keys to the old truck were in defendant's front jeans pocket and there was no suggestion that the jeans belonged to anyone else; (2) defendant made no attempt to demonstrate that he was subjected to actual coercion; and (3) the keys and cocaine would

still have been admissible under the inevitable discovery doctrine when the officers had a search warrant authorizing them to search defendant's person.

3. Search and Seizure— motion to suppress—validity of search warrant

The trial court did not err in a trafficking in cocaine, possession of cocaine, and knowingly maintaining a place to keep a controlled substance case by denying defendant's motion to suppress evidence obtained in a search based on an alleged improper warrant, because the magistrate's decision to issue the warrant was adequately supported.

4. Constitutional Law; Taxes— North Carolina drug tax—double jeopardy not implicated

The trial court did not violate defendant's double jeopardy rights in a trafficking in cocaine, possession of cocaine, and knowingly maintaining a place to keep a controlled substance case by failing to grant defendant's motion to dismiss the charges after his payment of $2.117.74 under the North Carolina drug tax.

5. Drugs— possession of cocaine—failure to arrest judgment

The trial court did not err by consolidating the possession and trafficking in cocaine charges into one judgment and by failing to arrest judgment as to the jury's verdict of possession of cocaine, because the legislature's intent was to proscribe and punish separately the offenses of felonious possession of cocaine and of trafficking in cocaine by possession.

Appeal by defendant from judgment entered 6 September 2001 by Judge David Q. LaBarre in Orange County Superior Court. Heard in the Court of Appeals 21 January 2003.

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

Jeffrey Evan Noecker, for defendant-appellant.

GEER, Judge.

Defendant Mark Titus Harris was convicted of trafficking in cocaine, possession of cocaine, and knowingly maintaining a place to keep a controlled substance. On appeal, defendant argues that the

trial court erred in: (1) failing to dismiss the charge of knowingly maintaining a place to keep a controlled substance for lack of sufficient evidence; (2) admitting into evidence, over a Fifth Amendment objection, defendant's statement to one of the officers and physical evidence located as a result of that statement; (3) denying defendant's motion to suppress evidence obtained in a search based on an improper warrant; (4) failing to grant defendant's motion to dismiss based on his argument that defendant's criminal prosecution, after his payment of the North Carolina drug tax, violated his constitutional right not to be twice put in jeopardy for the same offense; and (5) failing to arrest judgment as to the jury's verdict of possession of cocaine. We agree that the trial court should have dismissed as unsupported by the evidence the charge of knowingly maintaining a place to keep a controlled substance, but find the remaining arguments without merit. We therefore affirm in part and reverse in part.

Facts

In June 2000, Detective Dexter Davis heard from a confidential informant that cocaine was being sold at 116-B Daphine Drive, a duplex in Hillsborough, North Carolina. Detective Davis and other officers had seen defendant at that duplex before and had talked to him on two occasions. Detective Davis obtained a search warrant to search apartment B of the duplex, a blue van on the premises, and the person of defendant.

On 2 June 2000, Detective Davis and other police officers went to the duplex to serve the search warrant. The officers knocked on the door and announced, "Police. Search warrant. Open the door[.]" When no one opened the door, the officers used force to enter and secured five people inside, including defendant.

After patting down the five people, the officers removed them from the duplex and conducted a search pursuant to the warrant. In the course of the search, the officers found a razor on a plate with a white substance, plastic baggies cut in a manner used for the sale of drugs, a digital scale, baking soda in the refrigerator (often used as a cutting agent for cocaine), several firearms and ammunition, a small amount of marijuana, and a small rock of cocaine.

In the bedroom dresser, the officers found various personal papers of defendant, including pieces of identification for defendant, pay records of defendant, and a photo album stipulated by defendant

to belong to him that contained photos of an old truck parked approximately eight feet from the duplex. None of the personal papers of defendant found in the search listed the address for the duplex as defendant's address. The officers did find a water bill for the duplex apartment in the name of Jacob Burton—consistent with the Town of Hillsborough records—and a power bill for the duplex apartment in the name of Iris Cameron.

During the search of the apartment, defendant was kept outside in handcuffs with Officer Holloway standing next to him. Officer Holloway testified that he patted down defendant and although he found no weapons, he did find a large amount of cash that he put back in defendant's pocket.

Detectives Chappell and Fredrick searched the old rusted Ford truck in the photos. After finding a locked toolbox on the side of the truck closest to the duplex, Detective Chappell asked defendant if he had any keys and defendant said that he had. No evidence was presented that defendant had been given Miranda warnings prior to Detective Chappell's asking him if he had any keys. Detective Chappell removed a set of keys from defendant's front jeans pocket and opened the locked compartment with one of the keys. Inside the compartment was a plastic bag of white powder later determined to contain 36.2 grams of cocaine. Defendant was then arrested.

No documents showed that defendant owned the truck. A police officer testified, however, that in 1999, the officer had stopped defendant while defendant was driving the truck.

On 5 June 2000, defendant was charged with trafficking in cocaine, possession with intent to sell and/or deliver cocaine, and knowingly and intentionally maintaining a place to keep a controlled substance. A grand jury indicted defendant on all three charges on 9 October 2000. On 8 January 2001, defendant filed a motion to suppress all evidence that resulted from the search on 2 June 2000. Defendant also made a motion to dismiss the charges of maintaining a house used for keeping and selling controlled substances, trafficking in cocaine, and possession with intent to sell and/or deliver cocaine. The court denied defendant's motions prior to trial. On 6 September 2001, a jury convicted defendant of trafficking in cocaine, possession of cocaine (as a lesser included offense of possession with intent to sell or deliver), and knowingly maintaining a place to keep a controlled substance (as a lesser

included offense of intentionally maintaining a place to keep a controlled substance).[1]

I

[1] Defendant contends first that the trial court erred in failing to dismiss for lack of sufficient evidence the charge of maintaining a place to keep a controlled substance.

> "In reviewing the denial of a motion to dismiss, this Court must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists."

State v. Williams, 151 N.C. App. 535, 539, 566 S.E.2d 155, 159 (quoting *State v. McKinnon*, 306 N.C. 288, 289, 293 S.E.2d 118, 125 (1982)), *cert. denied*, 356 N.C. 313, 571 S.E.2d 214 (2002).

N.C. Gen. Stat. § 90-108(a)(7) (2001) makes it unlawful for any person "[t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, . . . which is used for the keeping or selling of [a controlled substance] in violation of this Article . . . ." Whether a person "keeps or maintains" a dwelling requires consideration of various factors, none of which is dispositive, including ownership of the property, occupancy of the property, repairs to the property, payment of taxes, payment of utility or repair expenses, and payment of rent. *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001).

Bowens compels the conclusion that the State, in this case, offered insufficient evidence to establish a violation of N.C. Gen. Stat. § 90-108(a)(7). In *Bowens*, this Court held that a motion to dismiss should have been granted when "[t]here [was] no evidence Defendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling." *Id.* at 222, 535 S.E.2d at 873. The Court pointed out that the State's evidence showed only that:

1. "Intentionally" maintaining a place for the purpose of keeping or selling a controlled substance is a Class I felony. N.C. Gen. Stat. § 90-108(b). The jury declined to find that defendant acted intentionally, but instead found that he was guilty of knowingly maintaining a place to keep a controlled substance, a Class 1 misdemeanor under N.C. Gen. Stat. § 90-108(a)(7).

> Defendant was seen in and out of the dwelling 8-to-10 times over the course of 2-to-3 days; nobody else was seen entering the premises during this 2-to-3 day period of time; men's clothing was found in one closet in the dwelling; Branch testified he believed Defendant lived at 1108 Carolina Street, although he offered no basis for that opinion and had not checked to see who the dwelling was rented to or who paid the utilities and telephone bills.

Id. at 221-22, 535 S.E.2d at 873. This Court held that such evidence did not amount to substantial evidence of a violation of N.C. Gen. Stat. § 90-108(a)(7):

> Testimony Defendant was present at the dwelling on several occasions and testimony he lived "[a]t 1108 Carolina Street" cannot alone support a conclusion Defendant kept or maintained the dwelling. Although men's clothing was found in the dwelling, there is no evidence the clothes belonged to Defendant. Accordingly, Defendant's motion to dismiss the charge of maintaining a dwelling to keep or sell controlled substances should have been granted.

Id. at 222, 535 S.E.2d at 873.

In this case, the State presented evidence only that defendant was seen at the house several times over a period of two months and that an officer had spoken to defendant twice during that time. There is no other evidence linking defendant to the house apart from personal property of defendant found in the bedroom. At most, this evidence supports a finding that defendant occupied the property from time to time although none of defendant's personal papers listed the duplex as defendant's address. The State offered no evidence that defendant owned the property, bore any expense of renting or maintaining the property, or took any other responsibility for the property. This evidence is indistinguishable from the facts of *Bowens* and other decisions in which this Court has held that a motion to dismiss should have been granted. *See also State v. Kraus*, 147 N.C. App. 766, 768-69, 557 S.E.2d 144, 147 (2001) (occupancy of hotel room insufficient evidence when State offered no evidence that defendant bore the expense of the room); *State v. Hamilton*, 145 N.C. App. 152, 154, 549 S.E.2d 233, 235 (2001) (evidence insufficient when State showed only that defendant was often at the apartment leased by his girlfriend). The trial court should have granted defendant's motion to

dismiss the charge of maintaining and keeping a place to keep or sell a controlled substance.

II

[2] Defendant next contends that Detective Chappell's question to defendant—"if he had any keys"—amounted to custodial interrogation and because defendant was not given his Miranda warnings, his response and all physical evidence obtained as a result of that interrogation should have been excluded. Assuming without deciding that Detective Chappell's inquiry about keys amounted to custodial interrogation, we hold that admission of defendant's response was harmless beyond a reasonable doubt and admission of the physical evidence was in any event permissible.

In *State v. Phelps*, 156 N.C. App. 119, 575 S.E.2d 818 (2003), a police officer recommended to defendant that he tell the officer if he had any illegal substances in his possession before they reached the jail. The defendant responded that he had crack cocaine in his front coat pocket. *Id.* at 121, 575 S.E.2d at 820. This Court held that admission of defendant's statement was harmless beyond a reasonable doubt since the cocaine was in the pocket of a coat worn by defendant and there was no evidence to suggest that defendant did not own the coat or that it had recently come into his possession. *Id.* at 124, 575 S.E.2d at 822. The facts of this case are indistinguishable. The keys to the old truck were in defendant's front jeans pocket along with other keys belonging to defendant and there has been no suggestion that the jeans belonged to anyone else. As a result, there is no reasonable possibility that the exclusion of defendant's statement—that he had keys—would have resulted in a different verdict. *Id.*

With respect to admission of the truck keys and the cocaine found in the truck's tool box, in *Phelps*, this Court construed *State v. May*, 334 N.C. 609, 612-13, 434 S.E.2d 180, 182 (1993), *cert. denied*, 510 U.S. 1198, 127 L. Ed. 2d 661 (1994), as holding that physical evidence obtained in violation of *Miranda* is admissible unless obtained as a result of actual coercion.[2] *Phelps*, 156 N.C. App. at 124-25, 575 S.E.2d at 822. Defendant has made no attempt to demonstrate that he was subjected to actual coercion.

2. This Court recognized that the decision in *May* could be called into doubt by *Dickerson v. United States*, 530 U.S. 428, 147 L. Ed. 2d 405 (2000), but noted that the Court of Appeals is bound by *May* unless and until our Supreme Court holds otherwise. *Phelps*, 156 N.C. App. at 125 n.1, 575 S.E.2d at 822 n.1.

Even assuming that defendant could point to evidence of coercion, the keys and cocaine would still have been admissible under the inevitable discovery doctrine:

> "Under the inevitable discovery doctrine, evidence which is illegally obtained can still be admitted into evidence as an exception to the exclusionary rule when "the information ultimately or inevitably would have been discovered by lawful means." . . . Under this doctrine, the prosecution has the burden of proving that the evidence, even though obtained through an illegal search, would have been discovered anyway by independent lawful means."

State v. Woolridge, 147 N.C. App. 685, 689, 557 S.E.2d 158, 160-61 (2001) (quoting *U.S. v. Nix*, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 387-88 (1984)), *disc. review granted*, 356 N.C. 624, 575 S.E.2d 761 (2002). The question in this case is whether officers would have inevitably located the truck keys even without defendant's acknowledgment that they were in his jeans pocket.

There is no dispute that the officers had a search warrant specifically authorizing them to search defendant's person. Had defendant refused to answer the question about the keys, the officers would have been able to lawfully search defendant and necessarily would have found the keys in defendant's front jeans pocket. *See Phelps*, 156 N.C. App. at 126, 575 S.E.2d at 823 (cocaine in coat pocket would have been inevitably discovered when defendant reached the jail and was searched during processing); *State v. Vick*, 130 N.C. App. 207, 218, 502 S.E.2d 871, 878 (drugs in refrigerator would have been inevitably discovered when police searched premises pursuant to search warrant), *disc. review denied*, 349 N.C. 376, 525 S.E.2d 464, and *appeal dismissed*, 349 N.C. 376, 525 S.E.2d 465 (1998). This assignment of error is overruled.

III

[3] Defendant argues that the trial court should have granted his motion to suppress on the grounds that the affidavit supporting the application for the search warrant was insufficient to establish probable cause. It is well established that the standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant. *State v. Reid*, 151 N.C. App. 420, 423, 566 S.E.2d 186, 189 (2002). After a careful review of the record, we find that substantial

evidence exists in the record to support the magistrate's issuance of the search warrant.

Defendant bases his argument on *State v. Johnson*, 143 N.C. App. 307, 547 S.E.2d 445 (2001), in which this Court held that the information in the warrant application *was sufficient* to support the finding of probable cause. The fact that the warrant application in the case before us was not as detailed as the one in *Johnson* does not necessarily lead to the conclusion that the present application was insufficient. *Johnson* did not purport to set a floor with respect to the amount of detail required in a search warrant application.

By contrast, in *State v. Marshall*, 94 N.C. App. 20, 27, 380 S.E.2d 360, 364, *disc. review denied and appeal dismissed*, 325 N.C. 275, 384 S.E.2d 526 (1989), this Court considered a warrant application virtually identical to the one submitted in this case and found that the application provided a sufficient basis for the magistrate to issue a search warrant. We therefore hold that the magistrate's decision to issue the warrant in this case was adequately supported and the trial court properly denied defendant's motion to suppress.

IV

[4] Prior to his criminal trial, defendant was assessed in a civil proceeding with a "drug tax" of $2,117.74. This amount was paid out of the cash found on defendant at the time he was arrested. Defendant contends that payment of the drug tax gave rise to double jeopardy.

Defendant's argument has already been rejected by this Court in *State v. Woods*, 136 N.C. App. 386, 524 S.E.2d 363, *disc. review denied*, 351 N.C. 370, 543 S.E.2d 147 (2000):

> Defendant bases his claim of double jeopardy on the North Carolina Department of Revenue's collection of unpaid taxes on the seized drugs pursuant to the North Carolina Controlled Substance Tax Act, N.C. Gen. Stat. §§ 105-113.105 through 105-113.113 (1995) ("Drug Tax") in addition to prosecution against him in this case. . . . Defendant contends the trial court's ruling must be reversed pursuant to *Lynn v. West*, 134 F.3d 582, 593-94 (4th Cir.), *cert. denied*, 525 U.S. 813, 142 L. Ed. 2d 36 (1998), where the Fourth Circuit held that the North Carolina Drug Tax constitutes criminal punishment. The State asserts the trial court correctly denied defendant's motion to dismiss under *State v. Adams*, 132 N.C. App. 819, 513 S.E.2d 588, 589, *disc. rev.*

denied, 350 N.C. 836, — S.E.2d —, *cert. denied*, — U.S. —, 145 L. Ed. 2d 414 (1999), where a panel of this Court upheld assessment and collection of the Drug Tax against a challenge under the Double Jeopardy Clause. As we noted in *Adams*, with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State. *Id.* Absent modification by our Supreme Court, a panel of this Court is bound by the prior decision of another panel addressing the same issue. *Id.* Accordingly, we are bound by our decision in *Adams* and defendant's assignment of error based on double jeopardy fails.

Id. at 389-90, 524 S.E.2d at 365. *See also State v. Crenshaw*, 144 N.C. App. 574, 551 S.E.2d 147 (2001); *State v. Wambach*, 136 N.C. App. 842, 526 S.E.2d 212 (2000). This assignment of error is overruled.

V.

[5] Defendant further argues that the trial court erred in consolidating the possession and trafficking charges into one judgment, contending that the court should instead have arrested judgment as to the possession charge. Defendant bases his argument on *State v. Fletcher*, 27 N.C. App. 672, 220 S.E.2d 101 (1975), in which this Court held that when a defendant was convicted of both armed robbery and the lesser-included offense of assault with a deadly weapon, judgment should have been arrested as to the assault with a deadly weapon charge.

Under *State v. Pipkins*, 337 N.C. 431, 433-34, 446 S.E.2d 360, 362 (1994), however, a court may impose multiple punishments in a single trial for the same conduct when the legislature has expressed a clear intent to proscribe and punish that same conduct under separate statutes. The *Pipkins* Court addressed the exact offenses that are at issue here—possession of cocaine and trafficking in cocaine—and "conclude[d] that the legislature's intent was to proscribe and punish separately the offenses of felonious possession of cocaine and of trafficking in cocaine by possession." *Id.* at 434, 446 S.E.2d at 363. Under *Pipkins*, the trial court in this case did not err in failing to arrest judgment as to the jury's verdict on the possession charge.

For the foregoing reasons, we reverse the trial court's ruling on defendant's motion to dismiss as to the charge of maintaining and keeping a dwelling for keeping or selling a controlled substance. We affirm as to the remaining assignments of error.

Reversed in part, affirmed in part.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. SIDNEY RAY CRUDUP

No. COA02-649

(Filed 20 May 2003)

Confessions and Incriminating Statements— custodial interrogation—motion to suppress-failure to give Miranda warnings

The trial court erred in a felonious possession of cocaine case by denying defendant's motion to suppress incriminating statements made without Miranda warnings in response to police questioning while he was handcuffed and detained, and defendant is entitled to a new trial because: (1) the totality of circumstances revealed that defendant was in custody when he was immediately handcuffed and detained as a possible burglary suspect; (2) defendant was being interrogated when a reasonable officer would have known that any response to the pertinent questions would have incriminated defendant; (3) defendant was not subjected to general on-the-scene questioning and the circumstances of this case exceeded the narrow scope of the public safety exception; and (4) the error was not harmless when the State's evidence of constructive possession rested upon defendant's unconstitutionally procured statement claiming possession of the items in an apartment which rested on defendant's physical presence in a house where he did not reside.

Appeal by defendant from judgment entered 17 October 2001 by Judge Henry W. Hight, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 12 March 2003.

Attorney General Roy Cooper, by W. Richard Moore, Special Deputy Attorney General, for the State.

Paul Pooley, for the defendant-appellant.

WYNN, Judge.

Sidney Ray Crudup appeals his conviction for felonious possession of cocaine and presents one issue: Did the trial court err by admitting defendant's incriminating statements (made without *Miranda* warnings in response to police questioning while handcuffed and detained) in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966)? We conclude, based upon the totality of the circumstances, defendant was subjected to an unconstitutional custodial interrogation. Furthermore, we hold that this error was not harmless beyond a reasonable doubt; accordingly, we grant defendant a new trial.

In February 2001, James Patterson rented an apartment to defendant with the understanding that defendant would not reside in the apartment; instead, defendant's girlfriend and baby would reside therein. Under that understanding, Patterson gave one key to defendant. On 22 May 2001, Patterson asked defendant to move his girlfriend and baby out of the apartment because of delinquent rent payments. After arguing, Patterson called the police and, for reasons not revealed in the record, reported a break-in.

In response to Patterson's call, Officer Jeff Marbrey and five to six other officers went to the apartment to investigate the alleged break-in. However, as Officer Marbrey prepared to enter the residence, defendant exited the front door. Three officers handcuffed defendant and detained him as a burglary suspect. Thereafter, Officer Marbrey and another officer searched the house for the alleged burglar; in the course of doing so, Officer Marbrey observed numerous plastic sandwich bags in the bedroom closet. Upon closer inspection, Officer Marbrey discovered what was later determined to be crack cocaine. No one else was found in the house. Shortly thereafter, Officer Marbrey asked defendant if he: (1) resided in the house, (2) was the only resident, and (3) owned the possessions found on the premises. Defendant answered the questions affirmatively. Officer Marbrey placed defendant under arrest for drug possession.

At trial, over defendant's objection, the trial court admitted defendant's inculpatory statements into evidence. The trial court reasoned that the questions "by the officers were objective and reasonable . . . for their own protection [and] the protection of the public at large." On 17 October 2001, defendant was convicted of possession of cocaine and sentenced to 8 to 10 months in the North Carolina Department of Corrections. On appeal, defendant assigns error to the admission of his inculpatory statements into evidence. Furthermore,

defendant contends that the statements were incurably prejudicial. After carefully reviewing the record, we agree.

"It is well-established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (citation omitted). "The determination of whether a defendant was in custody, based on those findings of fact, however, is a question of law and is fully reviewable by this Court." *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000) (citations omitted). Likewise, "the trial court's determination of whether an interrogation is conducted while a person is in custody [also] involves reaching a conclusion of law, which is fully reviewable on appeal." *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (citation omitted). Accordingly, we review the trial court's determination that defendant was not entitled to *Miranda* warnings under a *de novo* review.

"*Miranda* warnings are required only when a defendant is subjected to custodial interrogation." *State v. Patterson*, 146 N.C. App. 113, 121 552 S.E.2d 246, 253 (2001) (citations omitted). The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. Accordingly, in determining whether defendant was entitled to *Miranda* protections this Court must make three inquires: First, was defendant in custody? Second, was defendant interrogated? Third, do any exceptions to the *Miranda* rule apply?

First, was defendant in custody? In *State v. Buchanan*, the Supreme Court of North Carolina held that "the appropriate inquiry in determining whether a defendant is in 'custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' " *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (2001) (citations omitted). "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood this situation." *Id.* at 341-42, 543 S.E.2d at 829 (citations omitted).

Under the facts of this case, we conclude, as a matter of law, that defendant was in "custody." The record reveals that defendant was immediately handcuffed and detained as a possible burglary suspect.

While handcuffed, defendant was questioned while four officers, including Officer Marbrey, surrounded him. Most assuredly, defendant's freedom of movement was restrained to the degree associated with a formal arrest. A reasonable person under these circumstances would believe that he was under arrest. *See e.g., State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 440 (2002) (holding "that handcuffing defendant in the back of a police car" constituted custody under *Buchanan.*).

Second, was defendant interrogated? Our Supreme Court has held that "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect" constitute an interrogation. *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000).

In the case *sub judice*, after searching the residence and finding what he believed to be crack cocaine, Officer Marbrey questioned defendant, asking if he or anyone else lived in the residence and whether he owned the contents therein. Unquestionably, a reasonable officer would know, or should have known, that any response to these questions would have incriminated defendant. If defendant denied having a right to be in the home, then defendant's response would have tended to incriminate him as a burglar. On the other hand, if defendant admitted that he lived at the home and owned the possessions therein, then his response would have tended to incriminate him for possessing cocaine. Therefore, under the definition articulated by our Supreme Court in *Golphin*, we conclude that defendant was interrogated.

Third, do any exceptions to the *Miranda* rule apply? The trial court in this case held that defendant was not entitled to *Miranda* warnings because (1) the questions were permissible as routine on-the-scene questions, and (2) the questions were permissible under the public safety exception.

Miranda warnings are not required during normal investigative activities conducted prior to arrest, detention, or charge. *Miranda*, 384 U.S. at 477; *State v. Meadows*, 272 N.C. 327, 158 S.E.2d 638 (1968). In determining whether specific questions constitute custodial interrogation or general on-the-scene questioning, this Court has found the following factors to be relevant: (1) the nature of the interrogator, (2) the time and place of the interrogation, (3) the degree to which suspicion had been focused on the defendant, (4) the nature of the interrogation and (5) the extent to which defendant was restrained or free

to leave. *State v. Clay*, 39 N.C. App. 150, 155, 249 S.E.2d 843, 846-47 (1978), *rev'd on other grounds by* 297 N.C. 555, 256 S.E.2d 176 (1979). While none of the factors standing alone is determinative, each factor is relevant.

In light of these factors, we hold that defendant was subjected to a custodial interrogation and not general on-the-scene questioning because: (1) defendant was interrogated by a police officer; (2) defendant was interrogated while in handcuffs; (3) Officer Marbrey testified that defendant was immediately considered a burglary suspect; (4) Officer Marbrey asked incriminating questions; and (5) defendant was not free to leave.[1]

In the alternative, the trial court found, and the State contends, that the questions asked were legitimately based upon *Miranda*'s "public safety exception." *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994). In *New York v. Quarles*, 467 U.S. 649 (1984), the United States Supreme Court held that *Miranda* warnings are not required where "police officers ask questions reasonably prompted by a concern for the public safety." The essential purpose of the public safety exception is the "objectively reasonable need to protect the police or the public from any immediate danger associated with . . . weapon[s]." *Id.* at 659. However, the *Quarles* Court characterized the public safety exception as a "narrow exception," intended to neutralize volatile situations and to address situations where spontaneity rather than adherence to a police manual is necessary.

In the case *sub judice*, the trial court concluded that "the questioning by the officers [was] objective and reasonable . . . for their own protection [and] the protection of the public at large." We hold the circumstances in this case exceed the narrow scope of the public safety exception. Defendant was handcuffed and surrounded by three officers. There was no risk of imminent danger to the public, the officers, or even to the defendant. Absent the pro-

1. Of the three questions asked by Officer Marbrey, only two exceeded the scope of either the on-the-scene general questioning or routine booking exceptions. *See e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (where Supreme Court held that questions regarding a suspect's name, address, physical characteristics, date of birth, are permitted under the 'routine booking question' exception which exempts from *Miranda*'s coverage certain "biographical data necessary to complete booking or pretrial services.").

Under these exceptions, defendant's statement that he lived at the residence were permissible. However, questions regarding who else lived in or stayed at the home, and the ownership of the belongings in the home were, under the particular facts of this case, outside the scope of these exceptions.

tection of this exception, or any other exception, the officers had a duty to administer to defendant his *Miranda* rights before proceeding with questioning. Accordingly, the trial court committed error by not suppressing defendant's inculpatory statements obtained in violation of *Miranda*.

While we conclude that the trial court erred in admitting defendant's inculpatory statements, we recognize that not all constitutional errors warrant a new trial. Under N.C. Gen. Stat. § 15A-1443(b) (2002), "[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." An error of constitutional magnitude will be held to be harmless beyond a reasonable doubt only when "the court can declare a belief . . . that there is no reasonable possibility that the violation might have contributed to the conviction." *State v. Lane*, 301 N.C. 382, 387, 271 S.E.2d 273, 277 (1980) (emphasis added). After carefully reviewing the record, we conclude, in light of the State's tenuous evidence of defendant's constructive possession, the trial court's error was not harmless beyond a reasonable doubt.[2]

To convict a defendant of possessing a controlled substance, the State must prove beyond a reasonable doubt that defendant knowingly possessed the substance. *State v. Givens*, 95 N.C. App. 72, 76, 381 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). Constructive possession may be inferred when a defendant has exclusive control over the premises where a substance is found. *State v. Givens*, 95 N.C. App. at 76, 381 S.E.2d at 871. Even where a defendant has nonexclusive control over the premises, one can infer constructive possession if other incriminating circumstances exist to show defendant had the power and intent to control the substance. *Id.*

In a strikingly similar case, *State v. Washington*, 330 N.C. 188, 410 S.E.2d 55 (1991), a police officer observed a vehicle with a broken headlight and other damage. Suspecting a possible hit and run, the officer stopped the vehicle. Defendant, the driver of the vehicle, did not have a license. Accordingly, the officer placed defendant in his

2. As noted, the burden is upon the State to show that a constitutional error is harmless beyond a reasonable doubt. The State's brief, six pages in length, does not make one argument that the error was harmless beyond a reasonable doubt. On this basis alone—the State's failure to shoulder its burden—we could find prejudice.

patrol car while checking his identity. Upon returning to defendant's car, the officer noticed a round of ammunition on the floorboard. The officer asked defendant, still sitting in the backseat of the patrol car, where the gun was located. Defendant denied having a gun, and, further, stated that the car did not belong to him. Furthermore, defendant stated: "Man, there ain't no gun in the car. It's not my car. You can search it, you're not going to find anything."

While searching the vehicle, the officer found small plastic bags with a white powdery substance, later proved to be cocaine. The officer showed the bags to defendant and said, "look what I found." Defendant said that "he had bagged up baking soda to look like cocaine so that he could sell it as cocaine and make a good profit." At that point, the officer placed defendant under arrest for possession of cocaine.

At trial, defendant moved to suppress his inculpatory statements because they were obtained in violation of *Miranda*. Although defendant's movement was involuntarily restricted, the trial court found that defendant was not "in custody." Accordingly, the trial court concluded that defendant was not entitled to *Miranda* warnings.

Our Supreme Court, based upon Judge Greene's dissent, reversed the trial court's decision. In addition to finding custodial interrogation, the Court found that the error was not harmless beyond a reasonable doubt. Thus, the Court adopted Judge Greene's reasoning that: "Without the unlawfully obtained statements, the only evidence of the defendant's guilt [was] circumstantial. As to the possession element, the only evidence is that the cocaine was found in a car driven by the defendant. However, the car belonged to someone else." Accordingly, the Court held that "in light of the less than overwhelming circumstantial evidence, [we conclude admission of defendant's statement] was not harmless error beyond a reasonable doubt." *State v. Washington*, 330 N.C. 188, 188, 410 S.E.2d 55, 56 (1991) (adopting 102 N.C. App. 535, 538-40, 402 S.E.2d 851, 853-55 (1991) (Greene, J., dissenting)).

In the case *sub judice*, the State's evidence of constructive possession substantially rested upon defendant's unconstitutionally procured statement claiming possession of the items in the apartment. Absent this evidence, the State's theory of constructive possession, as in *Washington*, rested on defendant's physical presence in a house where he did not reside. Based on this scant circumstantial evidence,

it can not be said that "there is no reasonable possibility that the violation might have contributed to the conviction." *State v. Lane*, 301 N.C. at 387, 271 S.E.2d at 277. Accordingly, we conclude that the trial court error in admitting defendant's incriminating statements was not harmless beyond a reasonable doubt. Defendant is therefore entitled to a,

New trial.

Judges TIMMONS-GOODSON and LEVINSON concur.

SHELBY JEAN GILMORE, PLAINTIFF v. BOBBY LEE GARNER, DEFENDANT

No. COA02-663

(Filed 20 May 2003)

Divorce— specific performance of separation agreement— divisible railroad retirement benefits

The trial court did not err by granting summary judgment in favor of plaintiff wife granting her specific performance of a separation agreement, by granting plaintiff 29.5% of defendant's divisible railroad retirement benefits, and by taxing defendant with the costs of this action because: (1) the language of the separation agreement reflects the parties' intention that upon defendant husband's retirement, the divisible portion of his retirement benefits would be divided in accordance with governing law; (2) the fact that specific performance of the separation agreement granted plaintiff a portion of the marital property did not convert plaintiff's action into one for equitable distribution; and (3) utilizing the fixed percentage method, the trial court awarded plaintiff less and not more than the retirement benefits which plaintiff was entitled to receive under the separation agreement and applicable law.

Appeal by defendant from order and judgment entered 15 February 2002 by Judge Spencer G. Key in Surry County District Court. Heard in the Court of Appeals 8 January 2003.

Finger, Parker, Avram & Roemer, L.L.P., by Raymond A. Parker, for plaintiff appellee.

Franklin Smith for defendant appellant.

TIMMONS-GOODSON, Judge.

Bobby Lee Garner ("defendant") appeals from an order of the trial court granting summary judgment in favor of defendant's former wife, Shelby Jean Gilmore ("plaintiff"), and from an order granting plaintiff a 29.5% portion of defendant's divisible railroad retirement benefits. For the reasons stated herein, we affirm the order and judgment of the trial court.

The relevant factual history of the present appeal is as follows: The parties married one another on 18 December 1955 and remained together until 24 April 1988, when they separated. On 24 January 1989, the parties entered into a "Contract of Separation and Property Settlement Agreement" ("the separation agreement"). Section sixteen of the separation agreement included the following language:

> It is stipulated and agreed that Husband has a substantial retirement account built up under the Railroad Retirement Act. Wife agrees not to make any demand on Husband at the present time, for any portion of this Railroad Retirement. However, it is stipulated and agreed by both parties that each of them may draw Railroad Retirement benefits in accordance with law when they are eligible to so draw, and that the other party will not contest any of said benefits.

On 14 November 2000, plaintiff filed a complaint in Surry County District Court seeking specific performance of the separation agreement. In her complaint, plaintiff alleged that defendant had "failed and refused to cooperate with the plaintiff in allowing the plaintiff to receive from the Railroad Retirement Board those benefits to which she was entitled and has contested and denies she has any rights to said benefits." Plaintiff requested that the trial court enforce specific performance of the separation agreement by means of a qualified domestic relations order. In addition to the complaint, plaintiff moved the court for summary judgment, contending that there were no genuine issues of material fact and that she was entitled to judgment as a matter of law.

The matter came before the trial court on 10 December 2001. After reviewing the pleadings, exhibits, discovery, and after hearing

arguments by counsel, the trial court determined that plaintiff was entitled to summary judgment and to specific performance of the separation agreement. To that end, the trial court entered an order granting plaintiff a 29.5% share of defendant's divisible railroad retirement benefits. Defendant appeals from the judgment and order of the trial court.

Defendant argues on appeal that the trial court erred in granting summary judgment in favor of plaintiff and in awarding plaintiff a portion of his railroad retirement benefits. For the reasons stated herein, we affirm the order and judgment of the trial court.

The standard of review on a motion for summary judgment requires the trial court to review all pleadings, affidavits, answers to interrogatories and other materials offered in the light most favorable to the party against whom summary judgment is sought. *See Harrington v. Perry*, 103 N.C. App. 376, 378, 406 S.E.2d 1, 2 (1991). The trial court properly grants summary judgment where there is no genuine issue of material fact to be decided and either party is entitled to a judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Harrington*, 103 N.C. App. at 378, 406 S.E.2d at 2.

Defendant argues that the trial court erred in granting summary judgment in favor of plaintiff and awarding her benefits under the separation agreement. Defendant contends that the separation agreement only allows plaintiff to apply for an individual "divorced spouse annuity" available under the Railroad Retirement Act, and does not entitle plaintiff to a portion of defendant's divisible benefits. We disagree.

Parties to a divorce may provide for division of retirement benefits as part of a separation agreement. *See* N.C. Gen. Stat. § 50-20(d) (2001); *Patterson v. Patterson*, 137 N.C. App. 653, 666, 529 S.E.2d 484, 491, *disc. review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).

> Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution.

Lane v. Scarborough, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). Where a contract is unambiguous, its construction is a matter of law

for the court to determine. *See Bicycle Transit Authority v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985); *Lane*, 284 N.C. at 410, 200 S.E.2d at 624. As stated in *Lane*,

> "Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made." However, "[n]o meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions."

Lane, 284 N.C. at 410-11, 200 S.E.2d at 624 (quoting 17 Am. Jur. 2d *Contracts* § 255 at 649, 652 (1964)) (citations omitted) (alteration in original). We therefore examine the language of the separation agreement to determine the intent of the parties at the time they entered the agreement.

Section sixteen of the separation agreement recites that the parties

> stipulated and agreed that Husband has a substantial retirement account built up under the Railroad Retirement Act. Wife agrees not to make any demand on Husband at the present time, for any portion of this Railroad Retirement. However, it is stipulated and agreed by both parties that each of them may draw Railroad Retirement benefits in accordance with law when they are eligible to so draw, and that the other party will not contest any of said benefits.

Defendant contends that the language concerning "Railroad Retirement benefits" contained in the separation agreement refers to a "divorced spouse annuity" available to plaintiff under the Railroad Retirement Act. A "divorced spouse annuity" is a benefit available under certain conditions to a former spouse of a railroad employee. Railroad Retirement Act, 20 C.F.R. §§ 216.60, 216.62 (2002). Such a

benefit does not reduce an employee's annuity, because it is a separate benefit paid from the railroad retirement trust funds rather than from an employee's account and does not represent a divisible portion of the employee's annuity. *Id.* at §§ 226.10, 226.30. Defendant argues that the separation agreement does not award plaintiff any of his divisible retirement benefits, but merely indicates that he will not contest plaintiff's right to seek a divorced spouse annuity under the Railroad Retirement Act. We do not agree with defendant's interpretation of the separation agreement.

A divorced spouse annuity under the Railroad Retirement Act does not comprise a portion of defendant's annuity and cannot be considered part of defendant's retirement account. Plaintiff was eligible for a divorced spouse annuity regardless of, or even in the complete absence of, specific language in the separation agreement regarding such an annuity. Given the fact that plaintiff did not need defendant's consent or aid in seeking a divorced spouse annuity, defendant's assertion that the term "Railroad Retirement benefits" contained in the separation agreement referred only to the divorced spouse annuity would render the entire paragraph at issue superfluous and without meaning. *See Lane*, 284 N.C. at 411, 200 S.E.2d at 625 (rejecting meaning, terms, or implied conditions that are inconsistent with the expressed provisions of a separation agreement).

Moreover, the parties acknowledged in the separation agreement that defendant had "a substantial retirement account built up under the Railroad Retirement Act." Both parties further agreed that plaintiff would "not . . . make any demand on [defendant] *at the present time*, for any portion of *this* Railroad Retirement [account]" but that plaintiff was free to seek such benefits at a later date. Defendant agreed that he would not contest plaintiff's right to such benefits when and if she chose to pursue them. Thus, the language of the separation agreement indicates that the parties agreed that plaintiff would not seek her share of defendant's retirement account "at the present time" (i.e., at the date of the separation agreement) but would wait to seek such benefits until a later date. Such agreement was particularly reasonable, as the value of the retirement benefits at issue was not determinable until defendant's retirement. Defendant did not retire until 29 March 2000, at which time plaintiff sought to receive her portion of defendant's divisible retirement benefits as contemplated by the separation agreement.

Defendant's interpretation of the separation agreement would render the words "at the present time" either illogical or unnecessary

in the context of the surrounding paragraph and overall separation agreement. If the parties intended plaintiff to receive no portion of defendant's retirement account, as defendant contends, the agreement more reasonably might state that "Wife agrees not to make any demand on Husband for any portion of this Railroad Retirement" or, alternatively, might omit any reference to the retirement account altogether. Where a separation agreement is unambiguous, the appellate courts should not "attempt to search for the meaning the parties gave to the words regardless of the understanding which is normally given to them" and "[a] party to a contract should not be allowed to say he gave a different meaning to words which are not ambiguous." *Higgins v. Higgins*, 321 N.C. 482, 486, 364 S.E.2d 426, 429 (1988) (holding that the phrase "live continuously separate and apart" contained in a separation agreement had a definite meaning when viewed objectively). We conclude the language of the separation agreement reflects the parties' intention that upon defendant's retirement, the divisible portion of his retirement benefits would be divided in accordance with governing law. The trial court therefore did not err in granting summary judgment to plaintiff.

Defendant further contends that the judgment and order by the trial court granting plaintiff a portion of defendant's railroad retirement benefits are in error because "the decision amounted to equitable distribution which is prohibited under the separation agreement." We do not agree.

In their agreement, the parties agreed to release one another "from any *further* claim which would or might arise in favor of either under N.C.G.S., Section 50-20, or any other state or federal law involving division of property acquired during marriage." Plaintiff's action for specific performance is not a *further* claim upon the marital assets, however; rather, it arises under the terms of section sixteen of the separation agreement. A marital separation agreement is subject to the same rules pertaining to enforcement as any other contract. *See Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979). Thus, parties to a separation agreement dividing marital assets may enforce such agreements through an action for specific performance. *See Rose v. Rose*, 66 N.C. App. 161, 163, 310 S.E.2d 626, 628 (1984). In her complaint, plaintiff clearly sought specific performance of section sixteen in the parties' separation agreement, which the trial court enforced by entering an order granting plaintiff that portion of the railroad retirement benefits to which she was entitled under the separation agreement. The fact that specific performance of the separa-

tion agreement granted plaintiff a portion of the marital property did not convert plaintiff's action into one for equitable distribution. We overrule this assignment of error.

Defendant also argues that the trial court erred in calculating the percentage of benefits to which plaintiff is entitled. Specifically, defendant contends that plaintiff is not entitled to receive benefits that arise, in part, from the twelve years of defendant's employment following his separation from plaintiff. This argument is without merit.

Under the separation agreement, the parties agreed that plaintiff was entitled to seek her share of defendant's railroad retirement benefits "in accordance with law." Absent more specific language in the separation agreement to the contrary, the governing law in North Carolina regarding division of retirement benefits is section 50-20.1 of the North Carolina General Statutes. Under section 50-20.1, an award of retirement benefits is

> determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.

N.C. Gen. Stat. § 50-20.1(d) (2001). The valuation method prescribed by section 50-20.1(d), known as the "fixed percentage method," can be expressed as a fraction, the numerator of which "is the total period of time the marriage existed (up to the date of separation) simultaneously with the employment which earned the vested pension or retirement rights[,]" with the denominator being "the total amount of time the employee spouse is employed in the job which earned the vested pension or retirement rights." *Lewis v. Lewis*, 83 N.C. App. 438, 442-43, 350 S.E.2d 587, 589 (1986); *see also Seifert v. Seifert*, 82 N.C. App. 329, 336-37, 346 S.E.2d 504, 508 (1986) (approving the fixed percentage method for distribution of retirement benefits), *affirmed*, 319 N.C. 367, 354 S.E.2d 506 (1987).

In the instant case, the parties married on 18 December 1955 and separated on 24 April 1988. Defendant accrued his railroad retirement benefits during his employment from 30 September 1969 until his retirement on 29 March 2000. Thus, defendant was employed for a total of thirty years and six months, during which time he was married for eighteen years, three months, and twenty-four days. Utilizing the fixed percentage method, defendant was married to plaintiff for approximately sixty percent of the time during which he was accruing retirement benefits. Plaintiff is entitled to half of these benefits, which equates to thirty percent. The trial court awarded plaintiff 29.5%, half a percentage less than what plaintiff was entitled to receive. Thus, contrary to defendant's argument, the trial court awarded plaintiff less, and not more than, the retirement benefits which plaintiff was entitled to receive under the separation agreement and applicable law. *See Gagnon v. Gagnon*, 149 N.C. App. 194, 198, 560 S.E.2d 229, 232 (2002) (affirming the trial court's application of the fixed percentage method in awarding the plaintiff's former wife twenty-six percent of the plaintiff's retirement benefits). We overrule this assignment of error.

Defendant argues that the trial court erred in failing to make findings of fact to support its order. It is not a function of the trial court, however, to make findings of fact in an order of summary judgment, as summary judgment presupposes that there are no triable issues of material fact. *See Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 781, 407 S.E.2d 283, 285 (1991). We overrule this assignment of error.

Defendant further argues that the trial court erred in awarding plaintiff $4,995.12, the amount calculated by the trial court as 29.5% of defendant's divisible benefits paid directly to defendant by the Railroad Retirement Board from 1 April 2000 through 1 April 2002. Under the federal regulations governing benefit payments by the Railroad Retirement Board to an employee's spouse or former spouse pursuant to court decree or court-approved property settlements, such payment "may accrue no earlier than the later of the date of delivery [to the Board] of a court decree or property settlement which will be honored under this part, or from October 1, 1983." Railroad Retirement Act, 20 C.F.R. § 295.5(c) (2002). Defendant maintains that, as the Railroad Retirement Board has not yet received the order of the trial court granting plaintiff specific performance of the separation agreement, payment to plaintiff could not have accrued, and the trial court therefore erred in awarding plaintiff $4,995.12

based on retirement funds already received by defendant. Defendant's argument is without merit.

Defendant confuses accrual of payments due to plaintiff by the Railroad Retirement Board with accrual of monies due plaintiff under the separation agreement. The applicable federal regulations direct that payments *by the Railroad Retirement Board* to a spouse may not accrue until the Board receives the court decree or property settlement. Thus, plaintiff may not seek payment of benefits from the Board until she submits the trial court's qualified domestic relations order to the Board. The award of the trial court, however, was not based on monies owed by the Railroad Retirement Board to plaintiff; it was based on monies owed to plaintiff under the terms of the separation agreement. In the separation agreement, defendant acknowledged that he had built a substantial retirement account during the marriage, and agreed that he would not contest plaintiff's right to receive that portion of benefits to which she was entitled under applicable law. Under applicable law, plaintiff was entitled to receive approximately thirty percent of the divisible retirement benefits already received by defendant, which the trial court correctly calculated as $4,995.12. We therefore overrule this assignment of error.

Finally, defendant argues that the trial court erred in taxing to him the costs of plaintiff's summary judgment action. Defendant contends that he never contested plaintiff's right to receive a "divorced spouse annuity" under the Railroad Retirement Act and should therefore not be taxed with the costs of the action. Given our determination that the separation agreement referenced plaintiff's right to receive a portion of defendant's divisible retirement benefits, which defendant *did* contest, and not a "divorced spouse annuity," we overrule this assignment of error.

In conclusion, we hold that the trial court properly granted summary judgment in favor of plaintiff. We further hold that the trial court did not err in entering an order awarding plaintiff 29.5% of defendant's divisible railroad retirement benefits. We therefore affirm the judgment and order of the trial court.

Affirmed.

Judges TYSON and LEVINSON concur.

IN RE McCABE

[157 N.C. App. 673 (2003)]

IN THE MATTER OF: ARIELLE McCABE

No. COA02-1030

(Filed 20 May 2003)

Child Abuse and Neglect— Munchausen syndrome by proxy— substantial risk of serious physical injury

The trial court did not err by adjudicating respondent mother's minor daughter abused and neglected, because: (1) the trial court weighed the conflicting inferences and determined that the minor was the victim of Munchausen syndrome by proxy, a form of child abuse with a substantial risk of morbidity and even mortality; and (2) the evidence and the trial court's findings demonstrated that there existed a substantial risk of serious physical injury to the minor child and that the minor child lived in an environment injurious to her welfare.

Appeal by respondent from order entered 6 April 2001 by Judge Henry L. Stevens, IV, in Onslow County District Court. Heard in the Court of Appeals 16 April 2003.

Lanier & Fountain, by Timothy R. Oswalt, for respondent appellant.

James W. Joyner for petitioner appellee.

TIMMONS-GOODSON, Judge.

Karrie McCabe ("respondent") appeals from an order of the trial court adjudicating her minor daughter ("juvenile") abused and neglected. For the reasons stated herein, we affirm the order of adjudication.

The facts pertinent to the instant appeal are as follows: Respondent is the natural mother of juvenile, who was born 24 May 1999. On 18 January 2001, Thomas McCabe ("McCabe"), respondent's former husband and the natural father of juvenile, served respondent with a civil domestic petition of custody for juvenile.

On 9 February 2001, the Onslow County Department of Social Services ("DSS") filed a petition alleging juvenile to be abused and neglected, on the grounds that juvenile was admitted to a hospital on 29 January 2001 for a history of intermittent episodes of cyanosis, or "blue spells." Respondent told admitting hospital physicians that

juvenile's hands and feet, as well as the area around her mouth, had turned blue numerous times within the previous days, and that respondent brought juvenile to the hospital after she lost consciousness during the latest incident. Respondent asserted that juvenile was particularly likely to exhibit such symptoms when cold, and that she was lethargic and unresponsive during such episodes. According to respondent, juvenile had exhibited these symptoms since her "neonatal period." Treating physicians later diagnosed juvenile's condition as being possibly induced by respondent. DSS therefore requested that custody of juvenile be placed with McCabe, and that any visitation between respondent and juvenile be supervised. The trial court issued an order for nonsecure custody placing physical custody of juvenile with McCabe.

The adjudication hearing was held before the trial court on 29 March 2001, at which time the following evidence was presented: Dr. Elaine Kabeanfuller ("Dr. Kabeanfuller"), a pediatrician specializing in the treatment of abused children, testified to a form of child abuse known as Munchausen syndrome by proxy. Dr. Kabeanfuller explained that Munchausen syndrome by proxy

> was first described in 1977 by a Dr. Roy Meadow. . . . [H]e was the first one to put case reports out in the literature [and] since then there have been hundreds of case reports and many reviews and actual books written on the subject. It is a case where we often see children where they have . . . either a parent or caretaker [who] will either simulate or induce an illness in the child, present them for medical care multiple times, [and] often . . . deny any knowledge of . . . the symptoms or the signs, what their etiology is and then when that child is removed from that caretaker or parent's care, these signs and symptoms abate and no longer occur.

Dr. Kabeanfuller testified that she became involved in the present case in February of 2001 after the hospital physicians who were treating juvenile requested her consultation on the case. After observing juvenile, interviewing respondent and treating health care professionals, reviewing juvenile's medical history as well as records from juvenile's daycare providers, and consulting other medical experts, Dr. Kabeanfuller opined that juvenile possibly suffered from Munchausen syndrome by proxy. Dr. Kabeanfuller specifically based her opinion on the fact that juvenile's cyanotic episodes, witnessed by her daycare providers and reported by respondent as

occurring "every day" before juvenile's hospitalization, occurred only after juvenile had been in the exclusive care of respondent. Numerous medical procedures revealed no organic abnormalities in the child, and juvenile never exhibited any symptoms during her eleven days in the hospital. When she later learned during her testimony that juvenile had shown no sign of the symptoms reported by respondent since being removed from respondent's care, Dr. Kabeanfuller altered her diagnosis from "possible" Munchausen syndrome by proxy to "probable."

Dr. Kabeanfuller further stated that juvenile also potentially suffered from "Vulnerable Child Syndrome," which she explained as

> a syndrome we sometimes see in pediatrics where a child who is otherwise well and healthy is presented multiple times for medical care by a parent or caretaker who is convinced that the child is ill or has some serious symptoms and requires a lot of reassurance by the physicians or medical personnel but in fact there is no organic disease process going on in the child.

Dr. Kabeanfuller noted that

> [t]here's a continuum of an illness going from Vulnerable Child all the way to Munchausen syndrome where you have Vulnerable Child where the child actually is well and the parent is just overly concerned, and then the next, it can evolve into a Munchausen syndrome by proxy, um, type situation because you can have a child whose parents or caretaker believes that they're ill when they truly are not or may, may evolve into a parent who creates symptoms or fabricates a history in order to present that child to various physicians and receive various medical procedures.

The risk of morbidity or mortality associated with Munchausen syndrome by proxy, according to Dr. Kabeanfuller, is fifteen to thirty percent. This form of abuse may also lead to survivors being "very fearful, and they often have some psychological illnesses of their own, later on." Dr. Kabeanfuller added that, during her hospitalization, juvenile underwent extensive, painful, and invasive medical procedures to determine the source of the symptoms described by respondent.

Dr. Dale Newton ("Dr. Newton"), a pediatrician and expert in child abuse, testified on behalf of DSS. Dr. Newton treated juvenile during her hospitalization and concurred with Dr. Kabeanfuller's diagnosis of Munchausen syndrome by proxy as probable. Dr. Newton tes-

tified that he became juvenile's primary treating physician when respondent dismissed juvenile's original physician, Dr. Stephen Boyce Coker ("Dr. Coker"), after Dr. Coker diagnosed juvenile as suffering from Munchausen syndrome by proxy. During her hospitalization, juvenile underwent numerous medical procedures to screen out any possible organic abnormality. In Dr. Newton's opinion, juvenile's cyanotic episodes were potentially induced by either smothering or administration of a toxin. Dr. Newton agreed with Dr. Kabeanfuller that returning juvenile to the care of respondent would put juvenile at risk of harm.

Dr. Coker, a pediatric neurologist, gave further testimony. Dr. Coker stated that he examined juvenile on 25 January 2001 when respondent brought her to the hospital. Based on respondent's reports of frequent cyanotic episodes, Dr. Coker originally believed juvenile to be suffering from a form of epilepsy, but changed his diagnosis to Munchausen syndrome by proxy after medical procedures revealed no abnormalities and juvenile exhibited no symptoms after five days in the hospital. After Dr. Coker advised respondent of his diagnosis, she requested his removal as juvenile's treating physician.

Stephanie Leger ("Leger"), a registered pediatric nurse, testified that while juvenile was under her care at the hospital, respondent attempted to induce a cyanotic episode in juvenile by giving the child popsicles. Respondent asked Leger "what did [she] think would happen when [respondent] put [the popsicles] in [juvenile's] hand?" Respondent then placed two wrapped popsicles in juvenile's grasp and asked Leger if she observed juvenile's "feet . . . turning colors, her hands turning violet colors." Despite respondent's insistence that juvenile was "turning blue," Leger did not observe any blue or violet discoloration.

Respondent presented testimony by Dr. David Hannon ("Dr. Hannon"), a pediatric cardiologist. Dr. Hannon consulted with juvenile's physicians during her hospitalization and diagnosed juvenile as suffering from what he labeled as "benign paroxysmal acrocyanosis." Dr. Hannon explained

> [t]hat's simply a linking of three terms, benign would indicate that I believe that children who do this do not have a serious medical illness. Paroxysmal is just a medical word meaning that it occurs very suddenly and acrocyanosis means that [you're] blue but distally blue in the hands and feet. So this is not an established medical diagnosis although I have written a small piece for an

> educational thing to the American Academy of Pediatrics on it mainly because I think that it probably, well I know that something like this does occur, whether my understanding of physiology is correct or not, I can't say.

Dr. Hannon testified that he had witnessed two other patients in the past who exhibited bluish discoloration similar to juvenile's. Dr. Hannon stated that he was "not particularly surprised" that juvenile had shown no further discoloration since her removal from respondent's care, because benign paroxysmal acrocyanosis tends to "have a spontaneous resolution." Dr. Hannon conceded that benign paroxysmal acrocyanosis and Munchausen syndrome by proxy are not mutually exclusive, and that juvenile might be suffering from both.

Dr. James Gant ("Dr. Gant"), juvenile's primary pediatrician, testified on behalf of respondent. Dr. Gant stated that juvenile had been his patient since birth, and that she had grown and developed normally. Dr. Gant referred juvenile to Dr. Coker

> because of the descriptions that we have from the day care center, there's a note in her chart from the day care workers and they described lethargy and some other symptoms that didn't seem to fit with the cardiac type of problem and so my main concern was that she had possibly a seizure disorder because she was lethargic either during or after and they said "unresponsive" and I don't know, you know, for a fact, that's what she was because we didn't witness the episode.

Dr. Gant agreed with Dr. Hannon's diagnosis of benign paroxysmal acrocyanosis, but nevertheless recommended a psychological evaluation for respondent because she was "so hysterical and anxious and nervous and overly, almost paranoid about us taking the baby away and how things were going" and that "if you are histrionic or [overly] anxious or nervous, that does affect the child and it [a]ffects how they respond." Dr. Gant testified that he had spoken with respondent about the fact that her two other children were no longer in her custody. When asked about Munchausen syndrome by proxy, Dr. Gant responded "that's something that I don't know that I can say." Dr. Gant also admitted that he considered "taking a restraining order out on [respondent]" because

> she was at our office so many times and she was very histrionic, um, it was causing a lot of problems because we couldn't actually keep functioning, but we were trying to support her and the only

> reason we didn't was because I know she was stressed out. I knew she was very anxious and I felt like, well maybe this would help her deal with it a little bit, um, so we just kind of kept, I talked to all the other physicians in the practice and we all agreed that, you know, we'd kind of just work with her. And she did come in numerous times when we didn't have appointments or things like that.

Ann Bell ("Bell"), a pediatric nurse employed by Dr. Gant's office, testified that she witnessed a cyanotic episode in juvenile. On 27 August 2000, respondent brought juvenile to the office. Bell stated that juvenile

> was sitting on the table, the exam table, in her diaper . . . and she was fine and then all of a sudden she just started to turn blue [and] she got cold. And I felt her legs and her arms and I went and got [a physician]. [The blue color] started from the very tips of her fingers and her toes and it just gradually went up to the trunk of her body and she had some bluish tinge around her lips.

Bell stated that the discoloration lasted from fifteen to twenty minutes, during which juvenile remained active and exhibited otherwise normal behavior.

Kathy Moore ("Moore"), a child care provider at juvenile's daycare, testified that juvenile twice exhibited symptoms of cyanosis after being dropped off at the school by respondent. Moore stated that juvenile was lethargic and "kind of out of it" with a "purple color and she was purple toned on her arms, her legs, and around her mouth." In both instances, juvenile's skin remained discolored for at least thirty minutes. Moore never observed these symptoms in juvenile at any other time of day. Debra Lewis ("Lewis"), a social worker with DSS, testified that, since juvenile's removal from respondent's care, there have been no further reports of any cyanotic episodes by juvenile.

Upon consideration of the evidence, the trial court found and concluded that there was clear, cogent and convincing evidence that respondent abused and neglected juvenile, and that it was in the best interests of juvenile to remain in the custody of her father. From the adjudication of abuse and neglect, respondent appeals.

Respondent argues on appeal that the trial court erred in determining that juvenile was abused and neglected, asserting that there

was insufficient evidence to support such a determination. We disagree and affirm the order of adjudication of the trial court.

When an appellant asserts that an adjudication order of the trial court is unsupported by the evidence, this Court examines the evidence to determine whether there exists clear, cogent and convincing evidence to support the findings. *See* N.C. Gen. Stat. §§ 7B-805, 807 (2001); *In re Allen*, 58 N.C. App. 322, 325, 293 S.E.2d 607, 609 (1982). If there is competent evidence, the findings of the trial court are binding on appeal. *See id; In re Smith*, 56 N.C. App. 142, 149, 287 S.E.2d 440, 444, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982). Such findings are moreover conclusive on appeal even though the evidence might support a finding to the contrary. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985). "The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject." *Id.*

Under section 7B-101 of our General Statutes, an abused juvenile includes "[a]ny juvenile less than 18 years of age whose parent . . . [c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1) (2001). A neglected juvenile is one 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. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2001).

After reviewing the record, we conclude that there was clear, cogent and convincing evidence to support the trial court's findings and conclusions concerning respondent's neglect and abuse of juvenile. Three physicians, two of whom were experts in the area of child abuse, testified that juvenile was the victim of Munchausen syndrome

by proxy, a form of child abuse with a substantial risk of morbidity and even mortality. During her hospitalization, juvenile repeatedly underwent numerous extensive, painful, and invasive medical procedures to determine the source of symptoms reported by respondent. Dr. Newton opined that respondent potentially induced these symptoms by either smothering juvenile or administering a toxin. None of the medical procedures revealed any organic abnormalities in juvenile, and she never exhibited any symptoms or "blue spells" during her eleven-day stay at the hospital. Nor has there been any resumption of symptoms since juvenile was removed from respondent's care. The only cyanotic episode witnessed in its entirety by an individual other than respondent occurred at Dr. Gant's office and was witnessed by Bell. Bell confirmed, however, that juvenile remained active and alert during this episode. In contrast, juvenile's daycare providers testified that juvenile was lethargic and unresponsive during such episodes, which only occurred shortly after juvenile was dropped off by respondent and the onset of which were never witnessed by the daycare providers.

Although the evidence presented by Dr. Hannon did raise conflicting inferences as to the cause of juvenile's cyanotic episodes, Dr. Hannon conceded that benign paroxysmal acrocyanosis and Munchausen syndrome by proxy are not mutually exclusive, and that juvenile might be suffering from both. The trial judge weighed the conflicting inferences and determined that juvenile was the victim of Munchausen syndrome by proxy. Because there was evidence to support these findings, they are binding on appeal. *See Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. The evidence and the trial court's findings clearly demonstrated that there existed a substantial risk of serious physical injury to juvenile, and that juvenile lived in an environment injurious to her welfare.

In conclusion, we hold that there was clear and convincing evidence to support the trial court's adjudication of neglect and abuse by respondent. We therefore affirm the adjudication of the trial court.

Affirmed.

Judges BRYANT and GEER concur.

HORNE v. VASSEY

[157 N.C. App. 681 (2003)]

LOUENE F. HORNE, PLAINTIFF v. CAROL VASSEY, DEFENDANT

No. COA02-1041

(Filed 20 May 2003)

1. Evidence— photographs—automobile

The trial court did not abuse its discretion in a personal injury suit arising out of an automobile accident by allowing defendant to introduce into evidence photographs of plaintiff's automobile, because: (1) plaintiff verified that the photographs depicted her vehicle, that the photographs were made the day after the accident, and that plaintiff did not have her car repaired the same day as the accident; and (2) although plaintiff disputed the accuracy of the damage to her vehicle as portrayed in the photographs, such dispute was a matter of the weight to be accorded the exhibits and not their admissibility.

2. Trials— motion for new trial—extent of injuries

The trial court did not abuse its discretion in a personal injury suit arising out of an automobile accident by denying plaintiff's motion under N.C.G.S. § 1A-1, Rule 59 for a new trial, because: (1) contrary to plaintiff's assertions, the evidence in the present case regarding plaintiff's injuries was not unequivocal; (2) plaintiff's expert relied entirely upon plaintiff's statements to him concerning her medical history and her description of the collision in forming his medical opinion of the source and extent of plaintiff's injuries; (3) plaintiff's expert testified that it would be hard to sustain a significant injury in an accident where the rate of speed at impact was five miles per hour or less, and defendant testified that she was traveling at a rate no greater than one or two miles per hour when she rolled into plaintiff's automobile; and (4) plaintiff suffered from a multitude of pre-existing medical problems, and two physicians who examined plaintiff's neck following the accident found it to be supple and with a full range of motion.

Appeal by plaintiff from judgment entered 27 February 2002 by Judge Leon A. Stanback, Jr., in Wake County Superior Court. Heard in the Court of Appeals 16 April 2003.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff appellant.

Bailey & Dixon, L.L.P., by David S. Wisz, for defendant appellee.

TIMMONS-GOODSON, Judge.

Louene Horne ("plaintiff") appeals from final judgment entered by the trial court upon a jury verdict finding that plaintiff was entitled to no recovery on her suit for personal injuries suffered in an automobile accident with Carol Vassey ("defendant"). The trial court further denied plaintiff's motion for a new trial. For the reasons stated herein, we conclude that the trial court committed no error in rendering its judgment.

The pertinent facts of the instant appeal are as follows: On 24 April 2000, plaintiff filed a complaint in Wake County Superior Court alleging that defendant drove her automobile in a negligent manner, resulting in a collision with plaintiff's vehicle. As a result of the collision, plaintiff alleged she suffered serious and permanent medical injuries.

Plaintiff's case came before the jury on 12 and 13 February 2002, at which time the following evidence was presented: Plaintiff testified that, in the early morning hours of 13 January 1999, she drove her automobile onto an exit ramp of Interstate 40 in Raleigh, North Carolina. While plaintiff was stopped at an intersection at the top of the exit ramp, defendant's vehicle struck the rear of plaintiff's automobile. The impact "jerked [plaintiff's] head and neck," and she experienced "pain [and] instant headache from the pain in [her] neck." Following the collision, plaintiff and defendant exchanged personal contact and insurance information, but did not summon law enforcement to the scene of the accident. Defendant promised to compensate plaintiff for the damage to her automobile. Plaintiff did not inform defendant of any personal injury, however, nor did plaintiff seek immediate medical attention for the pain she was experiencing. Later that afternoon, plaintiff visited her chiropractor, Dr. Holcomb, who examined and treated plaintiff's neck. Plaintiff testified that she suffered constant pain in her neck and head for the following four weeks, and that she was unable to return to work during this time because of her injuries. Plaintiff eventually stopped working "because it was too strenuous." According to plaintiff, she continues to suffer debilitating pain in her head and neck and remains unable to work. Moreover, according to plaintiff, her pain prevents her from performing daily household activities and interferes with her sleep.

Plaintiff submitted into evidence the deposition of Dr. Rudolph Maier, a neurologist who initially examined plaintiff on 26 February

1999. In Dr. Maier's opinion, plaintiff suffered a ten percent permanent disability to her entire body as a result of the 13 January collision. Dr. Maier stated that he relied upon plaintiff's statements to him concerning her medical history and description of the collision in reaching this opinion.

During cross-examination, plaintiff testified that after the collision, defendant "was concerned whether [she] was hurt" but that plaintiff assured defendant that she "thought she was okay" and did not need medical assistance. Plaintiff also admitted that she suffered from numerous medical problems, including hypertension, degenerative joint disease, osteoporosis, chronic anxiety and depression, and coronary artery disease. Plaintiff conceded that she also had a pre-existing shoulder injury for which she took "up to six Darvocet a day . . . without any relief," and that she had been treated for ongoing problems with her lower back since 1990. Several months before the collision, plaintiff was diagnosed with "chronic pain syndrome." Further, plaintiff was admitted to a hospital in May of 1999 after suffering a "mini-stroke." Contrary to plaintiff's representations of constant neck pain, an examining physician reported on 2 March 2000 that plaintiff's neck was "supple [and] non-tender." Another treating physician reported on 21 March 2000 that plaintiff's neck was "supple, [with] full range of motion."

Defendant testified that on 13 January 1999 she stopped behind plaintiff's automobile at the top of the exit ramp. Defendant "saw [plaintiff's] car move slightly, and I was prepared to follow out into the traffic. I took my foot off the brake and I rolled into the back of her car." According to defendant, her vehicle was traveling at a rate of speed of approximately one or two miles per hour at the point of impact. Defendant testified that there was no damage to her vehicle, but that the bumper of plaintiff's automobile "was pushed out of place by a few inches." When defendant asked plaintiff whether she "was all right," plaintiff responded, "Yes, I think so." Defendant spoke with plaintiff for ten minutes following the accident, during which time plaintiff did not mention any pain or discomfort, nor showed signs of any physical distress.

Upon consideration of the evidence, the jury found that plaintiff was entitled to no recovery from defendant, and the trial court entered judgment accordingly. Counsel for plaintiff moved for a new trial, which motion the trial court denied. From the judgment of the trial court, plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in (1) allowing into evidence photographs of plaintiff's automobile; and (2) denying plaintiff's motion for a new trial. For the reasons stated herein, we conclude that these assignments of error have no merit, and we find no error in the judgment of the trial court.

[1] By her first assignment of error, plaintiff contends the trial court erred in allowing defendant to introduce into evidence photographs of plaintiff's automobile. Plaintiff argues that defendant failed to lay a proper foundation for introduction of this evidence, and that it was therefore improperly admitted. Plaintiff asserts that the improper admission of the photographs prejudiced her case, requiring a new trial.

At trial, counsel for defendant showed plaintiff four photographs labeled as Defendant's Exhibits 1-A, 1-B, 1-C and 1-D. The following exchange then occurred:

> [DEFENSE COUNSEL]: Show you what I've marked as Defendant's Exhibit 1-A, 1-B, 1-C and 1-D, ask you to take a look at those and see if you can identify what they are.
>
> [PLAINTIFF]: I believe this picture, me sitting in my car and Donna standing at the back, I believe that was taken in Angier. Is that what you wanted me—
>
> Q: Are those, in fact, four pictures of your car showing how it looked?
>
> A: That's my car, yes, sir.
>
> Q: They were taken about the day after the accident?
>
> A: Yes, sir.
>
> Q: Those four pictures accurately show how your vehicle looked following this collision; is that correct?
>
> A: No.
>
> Q: How was that not correct?
>
> A: It is not correct because there's no damage here. This was taken after the impact, after the car was repaired.
>
> Q: So you had your car repaired the same day of the accident?
>
> A: No, I did not.

Q: Let me understand this—

A: No, I did not have my car repaired the same day as the accident, but this doesn't show accurately what had happened. This was pushed up more here on the right side and the bumper was up against the trunk lid.

. . . .

This does not show as I remembered. I see here, where the bumper is pull[ed] out from the car, up—on the back panel here behind the back door because that's a four door—I don't remember, I don't have the car any longer. In fact, I didn't have it maybe two months after the accident or three before it was repossessed, but I don't remember this looking as if it had not been damaged. And this picture, the back, the bumper here, it shows it on the side and here where it was lifted, it doesn't show any damage here raising it up where it interfered with opening the trunk.

Q: How about the other two pictures that we have there?

A: This one, the back of the car shows the accident—the damage done to the impact, the bumper is moved from its original position and broken, the cover was broken in this picture.

Q: Which picture is that? Refer to the exhibit number. Can you refer to the exhibit number?

A: Yes, sir, C.

Q: So exhibit 1-C, so you agree in that one it accurately reflects the vehicle?

A: From this side, yes, sir, from the side view.

Q: How about 1-D?

A: In 1-D, you can see where the bumper is broken, you can see where the little space up above the bumper is, near the tail light is damaged, but it does not show the damage on the trunk as I remember it.

At the close of defendant's evidence, defendant moved to introduce the photographs of plaintiff's vehicle. The trial court admitted the photographs into evidence over plaintiff's objection. Plaintiff now argues that, because she testified that the photographs did not accurately portray the full extent of the damage to her automobile follow-

ing the accident, the photographs were not properly authenticated. We do not agree.

Generally speaking, photographs may be used to illustrate anything that a witness may competently describe in words. *See Smith v. Dean*, 2 N.C. App. 553, 563, 163 S.E.2d 551, 557 (1968). In order for a photograph to be admitted into evidence, the accuracy of a photograph must be demonstrated by extrinsic evidence that the photograph is a true representation of the scene, object or person it purports to portray. *See id.*

> "The correctness of such representation may be established by any witness who is familiar with the scene, object, or person portrayed, or is competent to speak from personal observation. . . . Whether there is sufficient evidence of the correctness of a photograph to render it competent to be used by a witness for the purpose of illustrating or explaining his testimony is a preliminary question of fact for the trial judge."

Id. (quoting *State v. Gardner*, 228 N.C. 567, 573, 46 S.E.2d 824, 828 (1948) (citations omitted). Testimony that the exhibit is a fair and accurate portrayal of the scene at the time of the accident is ordinarily sufficient to authenticate the exhibit. *See Thomas v. Dixson*, 88 N.C. App. 337, 344, 363 S.E.2d 209, 214 (1988). "Authentication does not, however, require strict, mathematical accuracy, and a lack of accuracy will generally go to the weight and not the admissibility of the exhibit." *Id.*; *Kepley v. Kirk*, 191 N.C. 690, 693, 132 S.E. 788, 790 (1926). "Where there is conflicting evidence as to the similarity of conditions at the time of the accident and at the time the photographs are made, the admissibility of the exhibits is a matter within the sound discretion of the trial judge." *Sellers v. CSX Transportation, Inc.*, 102 N.C. App. 563, 565, 402 S.E.2d 872, 873 (1991).

In the instant case, plaintiff verified that the photographs depicted her vehicle, and that the photographs were made the day after the accident. She further stated that she did not have the car repaired the same day as the accident. Plaintiff agreed that Exhibit 1-C, depicting the passenger-side of her vehicle, accurately showed the damage to the automobile. Plaintiff also testified that Exhibit 1-D was an accurate representation, with the exception of alleged damage to the trunk of the automobile. We conclude that the trial court did not abuse its discretion in admitting the photographs. Defendant clearly established that the photographs were of plaintiff's vehicle, and that they were made the day following the accident. Although

plaintiff disputed the accuracy of the damage to her vehicle as portrayed in the photographs, such dispute was a matter of the weight to be accorded the exhibits, not their admissibility. *See Sellers*, 102 N.C. App. at 565, 402 S.E.2d at 873. Because it was demonstrated that the photographs were true representations of plaintiff's automobile following the accident, the trial court did not abuse its discretion in admitting the photographs. We therefore overrule this assignment of error.

[2] By her second assignment of error, plaintiff argues that the trial court erred in denying her motion for a new trial. Plaintiff asserts that there was uncontroverted evidence that she sustained permanent injury and incurred medical expenses in the amount of $9,005.00 as a result of the collision caused by defendant. Plaintiff contends that the jury manifestly disregarded the evidence and the trial court's instructions such that the trial court was required to grant plaintiff a new trial. We disagree.

Under Rule 59 of the North Carolina Rules of Civil Procedure, a new trial may be granted where there is "[m]anifest disregard by the jury of the instructions of the court" or where the jury awards "[e]xcessive or inadequate damages . . . under the influence of passion or prejudice." N.C. Gen. Stat. § 1A-1, Rule 59(a) (2001). Whether to grant or deny a motion to set aside a jury verdict is in the sound discretion of the trial court. *See Albrecht v. Dorsett*, 131 N.C. App. 502, 505, 508 S.E.2d 319, 321 (1998). Thus, absent a manifest abuse of discretion, the trial court's ruling in this regard will not be disturbed. *See id*; *Coletrane v. Lamb*, 42 N.C. App. 654, 656, 257 S.E.2d 445, 447 (1979).

There is no question that "[i]t is the province of the jury to weigh the evidence and determine questions of fact." *Coletrane*, 42 N.C. App. at 657, 257 S.E.2d at 447. Moreover, as the finder of fact, the jury is "entitled to draw its own conclusions about the credibility of the witnesses and the weight to accord the evidence." *Smith v. Price*, 315 N.C. 523, 530-31, 340 S.E.2d 408, 413 (1986). The trial court must give the utmost consideration and deference to the jury's function as trier of fact before setting aside a decision of the jury. *See Albrecht*, 131 N.C. App. at 506, 508 S.E.2d at 322; *Coletrane*, 42 N.C. App. at 657, 257 S.E.2d at 447.

In the instant case, plaintiff introduced expert testimony by Dr. Maier, who testified that plaintiff suffered a ten percent permanent disability to her entire body as a result of the 13 January collision.

Plaintiff contends that this evidence was undisputed and that the jury's verdict was therefore inconsistent with the evidence and contrary to North Carolina law. In support of her argument, plaintiff cites the case of *Daum v. Lorick Enterprises*, 105 N.C. App. 428, 413 S.E.2d 559, *disc. review denied*, 331 N.C. 383, 417 S.E.2d 789 (1992). In *Daum*, the plaintiff-employee prevailed against the defendant-employer and supervisor in an action alleging intentional infliction of emotional distress and negligence, but the jury awarded the plaintiff damages in an amount far below the uncontroverted evidence submitted by the plaintiff. *Id.* at 431-32, 413 S.E.2d at 561. On appeal, this Court held that the plaintiff was entitled to a new trial on the issue of damages, because the jury arbitrarily ignored evidence of the employee's pain and suffering and her need for future medical expenses. *See id.*

Unlike *Daum*, the evidence in the present case regarding plaintiff's injuries was not unequivocal, plaintiff's assertions to the contrary. Although defendant presented no expert testimony to contradict the testimony of Dr. Maier, cross-examination revealed that Dr. Maier relied entirely upon plaintiff's statements to him concerning her medical history and her description of the collision in forming his medical opinion of the source and extent of plaintiff's injuries. Dr. Maier also testified that "it would be very hard to sustain a significant injury" in an accident where the rate of speed at impact was five miles per hour or less. Defendant testified that she was traveling at a rate no greater than one or two miles per hour when she "rolled into" plaintiff's automobile. Further cross-examination revealed that plaintiff suffered from a multitude of pre-existing medical problems, and that two physicians who examined plaintiff's neck following the accident found it to be supple and with a full range of motion. As credibility of the evidence is exclusively for the jury, "it was well within the jury's power to minimize or wholly disregard the testimony" given by Dr. Maier. *Albrecht*, 131 N.C. App. at 506, 508 S.E.2d at 322. We therefore hold that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial, and we overrule this assignment of error.

In the judgment of the trial court, we find

No error.

Judges BRYANT and GEER concur.

TYNDALL-TAYLOR v. TYNDALL

[157 N.C. App. 689 (2003)]

LUCILLE B. TYNDALL-TAYLOR AND RICHARD C. TYNDALL, IV, BY AND THROUGH HIS GUARDIAN AD LITEM, ELSIE S. TYNDALL, PLAINTIFFS v. MINNIE CAROL TYNDALL IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF RICHARD CARL TYNDALL, JR. AND MINNIE CAROL TYNDALL, INDIVIDUALLY, DEFENDANTS

No. COA02-246

(Filed 20 May 2003)

Contracts; Wills— breach of contract to make a will—specific performance of separation agreement

The trial court erred in a breach of contract to make a will case seeking specific performance of a separation agreement by granting summary judgment under N.C.G.S. § 1A-1, Rule 56 in favor of defendants and the case is remanded to the trial court for entry of summary judgment in favor of plaintiffs, because: (1) the terms of the separation agreement obligated both plaintiff mother and decedent father to separately execute wills that devised their interests in the subject real estate to their son, and decedent breached a contract to make a will by simply failing to execute a will; and (2) plaintiff mother is not precluded from seeking enforcement of the pertinent separation agreement in equity when by the combination of deeds and will she in effect carried out the intent of the agreement.

Appeal by plaintiffs from judgment entered 18 September 2001 by Judge Benjamin G. Alford in Jones County Superior Court. Heard in the Court of Appeals by a reconstituted panel per order 21 January 2003.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Arey W. Grady, III, for plaintiff-appellants.

Stubbs & Perdue, P.A., by John W. King, Jr., for defendant-appellees.

HUDSON, Judge.

Plaintiffs filed suit in superior court alleging breach of a contract to make a will. The court granted defendants' motion for summary judgment and dismissed the case. Plaintiffs appealed, and for the reasons discussed here, we reverse.

The parties submitted stipulations to the pertinent facts, which include those summarized below. Richard Carl Tyndall, Jr. ("dece-

dent") and Lucille Tyndall-Taylor ("Tyndall-Taylor") were married on 22 November 1953. One child was born of the marriage, Richard C. Tyndall, III ("Richard III"). Decedent and Tyndall-Taylor jointly owned a 280 acre farm when they separated in early 1979. On 15 May 1979, they entered into a separation agreement entitled a "Deed of Separation and Property Settlement" ("the Agreement"). As part of the Agreement, they agreed to divide the farm equally. Additionally, Paragraph 17 of the Agreement provided that "[t]he party of the first part and the party of the second part hereby covenant, contract and agree to execute a Last Will and Testament wherein each shall divise [sic] their interest in the 280 acre farm now owned by the parties to their son, Richard C. Tyndall, III." At the time the Agreement was signed, Richard III was an unmarried adult with no children.

On 27 June 1980, decedent and Tyndall-Taylor were divorced. On 30 December 1987 Richard III married Elsie S. Tyndall, and in May 1998, Elsie Tyndall gave birth to a son, Richard C. Tyndall, IV ("Richard IV"). On 29 March 1998, Richard III died, survived by his wife Elsie, his son Richard IV, his mother Tyndall-Taylor, and the decedent.

Decedent died in June 2000. At the time of decedent's death, Tyndall-Taylor had already conveyed away most of her interest in the farm in the following manner: approximately 131 acres to her son Richard III, subject to minor exceptions; and a 1.47 acre homesite to her son Richard III and his wife. She also executed a will in 1984 providing that all of her property should pass to her son, Richard III, or in the event of his death, to Richard IV. Decedent died intestate, and therefore, his interest in the farm passed in part to his second wife, defendant Minnie Carol Tyndall, and in part to plaintiff Richard IV, his only surviving lineal issue.

Plaintiffs brought this breach of contract action seeking an order directing that all of decedent's interest in the farm be conveyed to plaintiff Richard IV.

On 27 August 2001, Judge Benjamin G. Alford heard arguments from both parties on their respective motions. By order 13 September 2001, Judge Alford granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. Plaintiff now appeals.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001).

> An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Adams v. Jefferson-Pilot Life Ins. Co., 148 N.C. App. 356, 358, 558 S.E.2d 504, 506, *disc. review denied*, 356 N.C. 159, 568 S.E.2d 186 (2002) (internal citations and quotations omitted).

Plaintiffs and defendants, in their motions for summary judgment and in plaintiffs' assignment of error, agreed that there are no genuine issues of material fact, and entered into a stipulation of facts upon which the trial court made its ruling. Thus, we must determine only whether either party was entitled to judgment as a matter of law.

In general, a court interprets a contract according to the intent of the parties to the contract. *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999), *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). In addition, "[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Id.*

This Court has previously noted that:

> Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties.

Strader v. Sunstates Corp., 129 N.C. App. 562, 569, 500 S.E.2d 752, 756 (1998), *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). A contract necessarily "encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion." *Id.* at 569, 500 S.E.2d at 755-56.

However, "[w]hen a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law." *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985) (citations omitted). A separation agreement is construed using the rules of contract interpretation. Thus, "[w]here the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties." *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389-90 (1985). Moreover, "[i]t is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987). "Whether or not the language of a contract is ambiguous or unambiguous is a question for the court to determine." *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52, *affirmed*, 317 N.C. 330, 344 S.E.2d 788 (1986). In making this determination, "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Id.* Therefore, whether the parties to the agreement here implicitly intended Richard IV as a beneficiary of Paragraph 17 of the Agreement is a question of law susceptible to summary disposition. Based on the plain and unambiguous language of Paragraph 17, we hold that as a matter of law the parties had no such intention when they entered into the Agreement.

However, our Supreme Court has previously held on similar facts that unnamed parties in a contract to make a will may seek specific enforcement of that contract. In *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975), plaintiffs instituted an action seeking specific performance of an alleged contract to devise real property. In their complaint, plaintiffs alleged that: in March of 1959, James Lyerly entered into an agreement with his daughter, Mildred, and his son, Woodrow, under which Mildred and Woodrow obligated themselves to care for James and his wife Pearl during their lifetime. In return, James agreed

to leave all of his real estate to Mildred upon condition that she pay certain sums of money to other specified individuals. On 21 March 1959, James signed a writing embodying the agreement. Mildred died in 1965 and thereafter her husband, Basil, and her three children carried out her obligation to care for James and Pearl. Pearl died in 1966 and James died in 1970. James left a will devising substantial parts of his real estate to defendants, contrary to his agreement with Mildred. Plaintiffs, Mildred's children, brought suit for specific performance of the 1959 agreement between Mildred and James to convey certain parcels of real estate.

In holding that plaintiffs were entitled to specific performance of the 1959 agreement, the Court noted that "a valid written contract to devise land is enforceable in equity." *Id.* at 614, 215 S.E.2d at 745. The Court pointed out that:

> [A] decree for specific performance is nothing more or less than a means of compelling a party to do precisely what he ought to have done without being coerced by a court.
>
> * * *
>
> The foregoing impels the conclusion that the rights of plaintiffs are determinable as if [James] had died leaving a valid, probated will, in which he devised his real property in the manner set forth in . . . the 1959 contract-will. Had he done so, plaintiffs would take as *the issue* of Mildred by virtue of G.S. 31-42(a)[1], [North Carolina's anti-lapse statute].

Id. at 622, 215 S.E.2d at 750-51.

Here, the terms of the Agreement obligated both Tyndall-Taylor and decedent to separately execute wills that devised their interests in the subject real estate to their son, Richard III. Had decedent done so, when Richard III predeceased the decedent, Richard IV would have taken the property "as the issue" of Richard III "by virtue of G.S. 31-42." *Id.*

We are cognizant of the fact that in the present case the decedent died intestate, whereas in *Rape* the decedent died leaving a valid will. We are persuaded, however, that the reasoning behind the decision

1. Although the text of G.S. § 31-42 was amended by the General Assembly in 1999 to be less restrictive, *see* 1999 Sess. L. 145, s. 1, the general effect of that section as cited in *Rape* is consistent with the version of G.S. § 31-42 that was in effect at the time the present action was instituted.

applies here. We see no meaningful distinction between the circumstances in *Rape*, where decedent breached a contract to make a will by revoking the will and executing a subsequent will that was probated, and the situation here where decedent breached a contract to make a will by simply failing to execute a will.

We find additional support for this conclusion in our Supreme Court's decision in *Chambers v. Byers*, 214 N.C. 373, 199 S.E. 398 (1938), where the decedent contracted to devise all of his property to his adopted daughter. In *Chambers*, the decedent died intestate, thereby breaching his contractual obligation to devise his property to his adopted daughter. The Court, in holding that the daughter was entitled to retain possession of the property, noted that:

> There can be no question that a contract upon a sufficient consideration to devise lands is valid and may be enforced in a court of equity, the decree being so drawn as to declare the parties to whom the land is devised, *or, in the event of a failure to devise, the heirs at law to hold such lands in trust for the persons to whom the testator had contracted to devise them.* It is settled by a line of authorities which are practically uniform, that while a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will can not be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will (emphasis added).

Id. at 377-78, 199 S.E. at 401 (internal citations and quotation marks omitted). Further, the Court noted that "to give effect to such a contract is not making a will for a deceased party; it is merely making 'effectual what the parties have themselves agreed upon.' " *Id.* at 678, 199 S.E. at 402.

Defendant further contends that plaintiff Tyndall-Taylor by her own breach of the Agreement, excused decedent from performance under the Agreement. Defendants argue that because Tyndall-Taylor retained a small portion of the farm (which she currently owns), conveyed most of the farm to Richard III, conveyed a small portion of the farm to Richard III and his wife as tenants by the entireties and that

because these dispositions were by deed rather than by will, Tyndall-Taylor breached her obligations under the Agreement and therefore may not seek to enforce its terms in equity. We disagree.

For the breach of a covenant of a separation agreement by one spouse to relieve the other from liability "the respective covenants must be interdependent rather than independent [and] *the breach must be of a substantial nature*, must not be caused by the fault of the complaining party, *and must have been committed in bad faith.*" (emphasis added). *Smith v. Smith*, 225 N.C. 189, 198, 34 S.E.2d 148, 153 (1945).

Here, plaintiff Tyndall-Taylor by deed conveyed the majority of her share of the farm to her son, Richard III. She also conveyed a smaller portion of the farm to Richard III and his wife as tenants by the entireties, and still retains a small portion of the farm for herself as a homesite. In addition, she executed a will in which she left "all of my property, both real and personal, to my son [Richard III] . . . in fee simple forever." Thus, by the combination of deeds and will, she in effect carried out the intent of the Agreement. Paragraph 17 of the Agreement required each party to execute a will which would devise each party's interest in the farm to Richard III. Under the circumstances described above, we do not believe that Tyndall-Taylor's actions in conveying her portion of the farm, whether or not substantial in nature, bear any indication of bad faith on her part. Thus, we do not believe she is precluded from seeking enforcement of this provision of the Agreement in equity.

There being no genuine issue of material fact, we conclude that plaintiffs are entitled to judgment as a matter of law. Accordingly, summary judgment in favor of defendants is reversed and this case is remanded to the trial court for entry of summary judgment in favor of plaintiffs.

Reversed and remanded.

Judges McGEE and STEELMAN concur.

FRED PRESTON WILLIAMS, PLAINTIFF-APPELLANT v. JANAE MARIE DAVIS AND BENEDETTA STEVENSON DAVIS, DEFENDANTS-APPELLEES

No. COA02-865

(Filed 20 May 2003)

Motor Vehicles— automobile accident—contributory negligence

The trial court correctly determined that the plaintiff in an automobile accident case was contributorily negligent, and properly granted a directed verdict for defendant, where the evidence showed that plaintiff stopped at a stop sign and looked both ways but did not look at an exit ramp; defendant was traveling slightly faster than speed limit; defendant might not have had her headlights on, but there was sufficient light for plaintiff to see defendant approaching the intersection; and plaintiff pulled out in front of defendant when a reasonable person should have seen it was unsafe to enter the intersection.

Appeal by plaintiff from order dated 26 October 2001 by Judge Orlando F. Hudson, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 27 March 2003.

Herman L. Stephens, for plaintiff-appellant.

Frazier & Frazier, L.L.P., by Torin L. Fury, for defendants-appellees.

McGEE, Judge.

Fred Preston Williams (plaintiff) filed a complaint in June 2000 alleging that Janae Marie Davis failed to operate the headlights on her vehicle while driving after sunset, failed to keep a reasonable lookout, failed to keep her vehicle under control, failed to reduce speed, and failed to exercise due care, which proximately resulted in a collision between the vehicle operated by plaintiff and the vehicle operated by Janae Davis and owned by Benedetta Stevenson Davis (defendants). Plaintiff alleged that, as a result of the collision, he sustained damages including personal injury, medical expenses, loss of earning capacity, and property damage.

Defendants filed an answer on 27 October 2000, alleging plaintiff was contributorily negligent in failing to keep a proper lookout, in failing to keep proper control of his vehicle, in failing to start, stop, or turn his vehicle from a direct line without first determining that such

movement could be made in safety, in violation of N.C. Gen. Stat. § 20-154, and in failing to decrease his speed in violation of N.C. Gen. Stat. § 20-141(m).

The trial court entered a final pretrial order, dated 15 October 2001, which included stipulations by the parties that: on 12 May 1997 around 9:31 p.m., Janae Marie Davis was operating a vehicle owned by Benedetta Stevenson Davis, in a southbound direction on University Parkway in Winston-Salem, North Carolina; plaintiff drove his vehicle onto University Parkway; and that the vehicles collided on southbound University Parkway.

At the 15 October 2001 trial, evidence was presented that plaintiff was attending a banquet for Avon representatives as a guest of his wife at the Holiday Inn off University Parkway in Winston-Salem on 12 May 1997. After the banquet, plaintiff drove away from the Holiday Inn and entered University Parkway from Mercantile Drive around 9:31 p.m. where his vehicle was struck by the vehicle operated by Janae Davis as she traveled south on University Parkway. Plaintiff testified that:

> I . . . came to a full stop, and I checked the traffic lights to my left and the traffic lights to my right [farther] down south on Parkway and they were both red; and there was no traffic in the space in between those two lights. So I proceeded to cross University Parkway south with the intention of turning left onto University Parkway north; and I was going to proceed north . . . .
>
> . . .
>
> First of all I came to the full stop at the exit from Mercantile Drive. I looked to my left and checked the traffic lights and looked for traffic, of course, and I did the same thing to the right; and after I determined that there was no traffic I pulled straight across and—
>
> . . .
>
> I was in the—almost—just about entering inside lane of Parkway south, when my wife said "look out," and there was this car about five or six feet from us and bingo I didn't have any reaction time really.
>
> . . .
>
> The other vehicle slammed into me broadside at the driver's side.

The front of the vehicle operated by Janae Davis collided with the driver's side of plaintiff's vehicle. Plaintiff testified that the impact was "pretty terrific." The impact caved in the driver's side of plaintiff's vehicle, trapping plaintiff in the driver's seat until he was cut out of the vehicle.

Plaintiff testified that he looked for oncoming traffic before entering the intersection, because "[o]therwise [he] would not have proceeded across." Plaintiff testified that he presumed that Janae Davis must have come off the exit ramp because, although he acknowledged he did not actually see Janae Davis come off the ramp, he did not see any vehicular traffic in the two through lanes when he entered the intersection. Martha Joyce (Ms. Joyce) testified she saw the collision from the front of the Holiday Inn, approximately two hundred to four hundred feet from the site of the collision. Ms. Joyce contradicted herself during her testimony. Ms. Joyce stated once that the vehicle operated by Janae Davis came off the exit ramp; but on re-cross Ms. Joyce stated that the vehicle was coming south in the through lanes of University Parkway and that she saw the vehicle when it was one intersection back from the intersection where the collision occurred.

Ms. Joyce testified that the headlights of the vehicle operated by Janae Davis were not burning and that the vehicle was going "a little more than 45" miles per hour, although she could not state a specific speed of the vehicle. Ms. Joyce testified it was not quite dark at the time of the collision and she could clearly see the vehicle operated by Janae Davis as it traveled down University Parkway. Ms. Joyce testified that there were numerous lights in the area where the collision occurred, including lights in the parking lot of the Nissan dealership located across from the Holiday Inn, lights in the Holiday Inn parking lot, and street lights on University Parkway. In response to questioning by defendants' attorney, Ms. Joyce agreed with his statements that the Nissan dealership was "lit up like a Christmas tree" and that there was "an awful lot of light out on that roadway" at the time of the collision. Plaintiff introduced a videotape of University Parkway, which both Ms. Joyce and plaintiff testified fairly and accurately depicted the collision scene at the time of the collision. Ms. Joyce testified that she had no difficulty in seeing the vehicle on the videotape. Plaintiff also testified that while the tape was playing, he was able to see all of the landmarks on the roadway, including an unlighted street sign, the median, two signs in the median, trees and leaves in trees that were approximately fifty

yards away, as well as a vehicle traveling in the same direction as the vehicle operated by Janae Davis on 12 May 1997.

Defendants moved for a directed verdict at the close of plaintiff's evidence at trial, stating:

> Your Honor I understand the plaintiff to have rested at the close of their evidence. At this time, I would like to make a motion for a directed verdict on the issue of plaintiff's contributory negligence.

Defendants' attorney summarized the testimony of plaintiff and Ms. Joyce and stated that:

> Based on that evidence we feel that Mr. Williams violated [N.C.G.S. §] 20-158(b)(1), where it states when a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right of way to vehicles operating on a designated main-traveled or thru highway. That fits perfectly with the facts that have been described by Mr. Williams and Mrs. Joyce on the witness stand. As such we feel that Mr. Williams violated that statute and was negligent and the court should find him to be contributorily negligent as a matter of law. Thank you.

Defendants' attorney further stated that:

> It is our contention[] focusing solely on the conduct of Mr. Williams and based on the statute his obligation to stop and yield to oncoming traffic that he was negligent.
>
> Now as Your Honor knows and I don't have to say it for the record, you do not have to prove his negligence was the sole proximate cause of the accident. In this incident, all we have to prove is that it was a proximate cause of the accident. I believe the evidence amply demonstrates his failure to yield to an oncoming vehicle that is clearly visible is sufficient to find him contributorily negligent. Thank you.

The trial court granted defendants' motion for a directed verdict, stating:

> Well I have given it considerable thought. I'm going to allow the Defendant[s'] motion for Directed Verdict on the contributory negligence of the Plaintiff as argued by the defense counsel.

The trial court entered an order dated 26 October 2001 granting defendants' motion for a directed verdict. The trial court also dismissed plaintiff's complaint with prejudice. Plaintiff appeals from this order.

Plaintiff argues two assignments of error, claiming that the trial court's entry of the 26 October 2001 order granting defendants' motion for directed verdict was in error. Although inartfully worded, when viewed in conjunction with plaintiff's brief, the gist of these assignments are that (1) defendants were not entitled to judgment dismissing plaintiff's case as a matter of law and (2) that the evidence, viewed in a light most favorable to the plaintiff, does not establish that plaintiff was contributorily negligent. Plaintiff addressed both of these assignments of error in one argument in his brief and we, too, will address them together.

When ruling on a motion for a directed verdict, the trial court must consider " 'whether the evidence, when considered in a light most favorable to [the non-moving party], was sufficient for submission to the jury.' " *Smith v. Wal-Mart Stores*, 128 N.C. App. 282, 285, 495 S.E.2d 149, 151 (1998) (quoting *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E.2d 396, 397 (1971)). The non-moving party " 'must receive the benefit of every inference which may reasonably be drawn in his favor.' " *Hill v. Williams*, 144 N.C. App. 45, 54, 547 S.E.2d 472, 477, *disc. review denied*, 354 N.C. 217, 557 S.E.2d 531 (2001) (quoting *Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 88, 379 S.E.2d 677, 679 (1989)).

Where more than one conclusion can reasonably be drawn from the evidence, such a determination should be left for the jury. *Maness v. Construction Co.*, 10 N.C. App. 592, 598, 179 S.E.2d 816, 819, *cert. denied*, 278 N.C. 522, 180 S.E.2d 610 (1971). Although a directed verdict in a negligence case is "rarely proper," *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 138, 539 S.E.2d 331, 333 (2000), a directed verdict is appropriate on the basis of contributory negligence in cases where "the evidence taken in the light most favorable to plaintiff establishes [his] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979) (citations omitted), *overruled in part on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). "The negligence of the plaintiff . . . need not be the sole proximate cause of the injury; if such negligence contributes as *one* of the proximate causes of the injury, then it suffices to bar any recovery." *Industries, Inc. v. Tharpe*, 47 N.C. App. 754,

761, 268 S.E.2d 824, 829, *disc. review denied*, 301 N.C. 90, 273 S.E.2d 311 (1980) (citing *Holland v. Malpass*, 255 N.C. 395, 121 S.E.2d 576 (1961) and *Cook v. Winston-Salem*, 241 N.C. 422, 85 S.E.2d 696 (1955)).

" '[A] motion for a directed verdict *shall state the specific grounds therefor.*' " *Clary v. Board of Education*, 286 N.C. 525, 528, 212 S.E.2d 160, 162 (1975) (quoting N.C. Gen. Stat. § 1A-1, Rule 50(a)). Also, "an appellate court will not consider grounds other than those stated to the trial court in reviewing the trial court's ruling on the motion." *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 18, 564 S.E.2d 883, 886 (2002) (citations omitted).

As shown above, defendants' stated grounds for the motion for directed verdict was that the evidence showed plaintiff was contributorily negligent as a matter of law. Specifically, defendants contended that plaintiff's actions violated the requirements of N.C.G.S. § 20-158(b)(1), in that the statute required plaintiff to stop and yield to oncoming traffic. The trial court granted defendants' motion based on contributory negligence as argued by defendants.

A violation of N.C.G.S. § 20-158(b)(1) is not negligence or contributory negligence *per se*; however, it "may be considered with the other facts in the case in determining whether a party was guilty of negligence or contributory negligence." N.C. Gen. Stat. § 20-158(d) (2001). Thus, a violation of N.C.G.S. § 20-158(b)(1) is "evidence of negligence; and when the proximate cause of injury, is sufficient to support a verdict . . . ." *Wooten v. Russell*, 255 N.C. 699, 701, 122 S.E.2d 603, 604 (1961) (citations omitted).

> The motorist who is required to stop and ascertain whether he can proceed safely is deemed to have seen what he would have been able to see had he looked. "[H]is liability to one injured in a collision with his vehicle is determined as it would have been had he looked, observed the prevailing conditions and continued to drive as he did."

Industries, Inc., 47 N.C. App. at 761, 268 S.E.2d at 829 (quoting *Raper v. Byrum*, 265 N.C. 269, 274, 144 S.E.2d 38, 41 (1965)).

In *Raper*, our Supreme Court stated that:

> The plaintiff's evidence permits no other reasonable conclusion but that his intestate brought his automobile to a stop at a point where he had an unobstructed view of the defendants' auto-

> mobile approaching on the dominant highway, and that he resumed his progress into the intersection at a very slow rate of speed when the defendants' automobile was so near to the intersection and moving at such a speed that in the exercise of reasonable prudence he should have seen that he could not cross in safety. His entry into the intersection in this manner and under these conditions was negligence and was one of the proximate causes of the collision and of his death, if not the sole proximate cause thereof.

Raper, 265 N.C. at 276, 144 S.E.2d at 43.

The cases plaintiff has cited in support of his argument that the trial court's grant of a directed verdict is contrary to the case law in this state, including *Wooten v. Russell*, 255 N.C. 699, 122 S.E.2d 603 (1961), *Primm v. King*, 249 N.C. 228, 106 S.E.2d 223 (1958), and *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E.2d 17 (1953), are all distinguishable from the present case. Each case cited by plaintiff involved situations where the parties presented conflicting evidence of the facts surrounding the collision. *See Wooten*, 255 N.C. at 703, 122 S.E.2d at 605; *Primm*, 249 N.C. at 232, 106 S.E.2d at 226; and *Hawes*, 236 N.C. at 648, 74 S.E.2d at 20. As is well established in this state, a motion for directed verdict should not be granted when there is a conflict in the evidence, because it is the job of the jury to resolve such conflicts. *Maness*, 10 N.C. App. at 598, 179 S.E.2d at 819.

In the present case, there is no conflict in the evidence to be resolved by the jury. The evidence taken in a light most favorable to plaintiff shows that: plaintiff stopped at the stop sign, looked left and then right down University Parkway; plaintiff failed to look at the exit ramp; Janae Davis was traveling slightly faster than the forty-five miles per hour speed limit on University Parkway; although Janae Davis might not have had her headlights burning, there was sufficient light for plaintiff to see the vehicle operated by Janae Davis approaching the intersection; and plaintiff pulled out onto University Parkway in front of the vehicle operated by Janae Davis when a reasonable person should have seen it was unsafe to enter the intersection. *See Raper*, 265 N.C. at 276, 144 S.E.2d at 43. The evidence was sufficient to support the trial court's conclusion that plaintiff was contributorily negligent as a matter of law. We therefore affirm the trial court's grant of a directed verdict for defendants. Plaintiff's assignments of error are overruled.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

WILMA LANG, PLAINTIFF v. MANFRED LANG, DEFENDANT

KARIN WILMA LANG, PLAINTIFF v. MANFRED LANG, DEFENDANT

No. COA02-1064

(Filed 20 May 2003)

Child Support, Custody, and Visitation— enforcement of foreign support order—personal jurisdiction—long-arm statute

The trial court did not err in a child support case by denying defendant's motion to dismiss based on lack of personal jurisdiction plaintiffs' motions in the cause to enforce a support judgment in North Carolina that was originally entered in Germany even though defendant contends he was never a resident or citizen of North Carolina and did not have sufficient contacts with the state to warrant the exercise of personal jurisdiction, because: (1) although defendant contends that the trial court erroneously based the jurisdictional claim or finding upon the existence of a prior registered order, the pertinent finding served an introductory function providing information on the procedural background of the case rather than as a basis for the exercise of personal jurisdiction; (2) under the long-arm statute of N.C.G.S. § 1-75.4(1)d, the trial court properly considered defendant's activity prior to service of process for purposes of determining whether defendant was engaged in substantial activity within North Carolina; and (3) defendant's activities were systematic and continuous and defendant purposefully availed himself of the privilege of conducting activities within the forum state including that defendant was engaged in the business of selling real estate in this state over the course of ten years, defendant signed as a seller offers to purchase and contract for real property located in this state as late as November 2000, and defendant or his attorney-in-fact on his behalf also signed many warranty deeds as grantor conveying property located in this state.

Appeal by defendant from order filed 2 May 2002 by Judge Mark E. Powell in Henderson County District Court. Heard in the Court of Appeals 23 April 2003.

Frank B. Jackson and James L. Palmer, and Henderson County Legal Department, by Charles Russell Burrell, for plaintiff appellee.

Elkins & Elkins, by H. Trade Elkins, for defendant appellant.

BRYANT, Judge.

Manfred Lang (defendant) appeals an order filed 2 May 2002 denying his motion to dismiss for lack of personal jurisdiction.[1]

On 27 October 2000, Wilma Lang (Lang) and Karin Wilma Lang (the daughter) (collectively plaintiffs) filed separate motions in the cause to enforce a foreign support judgment pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA). The motions alleged that Lang and defendant had married in Germany in 1962. The daughter was born during the marriage, which ended in divorce in 1974. Defendant and Lang entered into a separation agreement whereby defendant was to pay spousal and child support. This agreement was incorporated into the German divorce decree. Sometime thereafter, defendant moved to Henderson County, North Carolina. Because defendant failed to meet his support obligations under the agreement, Lang filed a "Notice of Registration of Foreign Support Order" with the district court in Henderson County, on 23 June 1992. On 18 August 1994, the daughter filed her own notice of registration. The notices of registration listed a Flat Rock, North Carolina mailing address for defendant. Defendant objected to the registration of the German support judgment and ultimately appealed the issue, resulting in this Court's affirmance of the trial court's confirmation of the registration. *See Lang v. Lang*, 125 N.C. App. 573, 481 S.E.2d 380 (1997).

In a motion to dismiss dated 7 February 2002, defendant argued the trial court lacked personal jurisdiction to hear plaintiffs' motions in the cause to enforce the existing support judgment because defendant was never a resident or citizen of the State of North Carolina and did not have sufficient contacts with the State to war-

1. Although normally the denial of a motion to dismiss is interlocutory and thus not immediately appealable, this Court has held a motion to dismiss based on personal jurisdiction to be immediately appealable. *See Woodard v. Local Gov't Employees' Retirement Sys.*, 110 N.C. App. 83, 86, 428 S.E.2d 849, 851 (1993).

rant the exercise of personal jurisdiction. The trial court entered an order on 2 May 2002 finding in pertinent part that:

> 1. These cases began as registrations by . . . [p]laintiffs of support orders entered in Germany. The notices of registration were served on . . . [d]efendant when he was present in North Carolina. The registrations were confirmed, and the confirmation was upheld by the North Carolina Court of Appeals.
>
> 2. On October 27, 2000 . . . [p]laintiffs filed a verified "Motion to Enforce Judgment" in these two cases. This motion was personally served on . . . [d]efendant in Florida. . . . Defendant's counsel filed a notice of special limited appearance to contest personal jurisdiction.
>
> . . . .
>
> 3. . . . Defendant has engaged in the following activity in the State of North Carolina or related to the State of North Carolina:
>
> a) He executed on July 26, 1999 a power of attorney appointing Don H. Elkins as his attorney-in-fact. This document was filed in the Office of the Henderson County Register of Deeds the same day.
>
> b) In the lawsuit *Kutz v. Lang*, 99-CVS-53 (Henderson County), [defendant] admitted in his answer filed in April of 1999 that he was a resident of Henderson County, North Carolina, and the [trial] [c]ourt finds that he was in fact such a resident at the time of the filing of the answer.
>
> c) During a deposition in the case of *Kutz v. Lang* on February 7, 2000, . . . [d]efendant stated that "we have a personal residence in Kenmure," a Henderson County, North Carolina subdivision, and that he had investments in building sites in two Henderson County subdivisions. He further stated that "within the last ten, twelve years we sold about 100, 110 lots in three different subdivisions" and used one subdivision clubhouse as a sales office. The actions of . . . [d]efendant as stated by him are found as fact.
>
> d) During the same deposition, . . . [d]efendant stated that he owned the Middleton Place subdivision in Henderson County, North Carolina for ten years and was in the subdivision "hundreds of times." He further admitted showing homes in the subdivision and taking back mortgages to assist with the financing. The

deposition of . . . [d]efendant further shows that . . . [d]efendant has recently been extensively involved with investing in and selling real estate in Henderson County, North Carolina. The actions of . . . [d]efendant as stated by him in the deposition are found as fact.

e) . . . Defendant was issued a North Carolina operator's license in September 1987. This license was renewed in January of 1991. The Division of Motor Vehicles driving history of . . . [d]efendant dated February 20, 2001 lists . . . [d]efendant's address as being in Flat Rock, North Carolina. . . . Defendant and his wife purchased an automobile in North Carolina in 1993 and registered it in North Carolina.

f) . . . Defendant signed, as a seller, offers to purchase and contract for real property located in North Carolina as late as November of 2000.

g) . . . Defendant, signed (or his attorney-in-fact signed on his behalf) many warranty deeds as grantor, conveying property located in Henderson County, North Carolina, the most recent being in November of 2001.

. . . .

i) . . . Defendant reserved certain repurchase rights for himself as shown in the "Amendment to Declaration of Restrictive Covenants for Wildwood Heights Subdivision," filed October 21, 1987 in the Henderson County Register of Deeds. . . . Defendant's home in Kenmure was sold in August of 2000.

Based on these findings, the trial court concluded that defendant engaged in substantial activity within the State and "that this activity allows the State of North Carolina to assert general personal jurisdiction over . . . [d]efendant pursuant to N.C.G.S. [§] 1-75.4(1)d." The trial court further concluded that defendant "purposefully established and maintained such contacts with the State of North Carolina such that he should reasonably anticipate being haled into court in North Carolina." Because the assertion of personal jurisdiction over defendant did not offend traditional notions of fair play and substantial justice, the trial court denied defendant's motion to dismiss.

The issues are whether: (I) the trial court erred in making finding of fact number 1 because it was prejudicial and irrelevant to the determination of personal jurisdiction; (II) the trial court erred in

relying on activities by defendant that pre-dated the service of process of plaintiffs' motions in the cause; and (III) defendant's activities in North Carolina were "substantial" and "continuous and systematic."[2]

I

Defendant first argues the trial court erred in making the following finding:

> 1. These cases began as registrations by . . . [p]laintiffs of support orders entered in Germany. The notices of registration were served on . . . [d]efendant when he was present in North Carolina. The registrations were confirmed, and the confirmation was upheld by the North Carolina Court of Appeals.

Defendant contends that this finding was not only irrelevant but prejudicial because, based on *Pinner v. Pinner*, no jurisdictional claim or finding may be founded upon the existence of a prior registered order. *See Pinner v. Pinner*, 33 N.C. App. 204, 207-08, 234 S.E.2d 633, 636 (1977). While defendant properly cites this Court's holding in *Pinner*, we conclude that his argument is without merit for the following reason. The trial court's finding served an introductory function, providing information on the procedural background of the case. It did not serve as a basis for the exercise of personal jurisdiction. Instead, all relevant factors supporting the trial court's conclusion of personal jurisdiction were specifically listed in finding of fact number 3. This assignment of error is therefore overruled.

II

Defendant next contends the trial court erred in relying on activities that pre-dated the service of process of plaintiffs' motions in the cause.

> When addressing a question of personal jurisdiction the court engages in a two-step inquiry. First, the court must determine whether the applicable long-arm statute permits the exercise of jurisdiction over the defendant. Next, the court determines

2. Defendant also assigned as error the trial court's failure to dismiss the case for lack of subject matter jurisdiction due to the URESA repeal by the time plaintiffs filed their motions in the cause to enforce the support judgment. Although defendant did not raise this argument in his motion to dismiss, we note that the repeal does not affect " 'pending actions, rights, duties, or liabilities based on the Act.' " *Twaddell v. Anderson*, 136 N.C. App. 56, 62, 523 S.E.2d 710, 715 (1999) (citation omitted). As plaintiffs registered the foreign support judgment prior to the repeal of URESA, the Act remains in effect for the purpose of enforcing defendant's support obligations.

whether the exercise of jurisdiction comports with due process under the Fourteenth Amendment.

North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, was enacted "to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." Since the North Carolina legislature designed the long-arm statute to extend personal jurisdiction to the limits permitted by due process, the two-step inquiry merges into one question: whether the exercise of jurisdiction comports with due process.

Regent Lighting Corp. v. Galaxy Elec. Mfg., Inc., 933 F. Supp. 507, 509-10 (1996) (citations omitted). In other words, "there must exist 'certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citations omitted). This requirement is satisfied if "a party who when service of process is made . . . [i]s engaged in substantial activity within this State." N.C.G.S. § 1-75.4(1)d (2001). The defendant must be considered to have "purposefully avail[ed] himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws" and creating a "reasonabl[e] anticipat[ion of] being haled into court there." *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Moreover, "in cases such as the one before us, where defendant's contacts with the state are not related to the suit, an application of the doctrine of 'general jurisdiction' is appropriate." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 617, 532 S.E.2d 215, 219 (2000). Under this doctrine, "jurisdiction may be asserted even if the cause of action is unrelated to [the] defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between [the] defendant and the forum state." *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989).

Defendant contends that the majority of his activities found as fact by the trial court occurred prior to the time he was served with process and can therefore not be considered under section 1-75.4(1)d to determine whether there was substantial activity with the State. We disagree. The long-arm statute requires a defendant to be "engaged in substantial activity" in the State "when service of process is made." N.C.G.S. § 1-75.4(1)d. Being engaged connotes already exist-

ing or ongoing activity. Furthermore, our courts have consistently looked to a defendant's conduct prior to service of process to find the existence of minimum contacts. *See First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, LLC*, 153 N.C. App. 248, 570 S.E.2d 217 (2002); *Strother v. Strother*, 120 N.C. App. 393, 462 S.E.2d 542 (1995). Thus, the trial court properly considered defendant's activity prior to the service of process for purposes of determining whether defendant was engaged in substantial activity within the State.

III

Defendant further argues that his activities in North Carolina, as found by the trial court, were neither substantial nor continuous and systematic because "property ownership alone is insufficient to allow a non-resident to be subject to the personal jurisdiction of the courts of this State." *Bruggeman*, 138 N.C. App. at 616, 532 S.E.2d at 218. We note, however, that defendant's contact with this state went beyond simply owning real estate. *See id.* at 618, 532 S.E.2d at 219 (finding minimum contacts of a continuous and systematic nature where the defendant, "besides owning real property in North Carolina, [was] engaged in at least one substantial and ongoing profit-making venture in this State through the leasing of that property"). Over the course of more than ten years, including after the motions in the cause were filed, defendant was engaged in the business of selling real estate in Henderson County, North Carolina. Defendant "signed, as a seller, offers to purchase and contract for real property located in North Carolina as late as November of 2000." Defendant, or his attorney-in-fact on his behalf, also signed "many warranty deeds as grantor, conveying property located in Henderson County, North Carolina, the most recent being in November of 2001." This activity, which the trial court's findings show was systematic and continuous, is sufficient to support the conclusion that defendant "purposefully avail[ed] himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws" and could therefore "reasonably anticipate being haled into court" in North Carolina. *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Accordingly, the trial court properly concluded that the exercise of personal jurisdiction complied with both the long-arm statute and due process.

Affirmed.

Judges TIMMONS-GOODSON and GEER concur.

BUSINESS COMMUNICATIONS, INC., PLAINTIFF v. KI NETWORKS, INC., DEFENDANT

No. COA02-1014

(Filed 20 May 2003)

1. Sales— goods—rejection—revocation

The trial court did not err by granting summary judgment under N.C.G.S. § 1A-1, Rule 56 in favor of plaintiff for recovery of the unpaid purchase price arising out of a contract for the sale of telephone system equipment, because: (1) defendant failed to effectively reject the goods under N.C.G.S. § 25-2-606 within the three-week time period agreed by the parties; (2) although the time allowed for revocation generally should be extended where the parties have attempted adjustment, in the instant case defendant failed to take the necessary steps to revoke within a reasonable time when it delayed for over three months before informing plaintiff that it was experiencing problems and even then refused altogether to describe what those problems were; and (3) although defendant need not have provided plaintiff with a detailed explanation of defects, more is necessary under N.C.G.S. § 25-2-608 than a mere notification of nonconformity.

2. Pleadings— amendment to answer—counterclaims

The Court of Appeals was not required under N.C.G.S. § 1A-1, Rule 13(f) to deem defendant's answer amended to include its proposed counterclaims when defendant at no time requested leave to file a counterclaim at the trial level.

Appeal by defendant from order entered 4 March 2002 by Judge Anthony Brannon in Forsyth County Superior Court. Heard in the Court of Appeals 17 April 2003.

Hendrick & Bryant, L.L.P., by Matthew H. Bryant and Timothy Nerhood, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Charles A. Burke and Christopher G. Daniel, for defendant-appellant.

LEVINSON, Judge.

I. BACKGROUND

On 18 August 2000, plaintiff and defendant entered into a contract for the sale of telephone system equipment (the "Equipment") for

$13,265.00 (the "Contract"). Under the terms of the Contract, defendant was to pay "20% of the above total sales price as a deposit upon the signing of [the Contract], 70% of total sales price upon delivery of the equipment and 10% upon acceptance of installation." Additionally, the following provisions were included:

> BCI installation, programming, training, cutover, design & layout labor price due with signed copy of this agreement. That amount is $2,396.53. This dollar amount is unreturnable.
>
> The remaining balance ($10,868.47) is due upon final acceptance of product 3 weeks after install date. Product may be returned w/in 3 weeks of install date at no additional charge.

The Equipment was installed on 8 February 2001. In his affidavit James Corrigan, defendant's president, claims the day after installation he forwarded an email to plaintiff describing nine (9) "areas that the system fell short of the requirements that [defendant] set forth to [plaintiff] during the negotiations." He further claims that although some of those initial problems were fixed, beginning 6 March 2001 defendant became aware of new problems.

On 25 May 2001, plaintiff's counsel wrote to defendant demanding payment of the unpaid purchase price of the Equipment. Defendant paid the initial 20% payment but did not make any further payments. Although not included in the record on appeal, defendant apparently wrote plaintiff on 9 June 2001 claiming defendant was experiencing difficulties with the Equipment. In a letter dated 18 June 2001, plaintiff requested a list detailing any non-conformities in the goods. In a return letter written 20 June 2001, defendant acknowledged receipt of plaintiff's 18 June 2001 letter and assured plaintiff that it would prepare a list of difficulties that it was experiencing with the Equipment. On 11 July 2001, without having received an explanation as to how the Equipment was non-conforming, plaintiff wrote another letter to defendant demanding payment and requesting a list of any difficulties. Defendant responded that it would forward plaintiff a letter detailing any problems with the Equipment by 3 August 2001. Without having received plaintiff's promised letter, on 20 August 2001, plaintiff again wrote defendant demanding payment and an explanation of any difficulties it was having with the Equipment. On 5 September 2001, without ever having received from defendant an explanation as to how the Equipment was non-conforming, plaintiff filed this action against defendant praying for recovery of the unpaid purchase price.

Subsequently, plaintiff moved for summary judgment, and on 4 March 2002, the trial court granted plaintiff's motion. Defendant appeals, contending it rejected the goods under N.C.G.S. § 25-2-602 (2001), or in the alternative, if it accepted the goods, it effectively revoked acceptance, N.C.G.S. § 25-2-608 (2001).

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

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." Once the moving party satisfies these tests, the burden shifts to the nonmoving party to "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." The trial judge must consider all the presented evidence "in a light most favorable to the nonmoving party," and "all inferences of fact must be drawn against the movant and in favor of the nonmovant." In addition, because summary judgment is " 'a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.' "

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681-82, 565 S.E.2d 140, 146 (2002) (citations omitted).

II. REJECTION

[1] Defendant contends there are genuine issues of material fact as to whether it rejected the Equipment. Generally, to make an effective rejection of goods, a buyer must (1) reject the goods within a reasonable time after delivery, and (2) seasonably notify the seller of the rejection. G.S. § 25-2-602(1). However, parties may contract to limit the time for rejection, provided the limits set allow the buyer a rea-

sonable time for discovery of defects.[1] *Id.* (see official comment 1); *see also* N.C.G.S. § 25-1-102 (2001) (allowing the provisions of Chapter 25 to be varied by agreement, except as otherwise provided); N.C.G.S. § 25-1-204 (2001). If a buyer fails to make an effective rejection, he is deemed to have accepted the goods. N.C.G.S. § 25-2-606 (2001).

Here, the Contract explicitly states the unpaid balance of the purchase price is "due upon final acceptance of [the] product 3 weeks after install date. Product may be returned w/in 3 weeks of install date at no additional charge." The clear import of this provision is to not only limit defendant to a three week period in which to reject the goods but also provide defendant a fixed three week window during which it could reject the goods. Because the Equipment was installed on 8 February 2001 and defendant does not allege it rejected the goods until July 2001, defendant failed to reject within the time agreed by the parties.[2] Therefore, defendant failed to make an effective rejection and, as a result, accepted the Equipment. *See* G.S. § 25-2-606.

III. REVOCATION

In the alternative, defendant contends it revoked its acceptance of the Equipment. A buyer may revoke acceptance if: (1) the goods are non-conforming and the non-conformity substantially impairs the goods' value to him; (2) the buyer accepted the goods under the premise that he (a) knew the goods were non-conforming but reasonably assumed they would be cured or (b) did not know of the nonconformity due to difficulty of discovery; (3) the buyer revoked within a reasonable time after he discovered or should have discovered the defects; and (4) the buyer seasonably notified the seller of his revocation. N.C.G.S. § 25-2-608 (2001); *Manufacturing Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282, *cert. denied*, 297 N.C. 454, 256 S.E.2d 806 (1979).

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1. Defendant contends it discovered problems with the Equipment approximately one day after installation, and it does not contend it had inadequate time in which to discover defects. Therefore, we do not consider whether the agreed upon time for rejection provided defendant with a reasonable time to discover defects in the Equipment.

2. Defendant's president stated in his affidavit that "[i]n or about the month of July 2001, [defendant] informed [plaintiff] that the goods were non-conforming, the repairs were not sufficient, and there was a breach of the contract and that [plaintiff] should either repair the goods such that they would conform or [plaintiff] should come to [defendant] and retrieve the goods as they had been rejected and return the deposit paid by [defendant]."

Although whether a buyer revoked acceptance within a reasonable time is normally a question of fact for the jury, *Manufacturing Co.*, 40 N.C. App. at 504, 253 S.E.2d at 286, where the facts are undisputed and only one inference can be drawn therefrom, the question of reasonableness is a question of law properly left to the court. *Whitehurst v. Crisp R.V. Center, Inc.*, 86 N.C. App. 521, 358 S.E.2d 542 (1987). Additionally, "the reasonable time period may extend in certain cases beyond the time in which notice of the nonconformity has been given, as for example where the parties make attempts at adjustment." *Manufacturing Co.*, 40 N.C. App. at 503, 253 S.E.2d at 286.

Here, defendant attempted revocation of acceptance almost six months after it first communicated to plaintiff that there were problems with the Equipment. This first communication occurred the day after installation. Although it is unclear from the record who repaired the equipment, defendant had repairs made prior to 6 March 2001, when defendant claims to have encountered additional problems with the Equipment. Defendant waited until 9 June 2001, over three months from the date it discovered the additional problems and only after plaintiff demanded payment, to communicate its dissatisfaction to plaintiff. Even then, defendant failed to signify what difficulties it was having with the Equipment. Significantly, although plaintiff made multiple inquiries into what problems defendant was experiencing, the record does not affirmatively show defendant informed plaintiff of any defects in the Equipment any time after its initial communication one day after installation.

We recognize that where parties have attempted adjustment, the time allowed for revocation generally should be extended. *Id.* In the instant case, however, defendant delayed for over three months before informing plaintiff that it was experiencing problems and even then refused altogether to describe what those problems were. Although defendant need not have provided plaintiff with a detailed explanation of defects, more is necessary than a mere notification of non-conformity.[3] G.S. § 25-2-608 (official comment 5).

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3. The content of the notice . . . is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach. . . . Following the general policy of this Article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer.

G.S. § 25-2-608 (official comment 5).

As a matter of law, under the foregoing facts, even accepting defendant's allegations as true and affording it the benefit of every inference, defendant failed to take the steps necessary to revoke acceptance within a reasonable time after discovering defects in the Equipment. Furthermore, because defendant failed to describe to plaintiff problems associated with the Equipment, it was unreasonable for defendant to assume that plaintiff would cure any defects.

IV. COUNTERCLAIMS

[2] Lastly, defendant contends the trial court erred because the evidence presented at summary judgment supports unpled counterclaims, namely, breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. Where a litigant "fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may *by leave of court* set up the counterclaim by amendment." N.C.R. Civ. P. 13(f) (emphasis added); *see N.C. Farm Bureau Mutual Ins. Co. v. Wingler*, 110 N.C. App. 397, 404, 429 S.E.2d 759, 764, *disc. review denied*, 334 N.C. 434, 433 S.E.2d 177 (1993) (holding "leave of court is necessary to add the counterclaim to the answer by way of an amendment"). At the trial level, defendant at no time requested leave to file a counterclaim. Now, at this late stage, defendant requests in its brief and at oral argument that this Court deem its answer amended to include its proposed counterclaims and reverse the summary judgment accordingly.[4] We decline to do so.

Affirmed.

Judges McGEE and McCULLOUGH concur.

4. To support its contention, defendant relies solely upon two cases holding where "evidence presented at a summary judgment hearing would justify an amendment to the pleadings, we will consider the pleadings amended to conform to the evidence raised at the hearing." *Stephenson v. Warren*, 136 N.C. App. 768, 771, 525 S.E.2d 809, 811 (citing *Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 90, 231 S.E.2d 891, 894 (1977)), *disc. review denied*, 351 N.C. 646, 543 S.E.2d 883 (2000). However, neither of these cases involves counterclaims subject to N.C.R. Civ. P. 13(f).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ANDERSON v. BLACK & DECKER No. 02-794	Ind. Comm. (584214)	Affirmed
BLUMSTEIN v. COLLINS No. 02-656	Swain (99CVS22)	Affirmed in part, no error in part
CASE v. EDWARDS No. 02-837	Guilford (00CVS11609)	Appeal dismissed
CORRIHER v. OAKWOOD HOMES CORP. No. 02-860	Ind. Comm. (011566) (966550)	Affirmed
DALGEWICZ v. LANGENBACH No. 02-870	Buncombe (01CVS2961)	Affirmed
ETTERS v. FAIRES No. 02-894	Gaston (01CVD4264)	Vacated in part
HESTER v. N.C. DIV. OF MOTOR VEHICLES No. 02-1186	New Hanover (02CVS760)	Affirmed
IN RE GILES No. 02-1369	Edgecombe (00J125)	Affirmed
IN RE GRAHAM No. 02-1194	Mecklenburg (01J585)	Affirmed
IN RE HECK No. 02-968	Lee (01J3) (01J4)	Affirmed
IN RE HENSLEY No. 02-1371	Buncombe (01J153) (01J154) (01J155)	Affirmed
IN RE R.T.W. No. 02-559	Orange (01J86)	Remanded
JONES v. COLUMBUS CTY. HOSP., INC. No. 02-981	Columbus (01CVS1341)	Affirmed
KING v. EPES TRANSP. SYS., INC. No. 02-700	Ind. Comm. (031286)	Affirmed
MELVIN FIN., INC. v. ARTIS No. 02-868	Cumberland (01CVD1141)	Affirmed

N.C. DEP'T OF ENV'T & NATURAL RES. v. CARROLL No. 02-714	Wake (00CVS4126)	Affirmed
ROBERSON v. ROBERSON No. 02-205 No. 02-479	Buncombe (98CVD2294)	Affirmed in part; reversed and remanded in part
STATE v. BAKER No. 02-1174	Onslow (01CRS55804) (01CRS55805)	No error
STATE v. BENNETT No. 02-572	Alamance (00CRS20150) (00CRS20151)	No error
STATE v. BROOKS No. 02-851	Mecklenburg (96CRS39269)	Affirmed
STATE v. CAMPBELL No. 02-1345	Guilford (01CRS53278)	No error
STATE v. DAVIS No. 02-1051	Pitt (01CRS16751) (01CRS59026)	No error
STATE v. EDDIE No. 02-1273	Union (01CRS4041) (01CRS4042) (01CRS4043)	No error
STATE v. FENTON No. 02-1083	New Hanover (01CRS13273) (01CRS13274)	No error
STATE v. FOWLER No. 02-1453	Surry (01CRS52925) (01CRS53066) (02CRS3401) (02CRS3402) (02CRS3403) (02CRS3404)	Affirmed
STATE v. GASTON No. 02-654	Forsyth (01CRS56075)	No error
STATE v. GOBBLE No. 02-742	Rowan (99CRS4511)	No error
STATE v. GREEN No. 02-1184	Buncombe (01CRS8509) (01CRS8510)	No error

STATE v. HEAVNER No. 02-737	Mecklenburg (00CRS49945) (00CRS49947) (00CRS49948) (00CRS49950)	No error. Remanded for correction
STATE v. JEUDI No. 99-1618-2	Buncombe (96CRS67276) (98CRS5646) (96CRS67278)	Affirmed
STATE v. JOHNSON No. 02-317	Wayne (00CRS53555) (00CRS53603)	No error
STATE v. JOYNER No. 02-688	Pitt (01CRS50941) (01CRS50946)	Judgment vacated in 01CRS50941; No error in 01CRS50946
STATE v. LYLE No. 02-1140	Ashe (00CRS248)	Affirmed
STATE v. McEACHIN No. 02-1145	Robeson (00CRS11314)	No error
STATE v. MURPHY No. 02-1130	Onslow (01CRS56149)	No error
STATE v. RAMOS No. 02-1277	Gaston (00CRS8588)	Affirmed
STATE v. RICE No. 02-1434	Forsyth (01CRS55835) (01CRS55836) (02CRS5622) (02CRS5623) (02CRS5624) (02CRS5625)	No error
STATE v. WILLIAMS No. 02-1151	Johnston (01CRS12592) (01CRS58193) (01CRS58195)	No error
TELLEY v. McCLINTON No. 02-1074	Mecklenburg (01CVD10543)	Affirmed
WAKE SUPPLY CO. v. RICCARDI No. 02-1132	Wake (01CVD7305)	Affirmed

APPENDIX

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Code of Judicial Conduct

The North Carolina Code of Judicial Conduct is hereby amended to read as follows:

Preamble

An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established. A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

Canon 1

A judge should uphold the integrity and independence of the judiciary.

A judge should participate in establishing, maintaining, and enforcing, and should himself observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved.

Canon 2

A judge should avoid impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. He should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

Canon 3

A judge should perform the duties of his office impartially and diligently.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise par-

ticipating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. Administrative responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself in a proceeding in which his impartiality may reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or

any other interest that could be substantially affected by the outcome of the proceeding;

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself from participating in any proceeding upon his own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of his potential disqualification. If, based on such disclo-

sure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Canon 4

A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast substantial doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and he may otherwise consult with an executive or legislative body or official.

C. He may serve as a member, officer or director of an organization or governmental agency concerning the activities described in Canon 4A, and may participate in its management and investment decisions. He may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. He may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization.

Canon 5

A judge should regulate his extra-judicial activities to ensure that they do not prevent him from carrying out his judicial duties.

A. Avocational activities. A judge may write, lecture, teach, and speak on legal or non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avoca-

tional activities do not substantially interfere with the performance of his judicial duties.

B. Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him.

(2) A judge may be listed as an officer, director or trustee of any cultural, educational, historical, religious, charitable, fraternal or civic organization. He may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation.

(3) A judge may serve on the board of directors or board of trustees of such an organization even though the board has the responsibility for approving investment decisions.

C. Financial activities.

(1) A judge should refrain from financial and business dealings that reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage his own personal investments or those of his spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified.

(4) Neither a judge nor a member of his family residing in his household should accept a gift from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official or academic use; or an invitation to the judge and his spouse to attend a bar-related function, a cultural or historical activity, or an

event related to the economic, educational, legal, or governmental system, or the administration of justice;

(b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, favor or loan from a friend or relative; a wedding, engagement or other special occasion gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) Other than as permitted under subsection C.(4)(b) of this Canon, a judge or a member of his family residing in his household may accept any other gift only if the donor is not a party presently before him and, if its value exceeds $500, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary activities. A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust or ward becomes involved in adversarial proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status. A judge of the Appellate Division may participate in any dispute resolution program conducted at the Court of Appeals and authorized by the Supreme Court.

F. Practice of law. A judge should not practice law.

G. Extra-judicial appointments. A judge should not accept appointment to a committee, commission, or other body concerned with issues of fact or policy on matters other than those relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. A judge may represent his country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Canon 6

A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

A judge may receive compensation, honoraria and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, subject to the following restrictions:

A. Compensation and honoraria. Compensation and honoraria should not exceed a reasonable amount.

B. Expense reimbursement. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public reports. A judge shall report the name and nature of any source or activity from which he received more than $2,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the

Clerk of the Superior Court of the county in which he resides. For each calendar year, such report shall be filed, absent good cause shown, not later than May 15th of the following year.

Canon 7

A judge may engage in political activity consistent with his status as a public official.

The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. Terminology. For the purposes of this Canon only, the following definitions apply.

(1) A "candidate" is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as he makes a public declaration of candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term "candidate" has the same meaning when applied to a judge seeking election to a non-judicial office.

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

(3) To "endorse" means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in his efforts to be elected to public office.

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he does not expressly endorse a candidate (other than himself) for a specific office or expressly solicit funds from the audience during the event;

(2) if he is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he may not personally make financial contributions or loans to any individual seeking election to office (other than himself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that he should resign his judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political activity.

C. Prohibited political conduct. A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his identity or qualifications.

D. Political conduct of family members. The spouse or other family member of a judge or a candidate is permitted to engage in political activity.

Limitation of Proceedings

Disciplinary proceedings to redress alleged violations of Canon 7 of this Code must be commenced within three months of the act or omission allegedly giving rise to the violation. Disciplinary proceedings to redress alleged violations of all other provisions of this Code must be commenced within three years of the act or omission allegedly giving rise to the violation; provided, however, that disciplinary proceedings may be instituted at any time against a judge convicted of a felony during his tenure in judicial office.

Scope and Effective Date of Compliance

The provisions of Canon 7 of this Code shall apply to judges and candidates for judicial office. The other provisions of this Code shall become effective as to a judge upon the administration of the judge's oath to the office of judge; provided, however, that it shall be permissible for a newly installed judge to facilitate or assist in the transfer of his prior duties as legal counsel but he may not be compensated therefor.

Adopted unanimously by the Court in Conference this the 2nd day of April 2003. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Brady, J
For the Court

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CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

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Support—modification—earnings capacity rule—The trial court did not abuse its discretion by modifying the parties' child support agreement under N.C.G.S. § 50-13.7(a) and by increasing defendant father's child support obligation by applying the earnings capacity rule. **Mason v. Erwin, 284.**

Support—Oregon and North Carolina orders—arreages—A child support case was remanded for a determination of what amount, if any, was owed where an initial order was obtained in Oregon in 1989, another in North Carolina in 1992, this 2001 motion in the cause sought arrears from the Oregon order after the children had "aged out," and the trial court found the North Carolina order to be controlling. The trial court's duty was to enforce defendant's obligation to pay vested arrears accrued under the Oregon order up to the date of the North Carolina order; from that point, defendant owed any arrears that vested under both orders, but is due a credit for payments made under either order. **New Hanover County ex rel. Mannthey v. Kilbourne, 239.**

Support—reasonable needs of child—The trial court did not err in a child support case by finding on remand that the total reasonable monthly needs for the child were $1,626, excluding health care and child care costs, and the trial court was not required to find specific detailed facts with regard to the child's reasonable expenses. **Mason v. Erwin, 284.**

Support—retroactive award—The trial court did not err in a child support case by awarding retroactive child support to plaintiff mother because the modification of a child support order takes effect on the date the petition for modification was filed. **Mason v. Erwin, 284.**

COMPROMISE AND SETTLEMENT

Breach of funding agreement—settlement agreement—validity—breach of fiduciary duty—fraud—negligent misrepresentation—A settlement agreement entered in an action by plaintiff pain clinic and its doctors against defendant charitable trust and foundation and its trustee for breach of contract to fund the pain clinic was not executed by plaintiffs as a result of breach of fiduciary duty, fraud or negligent misrepresentation and was binding and enforceable. Furthermore, plaintiffs' appeal is moot because plaintiffs abandoned their assignment of error relating to the trial court's decision to dismiss the breach of contract claim as barred by the statute of limitations, and the remaining claims are contingent on the viability of plaintiffs' underlying claim for breach of contract. **Piedmont Inst. of Pain Mgmt. v. Staton Found., 577.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Custodial interrogation—motion to suppress-failure to give Miranda warnings—The trial court erred in a felonious possession of cocaine case by denying defendant's motion to suppress incriminating statements made without Miranda warnings in response to police questioning while he was handcuffed and detained, and defendant is entitled to a new trial. **State v. Crudup, 657.**

Juvenile—motion to suppress—statement obtained in absence of parent—The trial court erred in a case adjudicating respondent juvenile a delinquent for commission of first-degree sexual offense by denying respondent's motion to suppress under N.C.G.S. § 7B-2101 his statement obtained by a detective after respondent's father voluntarily left the room and by failing to determine whether respondent was in custody when he signed the statement. **In re T.R.B., 609.**

Statement inquiring about keys to truck—cocaine—inevitable discovery doctrine—Assuming that a detective's inquiry about whether defendant had keys to an old truck amounted to custodial interrogation without Miranda warnings, defendant's response that he had the keys and cocaine found in the truck's tool box by use of the keys were properly admitted in a prosecution for trafficking in and possession of cocaine because there was no reasonable possibility that the exclusion of defendant's statement that he had the keys would have resulted in a different verdict, and the keys and cocaine would have been admissible under the inevitable discovery doctrine. **State v. Harris, 647.**

Voluntariness—waiver of Miranda rights—mental capacity—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motion to suppress post-arrest inculpatory statements he made to police even though defendant contends they were made involuntarily and obtained in violation of Miranda because the evidence supported the court's finding that defendant had the mental capacity to waive his Miranda rights and voluntarily confess; evidence of an officer's deception leading defendant to mistakenly believe his fingerprints had been recovered from the victim's holster was insufficient to render his statements inadmissable; and the actions of the police in not allowing an attorney to see defendant even though he was appointed by the public defender to represent defendant did not invalidate defendant's Miranda waiver or statements when defendant never requested an attorney. **State v. Mahatha, 183.**

CONSTITUTIONAL LAW

Double jeopardy—possession of stolen property and possession of stolen vehicle—same stolen vehicle—Sentences for possession of stolen goods and possession of a stolen vehicle based on possession of the same stolen Suburban violated double jeopardy. Although one requires proof of a fact which the other does not, the Legislature did not intend to punish defendant twice for possession of the same property. While defendant could be indicted and tried for both offenses, he could be convicted only once, and the conviction for possession of stolen goods was vacated. **State v. Bailey, 80.**

Effective assistance of counsel—expert opinion on defendant's mental state—The trial court did not commit plain error in a first-degree murder case by allowing the chief of forensic psychiatry at Dorothea Dix Hospital (chief) to give his opinion as to defendant's mental state at the time of the shooting and defendant's sixth amendment right to effective assistance of counsel was not violated. **State v. McClary, 70.**

Ex post facto—habitual felon sentence enhancement—The use of a voluntary manslaughter judgment from 1987 to support an habitual felon indictment did not violate constitutional ex post facto provisions because defendant's habitual felon status only enhances his punishment in the present case, not his punishment for the underlying voluntary manslaughter. **State v. Wolfe, 22.**

Ex post facto—habitual felon statute—The violent habitual felon statute, N.C.G.S. § 14-7.7, is not an ex post facto law in that it was passed in 1994 but allows the use of felony judgments from 1967. An habitual felon statute enacted in 1967 put perpetrators on notice that certain crimes could be used to enhance punishment for later crimes. **State v. Wolfe, 22.**

North Carolina drug tax—double jeopardy not implicated—The trial court did not violate defendant's double jeopardy rights in a trafficking in cocaine, possession of cocaine, and knowingly maintaining a place to keep a controlled substance case by failing to grant defendant's motion to dismiss the charges after his payment under the North Carolina drug tax. **State v. Harris, 647.**

Right to remain silent—defendant's assertion—officer's testimony—A defendant's Fifth Amendment rights were not violated by admission of testimony that he refused to answer questions after hearing his Miranda rights where the testimony was not solicited by the prosecutor and was merely offered in response to a question about the chronology of events surrounding defendant's arrest, there was no further reference to defendant asserting his right to remain silent, and there was strong evidence of defendant's guilt. **State v. Bailey, 80.**

Right to remain silent—detective's answer—not plain error—Admission of a detective's testimony that defendant had not wanted to waive his rights and was not questioned was not plain error where the evidence against defendant was substantial, the prosecutor did not comment directly on defendant's failure to testify, and defendant was not cross-examined about his invocation of his constitutional right to remain silent. **State v. Batchelor, 421.**

CONSTRUCTION CLAIMS

Breach of contract—quantum meruit—payment bond—timeliness of claim—final settlement—The trial court did not err in a breach of contract and

CONSTRUCTION CLAIMS—Continued

quantum meruit case arising out of a construction payment bond claim under N.C.G.S. § 44A-26 by granting summary judgment in favor of defendant payment bond surety on the basis that plaintiff failed to file its complaint within the allotted time restrictions provided under N.C.G.S. §44A-28(b) even though plaintiff asserts the settlement reached between the parties on 21 September 1999 was not a final settlement since the pertinent city retained approximately $50,000. **Cencomp, Inc. v. Webcon, Inc., 501.**

CONTEMPT

Civil—child custody order—The trial court erred in a child custody modification case by holding defendant father in civil contempt of the parties' 18 October 1999 consent order, because: (1) defendant's actions preventing plaintiff mother from entering her vehicle and his abusive language in the presence of the children do not constitute a violation of the consent order provisions upon which plaintiff relies; and (2) the conditions in the order do not clearly specify what defendant can and cannot do in order to purge himself of the civil contempt. **Scott v. Scott, 382.**

CONTRACTS

Breach—animal shelter site—sufficiency of evidence—There was insufficient evidence for the trial court to find in a bench trial that the County had breached an agreement with the Humane Society to assist the Society in finding a new site for an animal shelter where the evidence showed that zoning conflicts were the cause of the Society's failure to construct a new facility. **County of Moore v. Humane Soc'y of Moore Cty., 293.**

Breach—contract to make a will—specific performance of separation agreement—The trial court erred in a breach of contract to make a will case seeking specific performance of a separation agreement by granting summary judgment under N.C.G.S. § 1A-1, Rule 56 in favor of defendants and the case is remanded to the trial court for entry of summary judgment in favor of plaintiffs. **Tyndall-Taylor v. Tyndall, 689.**

Disputed final payment—summary judgment—burden of proof—The trial court erred by granting summary judgment for defendant on a contract claim where a "full and final payment" was made, but there was nothing in the record to indicate that the parties disputed the amount due when that check was submitted. Under N.C.G.S. § 25-3-311(a)(ii), the person against whom a claim is asserted must prove that the claim was unliquidated or subject to a bona fide dispute prior to submission of the instrument representing full and final payment. **Hunter-McDonald, Inc. v. Edison Foard, Inc., 560.**

CONTRIBUTION

Prejudgment interest—contribution not compensatory—Prejudgment interest was not available for a contribution award, even though the underlying award was designated as compensatory (a requirement for prejudgment interest), because contribution derives from equitable remedies and is not the equivalent of compensatory damages. **Medical Mut. Ins. Co. of N.C. v. Mauldin, 136.**

COSTS

Attorney fees—child support action—The trial court did not abuse its discretion in a child support case by awarding plaintiff mother attorney fees. **Mason v. Erwin, 284.**

Attorney fees—lien on settlement proceeds for medical services—The trial court did not err by denying plaintiff chiropractor's motion for attorney fees under N.C.G.S. § 6-21.1 because that statute was inapplicable where plaintiff alleged that defendant breached its duty to plaintiff by failing to retain sufficient funds from settlement proceeds to satisfy plaintiff's lien for medical services. **Smith v. State Farm Mut. Auto. Ins. Co., 596.**

Attorney fees—workers' compensation—incurred medical compensation—The trial court erred in a workers' compensation case by awarding attorney fees under N.C.G.S. § 97-90(c) based on incurred medical compensation procured for the medical providers rather than solely on the indemnity compensation awarded to plaintiff employee when the trial court's order effectively reduced the award of medical compensation to the hospitals. **Palmer v. Jackson, 625.**

Prosecution bonds—abuse of discretion standard—The trial court did not abuse its discretion by ordering that plaintiff personal representative was required to post prosecution bonds in the amount of $20,000 in an action arising out of defendants' initiation of incompetency and guardianship proceedings and their subsequent intervention in plaintiff personal representative's care of her father. **Dalenko v. Wake Cty. Dep't of Human Servs., 49.**

Recovery of real property—reverter clause in deed—The trial court properly awarded costs to the Humane Society as the prevailing party under N.C.G.S. § 6-18 and N.C.G.S. § 6-19 where the County unsuccessfully claimed the right of re-entry under a reverter clause in a deed to real property occupied by the Society. **County of Moore v. Humane Soc'y of Moore Cty., 293.**

COURTS

Disputed settlement—checks deposited in Virginia—Virginia law controlling—Virginia law was properly applied to a disputed settlement in a civil lawsuit where the checks were accepted and deposited in Virginia. The interpretation of a contract is governed by the law of the place where the contract was made, a contract is made where the last act necessary to make it binding occurred, and the acceptance and deposit of the checks was the last act necessary to form this contract. **Walden v. Vaughn, 507.**

CRIMINAL LAW

Competence to stand trial—ability to assist defense in rational or reasonable manner—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's pretrial motion under N.C.G.S. § 15A-1001 that he be declared incompetent to stand trial even though defendant contends he was unable to assist in his defense in a rational or reasonable manner. **State v. Mahatha, 183.**

Competence to stand trial—hearing—notice—Defendant received reasonable notice of a hearing on his capacity to stand trial where defense counsel

CRIMINAL LAW—Continued

raised the issue of a hearing on the first day of trial by stating that he had never received a report from defendant's competency examination, the trial court found the report in the case file and allowed both defendant and the State to review and copy the report, and the court proceeded with the competency hearing over defendant's assertion that he needed more time. N.C.G.S. § 15A-1002 (2002). **State v. Wolfe, 22.**

Competence to stand trial—jurors selected before competence questioned—There was no plain error in the trial court's failing to strike ex mero motu four jurors selected the day before defense counsel questioned defendant's competency. Defendant did not move to strike jurors at trial and it is not clear that defendant was not competent on that date. **State v. Wolfe, 22.**

Competence to stand trial—supporting evidence—A trial court finding of defendant's competence to stand trial was supported by medical testimony. **State v. Wolfe, 22.**

Continuance denied—defendant's competence questioned—There was no error in a first-degree murder prosecution where the trial court denied defendant's motion to continue after defense counsel questioned defendant's competency to proceed during jury selection. The ruling on the motion to continue was not the source of any prejudice to defendant; moreover, the court granted a week's recess for treatment of defendant after an evaluation by a doctor. **State v. Wolfe, 22.**

Continuance to obtain expert—denial—constitutional violation—The denial of a continuance violated a first-degree murder defendant's constitutional rights to confront her accusers, to effective assistance of counsel, and to due process of law where defendant sought more time in which to obtain a blood splatter expert. There was no sound reason in the record for the denial of the continuance given the penalty faced by defendant and the materiality of the issue on which defendant sought advice and testimony, and the State did not carry its burden of showing that the ruling was harmless beyond a reasonable doubt. **State v. Barlowe, 249.**

Deliberations—court's inquiry into jury division—The trial judge did not coerce the jury in a cocaine prosecution by asking the numerical division of the jurors and encouraging them to try to reach a unanimous verdict. The inquiry was made at the end of the day, is a natural break in deliberations, and the judge stated clearly that he did not want to know the direction in which the jury was leaning. **State v. Batchelor, 421.**

Instructions—missing evidence—no bad faith—no special instruction—The denial of a homicide defendant's request for a special instruction on an investigator's missing notes was not error. There was an insufficient showing of bad faith by officers, and defendant did not show that the missing notes and report would have contained any exculpatory evidence. **State v. Nance, 434.**

Motion for mistrial—curative instruction—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial when the jury heard testimony that in a later unrelated case a gun was seized which may have been used at the incident for which defendant was on trial. **State v. McCollum, 408.**

CRIMINAL LAW—Continued

Prosecutor's argument—characterization of defendant—not grossly improper—There was no prejudicial error in a homicide prosecution where the prosecutor called defendant a woman beater, a liar, and a murderer in his closing argument. Calling defendant a liar was quite improper, but not so prejudicial as to be a denial of due process. Calling him a murderer or woman beater did not require a new trial, given the evidence and the charge. **State v. Nance, 434.**

Prosecutor's argument—characterization of defense—A prosecutor's argument that defense counsel was trying to cloud minds like "The Shadow" was not so prejudicial as to require a new trial. **State v. Nance, 434.**

Prosecutor's argument—defendant's interview with investigators—partially played at trial—The prosecutor's argument in a homicide prosecution did not deny defendant due process where the prosecutor argued that the jury had not heard the entire recording of defendant's interview with investigators. The jurors had been informed that portions of the tape were not admissible, and a curative instruction was given. **State v. Nance, 434.**

Prosecutor's argument—defendant's manhood—A prosecutor's argument that questioned defendant's manhood and referred to defendant hitting his girlfriend and molesting her daughter was not improper where the court sustained defendant's objection and gave a curative instruction. **State v. Nance, 434.**

Prosecutor's argument—defendant's statement misread—A prosecutor's alleged misreading of defendant's statement was not error where the trial court sustained defendant's objection and required the prosecutor to read the entire statement in context. **State v. Nance, 434.**

Prosecutor's argument—homicide victim's violent nature—excluded evidence—A prosecutor's did not improperly refer to excluded evidence in a homicide prosecution where the prosecutor did not single out the excluded testimony but referred generally to the lack of evidence of the victim's alleged violent nature. Moreover, the court sustained defendant's objection. **State v. Nance, 434.**

Prosecutor's argument—improper statements—Although defendant contends the trial court abused its discretion in a first-degree murder case by failing to intervene ex mero motu when the State allegedly misstated evidence during closing arguments that defendant walked angrily and stated he had something to take care of, this assignment of error is overruled because the statements were not so gross or excessive to compel a holding that the trial court abused its discretion. **State v. McCollum, 408.**

Prosecutor's argument—reasonable inference from facts—A prosecutor's argument that a homicide victim told her daughter to run because she thought defendant would hurt the child was supported by the evidence. The daughter testified that her mother had told her to leave the house, and the State may argue reasonable inferences from the facts. **State v. Nance, 434.**

Prosecutor's argument—theatrics—not reflected in record—There was no error in a homicide prosecution where defendant contended that the prosecutor engaged in improper theatrics during closing arguments, but the record did not reflect the physical conduct about which defendant complained. **State v. Nance, 434.**

CRIMINAL LAW—Continued

Self-defense—instruction denied—The trial court did not err by denying a request for a self-defense instruction in a murder prosecution where the evidence was insufficient to raise the issue of whether defendant reasonably believed he had to shoot to protect himself from death or great bodily harm. **State v. Wolfe, 22.**

Statement to jury concerning custody of defendant at sheriff's department—plain error analysis—The trial court did not commit plain error in a taking indecent liberties with a child, attempted first-degree sexual offense, and first-degree statutory rape case by telling the jury that defendant was in the custody of the sheriff's department. **State v. Fowler, 564.**

Unanimous verdict—instructions—A trial judge's instructions on reaching a unanimous verdict were not coercive where the instructions achieved a proper balance between reminding the jurors of their duty and encouraging them not to surrender their own convictions; the court never indicated that the jurors would be forced to deliberate until they could agree or that their inability to reach a verdict would result in a waste of time; and the court's instructions closely followed N.C.G.S. § 15A-1235. **State v. Batchelor, 421.**

DAMAGES AND REMEDIES

Actual damages—opinion of property owner—purchase agreement—The trial court did not err in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by submitting the issue of actual damages to the jury. **Compton v. Kirby, 1.**

Failure to mitigate—evidence sufficient—There was sufficient evidence to submit the issue of plaintiff's failure to mitigate damages to the jury in a legal malpractice action. **Hummer v. Pulley, Watson, King & Lischer, P.A., 60.**

Loss of funding—damages not reasonably ascertainable—settlement agreement—failure to allege tort damages—The trial court properly entered summary judgment for defendant bank and defendant law firm in an action by plaintiff nonprofit pain clinic and its doctors to recover loss of funding damages allegedly caused by defendant's acts of negligence and fraud in causing the clinic to lose twenty years of annual funding by a charitable foundation because: (1) the clinic's damages were not ascertainable to a reasonable degree of certainty because they were contingent upon the clinic remaining tax exempt, the clinic's submission of annual grant requests, and the foundation having the funds available; (2) the clinic was completely compensated for such loss in a settlement agreement with the foundation and may not obtain a double recovery for the same loss against the bank and the law firm; and (3) the doctors have failed to allege any individual pecuniary loss measured by the difference between the benefit promised and the benefit received. **Piedmont Inst. of Pain Mgmt. v. Staton Found., 577.**

Punitive damages—moot—Although defendant contends the trial court erred in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by awarding $90,000 in punitive damages under N.C.G.S. § 1D-15(a)(1), this argument is moot because the trial court trebled the actual damages pursuant to N.C.G.S. § 75-1.1, and plaintiffs chose the trebled damages rather than punitive damages. **Compton v. Kirby, 1.**

DECLARATORY JUDGMENTS

Public assistance paid to adult caretaker—person aggrieved—Although petitioner contends the trial court erred by reversing a declaratory ruling of the North Carolina Department of Health and Human Services under N.C.G.S. § 150B-4 holding that the practice of calculating the debt owed to the State when an adult caretaker accepts payment of benefits under the Work First Families Assistance (WFFA) and Temporary Assistance to Needy Families (TANF) programs or its predecessor Aid to Families with Dependent Children (AFDC) was valid, the declaratory ruling has no effect because petitioner is not presently a person aggrieved and was not entitled to request a declaratory ruling under N.C.G.S. § 150B-4. **Diggs v. N.C. Dep't of Health & Human Servs., 344.**

DEEDS

Necessity of grantee—transfer to non-existent trust—A deed was void for lack of a grantee on the date of conveyance where the deed specified that the property was being conveyed to the trustee of a trust which was not then in existence. The language of the deed made clear that the property was conveyed to the trustee only in her representative and not her individual capacity. **Gifford v. Linnell, 530.**

Restrictive covenants—acquiescence—implied waiver of challenge—There are no North Carolina authorities stating that equitable remedies are available where homeowners challenge the continued validity of restrictive covenants and the homeowners' association claims an implied waiver in the homeowners' acquiescence in and benefit from the covenants. **Brown v. Woodrun Ass'n, 121.**

Restrictive covenants—provision for alteration—ambiguous—A provision for alteration of restrictive covenants was ambiguous as to whether the expiration date of the covenants could be extended and the trial court did not err by granting partial summary judgment for plaintiffs in an action challenging the validity of the restrictions. **Brown v. Woodrun Ass'n, 121.**

Reverter clause—meaning of animal shelter—continued operation—The trial court correctly concluded in a bench trial that a reverter clause in a deed to property used by the Humane Society was not triggered by the termination of its contract with the County where the court properly considered the ordinary meaning of "animal shelter" and found that the Society was still operating a shelter. **County of Moore v. Humane Soc'y of Moore Cty., 293.**

Reverter clause—not triggered—sufficiency of evidence—The evidence in a bench trial supported the court's finding that a reverter clause in a deed to property used by the Humane Society was not triggered by the termination of its contract with the County. **County of Moore v. Humane Soc'y of Moore Cty., 293.**

DENTISTS

Breach of standard of care—failure to correct orthodontic problems in timely manner—failure to take facial photographs—A whole record review revealed that the trial court did not err by reversing the State Board of Dental Examiners' final agency decision to suspend the dental license of an orthodontist based on a finding that the orthodontist breached the standard of care for ortho-

DENTISTS—Continued

dontists regarding his failure to address or correct the orthodontic problems of two patients within a timely manner and his failure to take any intraoral and facial photographs of one of those patients. **Watkins v. N.C. State Bd. of Dental Exam'rs, 367.**

Negligence—rescheduling based on patient nonpayment—A de novo review revealed that the trial court did not err by reversing the State Board of Dental Examiners' final agency decision to suspend the dental license of an orthodontist based on the conclusion that the orthodontist's failure to treat a patient due to nonpayment amounted to negligence under N.C.G.S. § 90-41(a)(12). **Watkins v. N.C. State Bd. of Dental Exam'rs, 367.**

Standard of care—expertise of State Board of Dental Examiners—The trial court did not err by reversing the State Board of Dental Examiners' final agency decision to suspend the dental license of an orthodontist even though the Board contends that it was empowered under *Leahy v. N.C. Bd. of Nursing*, 346 N.C. 775 (1997), to determine the proper standard of care and breach thereof based on its own expertise if its experts' testimony was insufficient. **Watkins v. N.C. State Bd. of Dental Exam'rs, 367.**

DISABILITIES

North Carolina Persons with Disabilities Protection Act—termination from employment—amount of damages, costs, and attorney fees—Although plaintiff teacher contends the trial court erred by denying plaintiff relief despite having found that defendant community college terminated her employment solely based upon her disability, this issue is remanded for an evidentiary hearing to determine the amount of damages, costs, and attorney fees that should be awarded to plaintiff in accordance with N.C.G.S. § 168A-11 and *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), because: (1) although after-acquired evidence of predischarge employee misconduct will not bar a discrimination claim under the North Carolina Persons with Disabilities Protection Act, such evidence may be used to bar the specific remedy of reinstatement if the employer establishes that it would have made the same employment decision had it known of the misconduct at the time of the discharge; and (2) if an employer can show that its discovery of the employee's predischarge misconduct was inevitable and independent of its employment decision, back pay shall be limited to the time between the discharge and the time of discovery. **Johnson v. Board of Tr. of Durham Tech. Cmty. Coll., 38.**

North Carolina Persons with Disabilities Protection Act—termination from employment—misconduct discovered after discharge—The trial court erred by failing to apply *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), stating that evidence of employee misconduct discovered after a discharge which would have provided a lawful basis for such discharge if discovered earlier does not bar a discrimination claim, to plaintiff teacher's employment discrimination case under the North Carolina Persons with Disabilities Protection Act (NCPDPA) based on defendant community college's failure to rehire plaintiff or offer her another contract. **Johnson v. Board of Tr. of Durham Tech. Cmty. Coll., 38.**

DISCOVERY

Defendant's statements to informant—not timely disclosed—The prosecutor's failure to timely disclose the substance of defendant's statements to a confidential informant did not compel suppression of the evidence where the substance of the statements was disclosed prior to trial. However, the trial court retained the discretion to issue a sanction for the State's failure to comply with the discovery rules. **State v. Batchelor, 421.**

Medical records—medical condition not raised in pleadings—discovery an abuse of discretion—The trial court abused its discretion by compelling discovery of defendant's medical records in an automobile accident case because there was nothing in the pleadings to raise the issue of defendant's medical condition. **Mims v. Wright, 339.**

Medical records—State's witness—request that State investigate—An attempted murder defendant's right to due process was not violated by the denial of his motion to require the State to investigate to learn the identities of any mental health professionals from whom an accomplice (and State's witness) had sought treatment. The motion did not suggest that the witness's ability to observe and to testify to events was impaired by a mental defect or by any medication used to treat a mental illness; defendant did not allege that information about the witness's mental health was in the possession of the State; and the denial of the motion did not prevent defendant from exploring the issue at trial. **State v. Lynn, 217.**

No unfair surprise—confidential informant's statement admitted—The purpose of discovery was achieved, and the trial court did not abuse its discretion by denying a motion in limine to suppress the testimony of a confidential informant about statements made to her by defendant although the substance of the statements were not timely disclosed to defendant, where the court held a voir dire, made findings supported by the evidence, and concluded that defendant was not unfairly surprised. **State v. Batchelor, 421.**

Sanctions for violation of discovery order—default judgment—The trial court did not abuse its discretion in a breach of fiduciary duty, unfair and deceptive trade practices, conversion, misappropriation of trade secrets, conspiracy, interference with prospective business advantage, and breach of contract case by imposing sanctions against defendants under N.C.G.S. § 1A-1, Rule 37 for discovery order violations and by entering a default judgment against defendants. **Essex Grp., Inc. v. Express Wire Servs., Inc., 360.**

Sealed medical records—in camera review—no exculpatory evidence—The trial court correctly ruled that the sealed medical records of a witness did not contain exculpatory evidence, even though the court said that certain medical terms were hard to understand. The court did not say that the records were incomprehensible, as defendant contended, and defendant did not preserve that issue for appeal. Moreover, the Court of Appeals conducted an independent review of the records. **State v. Lynn, 217.**

Timing requirements—disclosure of statement on day of trial—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion to continue or in the alternative his motion to suppress evidence of his statement to a jail administrator, even though the State failed to meet the discovery timing requirements in N.C.G.S. § 15A-903(a) by providing

DISCOVERY—Continued

defendant with the statement on the day his case was called for trial, where a recess was ordered to allow defendant's attorney to discuss the evidence with defendant; the State did not call the jail administrator as a witness until 18 days after it disclosed the statement to defendant; and the State disclosed the statement as soon as it became aware of it. **State v. McClary, 70.**

DIVORCE

Specific performance of separation agreement—divisible railroad retirement benefits—The trial court did not err by granting summary judgment in favor of plaintiff wife granting her specific performance of a separation agreement, by granting plaintiff 29.5% of defendant's divisible railroad retirement benefits, and by taxing defendant with the costs of this action. **Gilmore v. Garner, 664.**

DRUGS

Felonious possession of marijuana—indictment—amount not mentioned—sentencing for misdemeanor—A conviction for felony possession of marijuana was vacated and remanded for sentencing for misdemeanor possession where the indictment did not mention the weight of the marijuana in defendant's possession, but the parties agreed during the charge conference that defendant had possessed 59.4 grams of marijuana, if any. The indictment did not charge an essential element of the crime and the court was without jurisdiction to allow the felony conviction, but the jury necessarily found all of the elements of misdemeanor possession. **State v. Partridge, 568.**

Maintaining and keeping a dwelling for keeping or selling a controlled substance—motion to dismiss—sufficiency of evidence—The trial court erred by denying defendant's motion to dismiss the charge of maintaining and keeping a dwelling for keeping or selling a controlled substance where the evidence showed only that defendant was seen at the residence serveral times over a two-month period and personal property of defendant was found in a bedroom. **State v. Harris, 647.**

Possession of cocaine—failure to arrest judgment—The trial court did not err by consolidating the possession and trafficking in cocaine charges into one judgment and by failing to arrest judgment as to the jury's verdict of possession of cocaine. **State v. Harris, 647.**

Trafficking—oxycodone in tablet form—weight—The tablet form of oxycodone was properly considered a mixture for purposes of a trafficking charge under N.C.G.S. § 90-95(h)(4). The word "mixture" refers to the total weight of the dosage unit rather than the actual weight of the controlled substance within the mixture under *State v. Jones*, 85 N.C. App. 56. The statutory language "or any mixture containing such substance" presents a catch-all provision and does not lead to the conclusion that the legislature did not intend to include tablets within the definition of "mixture." **State v. McCracken, 524.**

Trafficking in oxycodone tablets—weight—no evidence of lesser offense—The trial court's failure to charge on the lesser-included offense of simple sale and possession of oxycodone in a prosecution for trafficking was not error. The weight to use when the controlled substance was in tablets was a ques-

DRUGS—Continued

tion of law, and there was no evidence from which the court could have fashioned an instruction to a lesser offense. **State v. McCracken, 524.**

Transporting cocaine—sufficiency of evidence—There was sufficient evidence of an agreement between defendant and another person to transport cocaine and the trial court correctly denied defendant's motion to dismiss a charge of conspiracy to traffick in cocaine by transportation. **State v. Batchelor, 421.**

EMOTIONAL DISTRESS

Negligent infliction—exhumation of remains—The trial court correctly granted summary judgment for defendant funeral home on plaintiff's claim for negligent infliction of emotional distress arising from the exhumation and transfer of her deceased husband's remains to Puerto Rico. Plaintiff failed to present sufficient evidence of severe emotional distress. **Pacheco v. Rogers & Breece, Inc., 445.**

EMPLOYER AND EMPLOYEE

Trade secrets—actual or threatened misappropriation—doctrine of inevitable disclosure—denial of preliminary injunction—The trial court did not err in a misappropriation of trade secrets case by refusing to issue plaintiff company a preliminary injunction to enjoin defendant company from seeking to hire any engineer at plaintiff company working in the high speed, high resolution analog-to-digital converters divisions and to enjoin two former employees of plaintiff company who went to work for defendant company from working in the development, design, implementation and marketing of high-speed analog to digital converters with specification of 12 bits or higher and sample rates of 65 MSPS or higher. **Analog Devices, Inc. v. Michalski, 462.**

ENFORCEMENT OF JUDGMENTS

Execution sale—collateral attack on confirmation—faulty notice of sale—A judgment debtor could not file a separate lawsuit to collaterally attack an order confirming an execution sale based on errors in the conduct of the sale, and the action was correctly dismissed for failure to state a claim upon which relief could be granted. **Leary v. N.C. Forest Prods., Inc., 396.**

EVIDENCE

Admissions—drinking and driving—statements to medical personnel—An officer's testimony that defendant admitted drinking and driving to nurses and a doctor in an emergency room was admissible as an admission by a party opponent. The officer was standing at the head of defendant's bed during treatment and defendant was aware that he had been in a high-speed chase that ended in an accident. **State v. Smith, 493.**

Charges against coconspirator—admission not plain error—Testimony that a cocaine defendant's alleged coconspirator was charged with trafficking should not have been admitted, but the error did not rise to the level of plain error because it is unlikely that the jury inferred defendant's guilt from

EVIDENCE—Continued

evidence that his codefendant had been charged with similar crimes. **State v. Batchelor, 421.**

Citation—not admissible—The admission of a citation charging defendant with resisting an officer and displaying a fictitious registration plate was prejudicial error. While a citation is not an indictment, there is no distinction between the potential for prejudice from the language of this citation and that found in indictments and other pleadings that may not be read to the jury by statute. The error was prejudicial because the case consisted almost entirely of witness testimony and turned on which account the jury believed. **State v. Jones, 472.**

Defendant's failure to testify—curative instruction—not required ex mero motu—The trial court was not required to provide a curative instruction without a request from defendant where a witness remarked on defendant's failure to testify during her cross-examination and the court sustained the objection and struck the testimony. **State v. Batchelor, 421.**

Defendant's remorse—admissible—The exclusion of lay testimony that a first-degree murder defendant might feel remorse for killing the victim was not error, much less plain error. The witness did not recount a statement, but gave an opinion which was not based on first-hand observation. Also, it is not clear how the opinion was relevant to any facts at issue in the case. **State v. Latham, 480.**

Emotional distress action—plaintiff's spouse's feelings—not an improper opinion—Testimony by a dismissed teacher's wife in a legal malpractice action against the teacher's attorneys, in response to a question as to how circumstances surrounding her husband's dismissal made her feel, that "all [plaintiff] wanted was his hearing to be heard and I know 'til the day I die he wouldn't have lost his job" was admissible in support of plaintiff's claim for negligent infliction of emotional distress allegedly resulting from the failure of defendant attorneys to request a hearing for plaintiff. **Hummer v. Pulley, Watson, King & Lischer, P.A., 60.**

Expert opinion—vehicle crash—cause of death—medical examiner's testimony—The testimony of a medical examiner that the victim was killed when she struck the passenger side of a truck's door frame was admissible in a second-degree murder and DWI prosecution in which the identity of the driver was in dispute. Although defendant argued that the testimony was outside the witness's area of expertise, the witness had been accepted as an expert without objection and a medical examiner's statutory responsibilities include the inspection of physical evidence and inquiries into the manner of death. **State v. Smith, 493.**

Expert testimony—legal conclusion for jury—Expert testimony was properly excluded from a legal malpractice claim involving the failure to request a hearing for teacher in a dismissal proceeding where the expert testimony was offered to tell the jury the result the school board would have reached even if a hearing had been requested and thus the result the jury should reach as a legal conclusion. **Hummer v. Pulley, Watson, King & Lischer, P.A., 60.**

Expert testimony—sexual abuse—The trial court did not commit plain error in a case adjudicating respondent juvenile a delinquent for commission of first-degree sexual offense by allowing a pediatrician to testify under N.C.G.S. § 8C-1, Rule 702 that her physical examination of the victim was consistent with the interview in which the victim told the pediatrician about the incident involving

EVIDENCE—Continued

respondent even though the exam failed to show any physical injury. **In re T.R.B., 609.**

Hearsay—hospital records—double hearsay—limiting instruction—The admission of hearsay was harmless error in a second-degree murder and DWI prosecution where the identity of the driver of the car was in dispute and the court admitted hospital records containing double hearsay that defendant was the driver. The court gave an instruction limiting consideration of the records to the type of treatment given to defendant. **State v. Smith, 493.**

Hearsay—murder victim's fear of defendant—state of mind exception—Statements made by a murder victim to several witnesses concerning her fear of defendant were admissible under the state of mind exception of the hearsay rule to show that the shooting of the victim was not accidental. **State v. Latham, 480.**

Hearsay—statements to nontestifying officer—related by another officer—Inconsistent statements from an attempted murder victim were properly excluded where they were made to an officer who did not testify and elicited at trial during the cross-examination of an SBI agent. Inconsistent statements must be proven by direct evidence. Moreover, defendant did not move at trial to admit the officer's notes under the public records and reports exception to the hearsay rule, and there was no reasonable possibility of a different result if the statement had been admitted. **State v. Lynn, 217.**

Hearsay—unavailable witness—admissibility under Rule 804(b)(5)—The trial court did not err in a first-degree rape case by allowing a detective to read the victim wife's statement to the jury under N.C.G.S. § 8C-1, Rule 804(b)(5) after the wife refused to testify before the jury. **State v. Finney, 267.**

Legal malpractice claim—earlier proceedings—relevant—The trial court did not abuse its discretion in a legal malpractice case by admitting evidence of earlier proceedings. The evidence was relevant to plaintiff's claim that defendants had failed to properly research the legal issues involved in the underlying case, relevant to emotional distress claims as showing the continuation of actions by defendants, and relevant to impeach defendant-attorney's assertion that plaintiff-teacher could have sought judicial review of his dismissal even though the attorney had not filed a request for a hearing. **Hummer v. Pulley, Watson, King & Lischer, P.A., 60.**

Other misconduct—indecent liberties—The trial court did not abuse its discretion in an indecent liberties prosecution by admitting evidence of other misconduct where the court concluded after voir dire that the State had met its burden on the similar plan exception, issued appropriate limiting instructions, and sustained eight objections from defendant during the testimony. **State v. Every, 200.**

Outstanding charges and warrants—relevance—A defendant's outstanding criminal charges and unserved warrants were relevant in a second-degree murder and DWI prosecution which resulted from a high speed chase where questions were raised about the reason for the pursuit. **State v. Smith, 493.**

Photographs—automobile—The trial court did not abuse its discretion in a personal injury suit arising out of an automobile accident by allowing defendant

EVIDENCE—Continued

to introduce into evidence photographs of plaintiff's automobile where plaintiff verified that the photograph depicted her vehicle the day after the accident. **Horne v. Vassey, 681.**

Physician-patient privilege—automobile accident case—privilege not waived by driving—A defendant in an automobile accident case did not waive the physician-patient privilege simply by driving. Nothing in defendant's answer or subsequent conduct during the course of discovery opened the door to an inquiry into defendant's medical history. **Mims v. Wright, 339.**

Prior assault—domestic partner—relevant—Evidence of prior assaults by the accused against the victim are both relevant and admissible when the victim is a domestic partner. Moreover, the defendant in this case did not object at trial, and any possible prejudice was outweighed by the probative value in determining whether the shooting was an accident. **State v. Latham, 480.**

Prior assault by homicide victim—exclusion not prejudicial—The exclusion of evidence was not prejudicial error in a homicide prosecution where defendant claimed that the victim (Smith) was shot in a struggle for a gun during an argument, and the witness (Welch) would have testified that he was shot in a struggle over a gun when he lived with the victim. **State v. Nance, 434.**

Prior convictions—admissible to challenge character testimony—The trial court did not abuse its discretion in a larceny prosecution by allowing a character witness to be cross-examined about his knowledge of defendant's convictions of similar crimes 30 years ago. Defendant placed his character in issue. **State v. Hargett, 90.**

Prior DWI convictions—admissible for malice—Defendant's prior convictions for driving while impaired were admissible in his second-degree murder and impaired driving prosecution where the prior convictions were remote in time but were offered to establish malice. **State v. Smith, 493.**

Similar drug transactions—not remote in time—admissible—There was no abuse of discretion in the admission of other drug transactions in a prosecution for trafficking in oxycodone. The other transactions involved the sale of oxycodone at prearranged locations similar to the location at issue here and occurred within a few weeks of this transaction. The evidence was more probative than prejudicial. **State v. McCracken, 524.**

Victim's prior testimony disallowed—failure to reopen case—The trial court did not err in a first-degree rape case by refusing to allow defendant to present the prior voir dire testimony of the victim because defendant was given the opportunity to reopen his case and call the victim as a witness but failed to do so. **State v. Finney, 267.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duty—constructive fraud—The trial court did not err in an action regarding the dissolution of the parties' business arrangement by denying defendant's motion for a directed verdict and by submitting to the jury the issue of breach of fiduciary duty and open, fair, and honest dealings, and the issue of constructive fraud. **Compton v. Kirby, 1.**

FIDUCIARY RELATIONSHIP—Continued

Exhumation and transfer of remains—no contact with plaintiff—The trial court did not err by granting summary judgment for defendant funeral home on plaintiff's claim for breach of fiduciary duty rising from the exhumation and transfer of her husband's remains to Puerto Rico. There was no fiduciary relationship between the parties at the time of the acts giving rise to the suit because plaintiff had not had any direct contact with defendant for at least seven years, and defendant had fully performed his part of the original contract. **Pacheco v. Rogers & Breece, Inc., 445.**

FRAUD

Allegation—not sufficiently specific—A judgment debtor was not allowed to attack an execution sale as fraudulent in an independent action where his conclusory allegations did not supply the necessary particularity. **Leary v. N.C. Forest Prods., Inc., 396.**

HOMICIDE

First-degree murder—motion to dismiss—sufficiency of evidence—intent to kill—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on alleged insufficient evidence of defendant's intent to kill. **State v. McClary, 70.**

First-degree murder—short-form indictment—Use of a short-form murder indictment was not error. **State v. Latham, 480.**

Second-degree murder—failure to submit lesser-included offense of involuntary manslaughter—The trial court did not commit plain error in a first-degree murder case by failing to submit the lesser-included offense of involuntary manslaughter *ex mero motu*. **State v. *McCollum*, 408.**

IMMUNITY

Sovereign immunity—public official immunity—quasi-judicial immunity—The trial court did not err by dismissing plaintiff's amended complaint based on failure to state a claim upon which relief could be granted in an action arising out of defendants' initiation of incompetency and guardianship proceedings and their subsequent intervention in plaintiff personal representative's care of her father, because: (1) dismissal was appropriate as to defendants Department of Human Services and a social worker in her official capacity under the doctrine of sovereign immunity; (2) dismissal as to defendant social worker in her individual capacity was proper under the doctrine of public official immunity; and (3) dismissal was proper as to defendant court-appointed guardian ad litem under the doctrine of quasi-judicial immunity. **Dalenko v. Wake Cty. Dep't of Human Servs., 49.**

INDECENT LIBERTIES

Instructions—presence—definition—There was no prejudice in a prosecution for taking indecent liberties with a minor from the trial court's failure to specifically define "with" and "presence" because those words are commonly understood. **State v. Every, 200.**

INDECENT LIBERTIES—Continued

Instructions—presence—modern electronic technology—The inclusion of the phrase "modern electronic technology" in the definition of constructive presence in the court's charge to the jury in an indecent liberties prosecution did not prejudice defendant because the definition was in accord with the holding of the one North Carolina case on point. **State v. Every, 200.**

Telephone conversations—constructive presence—instructions—victim calling defendant—An instruction that defendant constructively placed himself in the victim's presence during sexually explicit telephone conversations was not improper in an indecent liberties prosecution even though the victim called the defendant. He had requested or instructed that she do so. **State v. Every, 200.**

Telephone conversations—sexually explicit—constructive presence—A defendant using a telephone to have sexually explicit conversations with a minor girl was in her constructive presence for purposes of an indecent liberties prosecution; defendants may be deemed present constructively where the use of electronic technology enables them to effectively carry out conduct that would constitute taking an indecent liberty if done in the victim's actual presence to substantially the same degree that could have been achieved in the victim's actual presence. **State v. Every, 200.**

Telephone conversations—sexually explicit—evidence sufficient—common sense of society—Defendant's telephone conversations with the minor victim constituted an indecent liberty with a child, and the trial court correctly denied defendant's motion to dismiss, where defendant repeatedly engaged in extremely graphic and explicit sexual conversations while he groaned, breathed heavily, told the victim that he was masturbating, and invited her to do the same. Moreover, defendant exploited a position of trust as the victim's karate instructor to overcome her hesitation. **State v. Every, 200.**

Telephone conversations—sexually explicit—gratification of desire—There was sufficient evidence that an indecent liberties defendant accused of having sexually explicit telephone conversations with a minor acted to arouse or gratify a sexual desire. **State v. Every, 200.**

INJUNCTION

Permanent—exceeded scope of jurisdiction—The trial court erred in an action concerning the alleged improper award of a construction contract for a proposed water tank by granting a permanent injunction and awarding affirmative injunctive relief when the hearing was to determine whether a temporary restraining order should be continued as a preliminary injunction. **Hunter-McDonald, Inc. v. Edison Foard, Inc., 560.**

Trade secrets—actual or threatened misappropriation—doctrine of inevitable disclosure—denial of preliminary injunction—The trial court did not err in a misappropriation of trade secrets case by refusing to issue plaintiff company a preliminary injunction to enjoin defendant company from seeking to hire any engineer at plaintiff company working in the high speed, high resolution analog-to-digital converters divisions and to enjoin two former employees of plaintiff company who went to work for defendant company from working in the development, design, implementation and marketing of high-speed analog to dig-

INJUNCTION—Continued

ital converters with specification of 12 bits or higher and sample rates of 65 MSPS or higher. **Analog Devices, Inc. v. Michalski, 462.**

INSURANCE

Commercial automobile liability policy—leased vehicle—driving with lessee's permission—statutory minimum coverage—The insurer that provided commercial automobile liability insurance to the owner-lessor of an automobile was required by the Financial Responsibility Act to provide the statutory minimum coverage for claims against an employee of an automobile tire shop who caused an accident while test-driving the automobile with the lessee's permission even though the commercial liability policy provided that, regardless of whether the lessee or person in lawful possession had insurance, the lessee and anyone driving with permission of the lessee were not covered under the policy. **Harleysville Mut. Ins. Co. v. Zurich-American Ins. Co., 317.**

Liability insurance—duty to defend—leased scaffolding—indemnity claim—breach of contract claim—Summary judgment was properly granted for Penn National in a declaratory judgment action to determine whether Penn National had a duty to defend its insured, Comfort Engineers. The complaint against Comfort alleged breach of an indemnity agreement and breach of contract, but the indemnity was void in that Associated was seeking to be indemnified for its own negligence, and the contract allegation was outside the scope of the policy. **Penn. Nat'l Mut. Cas. Ins. Co. v. Associated Scaffolders & Equip. Co., 555.**

Motor vehicle—Financial Responsibility Act—duty to defend—The Financial Responsibility Act does not impose a duty to defend, and the insurer of a vehicle owner did not have the duty to defend a third-party driving the vehicle after it had been leased, where coverage was available only through the Financial Responsibility Act. **Harleysville Mut. Ins. Co. v. Zurich-American Ins. Co., 317.**

Motor vehicle—Financial Responsibility Act—umbrella liability policy—An umbrella liability policy issued to a vehicle owner did not provide excess coverage to a third-party driver for an automobile accident, even though coverage was written into another policy to the same insured by the Financial Responsibility Act. The Financial Responsibility Act only requires coverage to minimum limits, not additional umbrella coverage. **Harleysville Mut. Ins. Co. v. Zurich-American Ins. Co., 317.**

JUDGMENTS

Subject matter jurisdiction—prosecution bonds—out of session order—The trial court did not lack subject matter jurisdiction to enter an order out of session requiring that plaintiff personal representative post $20,000 in prosecution bonds under N.C.G.S. § 1-109 where plaintiff failed to object when the trial court informed the parties that it would render a decision at a later date and out of session. **Dalenko v. Wake Cty. Dep't of Human Servs., 49.**

KIDNAPPING

Release in a safe place—prosecutor's argument—A prosecutor's argument in a kidnapping prosecution was not so grossly improper as to warrant the trial court intervening ex mero motu where the prosecutor argued that the only safe place to leave a child is with his mother or with someone with a duty of care. **State v. Sakobie, 275.**

Release in a safe place—sufficiency of evidence—There was sufficient evidence that a child who had been kidnapped was not released in a safe place where the five-year old boy was released on a cold night in an isolated, rural, wooded area unfamiliar to him with a dog barking at him. **State v. Sakobie, 275.**

Second-degree—motion to dismiss—sufficiency of evidence—restraint—terrorizing—serious bodily harm—The trial court did not err by denying defendant's motion to dismiss the charge of second-degree kidnapping under N.C.G.S. § 14-39(a) arising out of a road rage incident occurring after defendant and the victim's cars were involved in an accident. **State v. Washington, 535.**

LARCENY

Motor vehicle—intent to deprive of possession—sufficiency of evidence—There was sufficient evidence that a larceny defendant intended to deprive her victim of possession of the victim's vehicle. **State v. Sakobie, 275.**

Possession of stolen property—sentencing for both—improper—Sentencing defendant for both larceny and possession of the property that he stole was plain error, although the court did not err by submitting both charges to the jury. **State v. Hargett, 90.**

Stealing from multiple vans inside one fenced area—single transaction—Two larcenies were part of a single transaction where defendant took tools from multiple vans which had the same owner and which were in close proximity inside the same locked fence, and the larcenies occurred within the same general time period. The trial court erred by convicting and sentencing defendant for both larcenies. **State v. Hargett, 90.**

LIENS

Medical services—settlement proceed monies—The trial court erred by denying plaintiff chiropractor's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict in an action against defendant insurance company for its failure to retain sufficient funds from settlement proceeds received by a pro se injured party to satisfy plaintiff's lien for medical services provided under N.C.G.S. §§ 44-49 and 44-50. **Smith v. State Farm Mut. Auto. Ins. Co., 596.**

MOTOR VEHICLES

Automobile accident—contributory negligence—The trial court correctly determined that the plaintiff in an automobile accident case was contributorily negligent, and properly granted a directed verdict for defendant, where the evidence showed that plaintiff stopped at a stop sign and looked both ways but did not look at an exit ramp; defendant was traveling slightly faster than speed limit;

MOTOR VEHICLES—Continued

defendant might not have had her headlights on, but there was sufficient light for plaintiff to see defendant approaching the intersection; and plaintiff pulled out in front of defendant when a reasonable person should have seen it was unsafe to enter the intersection. **Williams v. Davis, 696.**

Carrying children on trailer—hayride on farm—The statute prohibiting the transportation of children under 12 in the open bed or cargo area of a vehicle applies only to vehicles operated on highways, and did not apply to a church hayride held on a farm. N.C.G.S. § 20-135.2B(2001). **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

Negligence—hayride—improper lighting—overloading—Allegations that an injury on a church hayride occurred because the lighting was inadequate and the trailer overloaded stated a claim against the church, which was alleged to have organized the hayride, but not against the farmer who owned the trailer. The church determined the safety precautions to be taken, but the farmer was not involved in lighting or loading the trailer and the trailer was not alleged to be defective. **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

NEGLIGENCE

Hayride—failure to properly control tractor—The trial court properly granted defendants' motions to dismiss claims that defendants failed to keep a tractor under proper control during a hayride where no allegations supported the propositions that the vehicle was out of control or that a loss of control contributed to the plaintiff's injury. **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

Hayride—lack of supervision—In a negligence action arising from a church hayride, the trial court properly dismissed a claim against the farmer for failure to exercise reasonable care in the supervision of the children, but should not have dismissed the same claim against the church. There were no allegations that the farmer had responsibility for any of the children, but the complaint alleged facts indicating that the welfare of the children had been entrusted to supervisors appointed by the church. **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

Rescue doctrine—defined—The rescue doctrine holds the tortfeasor liable for injury to a rescuer on the grounds that a rescue attempt is foreseeable. The doctrine recognizes the need to bring an endangered person to safety, but does not apply unless it can be shown that the peril was caused by the negligence of another. **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

Volunteers' immunity—lack of liability insurance not shown—The immunity granted to volunteers for charitable organizations by N.C.G.S. § 1-539.10 did not justify dismissing a claim arising from a church hayride where the required showing that defendants did not have liability insurance was not made. **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

PARTIES

Real party in interest—lack of standing—The trial court did not err by granting defendant corporations's N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss plaintiff personal injury attorney's complaint for lack of standing in an action

PARTIES—Continued

concerning defendant corporation's alleged overcharging for the purchase of photocopies of medical records for plaintiff's clients in excess of the amount allowable under N.C.G.S. § 90-411 because plaintiff was not the real party in interest. **Street v. Smart Corp., 303.**

PARTNERSHIPS

Breach of partnership agreement—directed verdict—The trial court did not err in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by denying defendant's motion for a directed verdict and by submitting the issue of breach of the partnership agreement because plaintiffs presented sufficient evidence of a de facto partnership between plaintiffs and defendant. **Compton v. Kirby, 1.**

De facto—formation of partnership—directed verdict—The trial court did not err in a breach of partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices case by denying defendant's motion for a directed verdict and by submitting to the jury the issue of formation of a partnership. **Compton v. Kirby, 1.**

PLEADINGS

Amendment—new defense—no bad faith—The trial court did not abuse its discretion in a legal malpractice case by allowing defendants to amend their answer to include the defense of failure to mitigate damages where there was no evidence of bad faith and plaintiff had been made aware that damages would be at issue. **Hummer v. Pulley, Watson, King & Lischer, P.A., 60.**

Amendment to answer—counterclaims—The Court of Appeals was not required under N.C.G.S. § 1A-1, Rule 13(f) to deem defendant's answer amended to include its proposed counterclaims when defendant at no time requested leave to file a counterclaim at the trial level. **Business Communications, Inc. v. KI Networks, Inc., 710.**

POSSESSION OF STOLEN PROPERTY

Stolen vehicle—sufficiency of evidence—circumstantial evidence—There was sufficient evidence of possession of stolen goods and possession of a stolen vehicle where defendant was found driving a Suburban several hours after it was stolen, defendant claimed that the vehicle belonged to a friend but would not give the friend's name, the employee driving the company-owned Suburban testified that he had not given anyone permission to drive the vehicle on that day, and defendant was found with the employee's keys. Although the evidence of knowledge that the vehicle was stolen was circumstantial, the rule for determining sufficiency of evidence is the same for circumstantial or direct evidence. **State v. Bailey, 80.**

PREMISES LIABILITY

Church hayride on farm—liability of church—A church which sponsored a hayride at which an injury occurred was not liable on a premises liability claim, if indeed the church occupied the land, because the acts alleged to show a lack

PREMISES LIABILITY—Continued

of reasonable care relate to the way the hayride was conducted, not the maintenance or condition of the property. **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

Church hayride on farm—liability of farmer—A premises liability claim against a farmer who allowed a church to conduct a hayride on his farm was correctly dismissed for failure to state a claim because there were no allegations of willful or wanton infliction of injury. **Clontz v. St. Mark's Evangelical Lutheran Church, 325.**

Contributory negligence—fall on stairs—j.n.o.v.—Contributory negligence is generally for the jury and the trial court erred by granting plaintiff's motions for a new trial and judgment notwithstanding the verdict after the jury found plaintiff contributorily negligent in her fall on defendant's garage stairs. There was evidence that plaintiff had both hands occupied by a rolodex and bank bag, had suffered from inner ear problems for years, and did not trip on the steps but fell when her leg gave way after she reached the garage. **Cameron v. Canady, 132.**

PROBATION AND PAROLE

Juvenile delinquency—admission of guilt as a condition of probation—The trial court erred in a case adjudicating respondent juvenile a delinquent for commission of first-degree sexual offense by specifically conditioning respondent's probation on his express admission of the underlying offense after he had testified at trial and denied guilt. **In re T.R.B., 609.**

RAPE

First-degree—instruction—serious physical injury—mental injury—The trial court did not commit plain error by its jury instruction on first-degree rape, because: (1) the trial court correctly defined serious physical injury; and (2) there is no additional burden on the State to show that a mental injury was more than that normally experienced in every forcible rape in addition to showing that the mental injury extended for some appreciable time. **State v. Finney, 267.**

RELEASE

Settlement and release—satisfaction—misrepresentation—professional negligence—The trial court erred in a misrepresentation and professional negligence case by granting summary judgment in favor of defendant accountant even though plaintiff recovered similar damages from another party through a bankruptcy settlement and release. **Kogut v. Rosenfeld, 487.**

ROBBERY

Dangerous weapon—motion to dismiss—sufficiency of evidence—acting in concert—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon where defendant waited in the car as the getaway driver and was tried on theory of acting in concert. **State v. Jones, 110.**

SALES

Goods—rejection—revocation—The trial court did not err by granting summary judgment under N.C.G.S. § 1A-1, Rule 56 in favor of plaintiff for recovery of the unpaid purchase price arising out of a contract for the sale of telephone system equipment where defendant failed to reject the goods within the time agreed by the parties, and defendant failed to revoke within a reasonable time after the parties attempted an adjustment. **Business Communications, Inc. v. KI Networks, Inc., 710.**

SEARCH AND SEIZURE

Motion to suppress—validity of search warrant—The trial court did not err in a trafficking in cocaine, possession of cocaine, and knowingly maintaining a place to keep a controlled substance case by denying defendant's motion to suppress evidence obtained in a search based on an alleged improper warrant because the magistrate's decision to issue the warrant was adequately supported. **State v. Harris, 647.**

Traffic stop—failure to make motion to suppress prior to trial—The trial court did not err in a robbery with a dangerous weapon case by overruling defendant's objection to the admission of evidence gathered at a traffic stop where defendant made no pretrial motion to suppress. **State v. Jones, 110.**

SENTENCING

Aggravating factors—joining with more than one other person—The defendant did not join with more than one other person in committing a kidnapping and rape, and the trial court erred by finding this aggravating factor, where defendant joined with one accomplice in committing the offense. **State v. Rogers, 127.**

Aggravating factors—leadership role—The trial court correctly found in aggravation that defendant assumed a leadership role in a kidnapping and rape where defendant initiated the abduction, forced the victim into a truck, and initiated and completed the sexual assault. **State v. Rogers, 127.**

Aggravating factors—position of trust or confidence—Defendant did not take advantage of a position of trust and confidence in committing a kidnapping and rape, and the trial court erred by finding that aggravating factor, where the evidence showed that defendant and the victim were no more than acquaintances. **State v. Rogers, 127.**

Habitual felon—indictment—prima facie case—prior judgments—discrepancy in race of defendant—The State met the statutory prima facie requirement for submitting an habitual felon case to the jury where the State submitted certified records of judgments entered upon felony convictions of a person bearing defendant's name, but defendant is white while the convicted person's race in one of the indictments is noted as black. Discrepancies in details are for the jury to consider. **State v. Wolfe, 22.**

Habitual felon—instructions—identity of defendant—The trial court did not err in an habitual felon prosecution by denying defendant's request for an instruction that the jury must find beyond a reasonable doubt that defendant is the person named in the prior judgments. The references to the name in the

SENTENCING—Continued

instructions given could only have been understood as referring to defendant. **State v. Wolfe, 22.**

Habitual felon—plea transcript—court's response—Defendant was properly adjudicated an habitual felon where the trial court simply said "okay" after going through the transcript of the plea with defendant. The necessary inquiries were made; while "okay" was not the most appropriate choice of words, it signified the court's approval of the stipulation of defendant's guilt. **State v. Bailey, 80.**

Habitual felon—prior offense upgraded—The trial court did not err by not dismissing an habitual felon charge where defendant contended that a 1987 voluntary manslaughter conviction was a Class F felony in 1987 rather than the Class D felony it would have been at this trial. Voluntary manslaughter is a superseded offense which the State was specifically authorized to use by N.C.G.S. § 14-7.7. **State v. Wolfe, 22.**

Habitual felon—underlying conviction reversed—A conviction for being a habitual felon was vacated when defendant was granted a new trial on the underlying conviction. **State v. Jones, 472.**

Presumptive range—findings regarding aggravating and mitigating factors not required—The trial court was not required to find aggravating and mitigating factors in imposing sentences upon defendant for attempted first-degree rape, attempted first-degree sexual offense and taking indecent liberties with a minor where all of the sentences were within the presumptive range for those offenses based upon defendant's prior record level. **State v. Fowler, 564.**

STATUTES OF LIMITATION AND REPOSE

Fraud and misrepresentation—void deed—Summary judgment should have been granted for defendants on fraud and misrepresentation claims based on a void deed to a trust because plaintiff failed to bring her action within the statute of limitations. A three year-statute of limitations applies to plaintiff's claims, which rose from her transfer of property to what she thought was a revocable trust, but she did not bring her action until nine years after she learned that the trust was irrevocable. **Gifford v. Linnell, 530.**

Legal malpractice—expiration of time limit—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's legal malpractice action arising out of the handling of plaintiff's equitable distribution and alimony claims attendant to plaintiff's divorce based on the expiration of the statute of limitations under N.C.G.S. § 1-15(c). **Teague v. Isenhower, 333.**

TAXES

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Remand—claim not raised at trial—separate action—The trial court did not err by denying defendant's motion to clarify the issues for trial after a remand where defendant's remaining claim was not raised as a counterclaim at trial, but was a separate issue which could be determined in a separate action. **Brown v. Woodrun Ass'n, 121.**

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Attorney fees—entitlement to credit—The Industrial Commission's decision in a workers' compensation case to deny plaintiff employee's motion for an award of attorney fees under N.C.G.S. § 97-88, based on the fact that defendant was successful upon appeal with regard to entitlement to a credit, is remanded because the case is already remanded on the issue of whether defendant is entitled to a credit. **Cox v. City of Winston-Salem, 228.**

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Compromise settlement agreement—late payment penalty—Plaintiff employee was entitled to a ten percent late payment penalty under N.C.G.S. § 97-18(g) where plaintiff received payment of the amount owed him pursuant to a workers' compensation compromise settlement agreement thirty-six days after the agreement was approved by the Industrial Commission. **Carroll v. Living Ctrs. Southeast, Inc., 116.**

Failure to obtain insurance—penalty mandatory—The Industrial Commission did not err by imposing a fine for failure to obtain workers' compensation insurance. Under N.C.G.S. § 97-94(b), the imposition of a penalty is mandatory if the employer refuses or neglects to obtain workers' compensation insurance, and the phrase "failed to" obtain insurance in the Commission's findings carries the same meaning as "neglected to" carry insurance. **Johnson v. Herbie's Place, 168.**

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Future medical treatment—Parsons presumption—The trial court erred in a workers' compensation case by finding that plaintiff employee has failed to prove by the greater weight of the evidence that there is a substantial risk for the necessity of future medical treatment as a result of his compensable injury by accident, because: (1) the findings do not delineate between the two separate inquiries of whether plaintiff can show he is at substantial risk of needing future medical treatment, known as the *Parsons* presumption, and whether defendants can prove any anticipated future medical treatment will not be reasonably related to the original compensable injury; and (2) it appears the Commission erroneously placed the burden of proof for both inquiries on plaintiff instead of requiring defendants to prove that future medical treatment is not related to the original injury. **Taylor v. Bridgestone/Firestone, 453.**

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COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina